UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In Re **QIYU ZHANG**	) Case No.: **A096-796-201**
Respondent.	) REMOVAL PROCEEDINGS

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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I. INTRODUCTION

This case raises an important issue of first impression for the Board: whether Congress intended that K-2 visa holders could "age-out" of eligibility for adjustment of status. In this brief, *Amici* American Immigration Council (Immigration Council)[1] and American Immigration Lawyers Association (AILA) demonstrate that the only reasonable construction of the relevant statutory provisions is that a K-2 visa holder may adjust even after turning 21 years of age.

A K-2 visa holder adjusts as the derivative of the non-citizen parent, the K-1 fiancé(e). Unlike with other derivatives, Congress did not impose any statutory age limits on the eligibility of a K-2 visa holder to adjust status. Instead, as the Immigration Judge's decision in the present case correctly reflects, the *only* age-related eligibility requirement for individuals within this group is that they must be under age 21 for admission to the U.S. on the K-2 visa. In fact, the Department of Homeland Security (DHS) admits K-2 visa holders into the U.S. right up until their 21st birthday, sometimes with only days or weeks to spare.[2] To interpret the statute as requiring these K-2 visa holders to immediately depart the U.S. upon turning 21 – because, under the current adjudicatory system, it is impossible to adjust status within such a short time – conflicts

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[1] The American Immigration Council previously was named the American Immigration Law Foundation, often referred to as AILF. *See* http://www.americanimmigrationcouncil.org/newsroom/release/american-immigration-council-born for an announcement regarding this name change. *Amici* thank Immigration Council law fellow Laura Nally for her significant contributions to the research and drafting of this brief.

[2] In the present case, for example, Mr. Zhang entered the U.S. on his K-2 visa approximately 8 weeks before his 21st birthday. Although his fiancée mother married within less than a month and he promptly filed his adjustment application within weeks following this (and while he was still under 21), he was denied adjustment because USCIS did not adjudicate the application until after he had turned 21.

with the very purpose of the K visa statute and Congress's clear intent behind this statute. It also leads to absurd results.

The need for the Board to resolve this issue is great. *Amici* are aware of three additional cases raising this issue that are currently pending before the Board: *In re Ting Ting Chi,* Case No. A96-533-521; *In re Anchalee Satidkunakorn,* A096-722-341 and *In re Lin Chen,* A096-673-820.[3] Additionally, attached to this brief are five other decisions by immigration judges who have decided the K-2 age-out issue. Attachment A. At least one federal district court has also decided the issue. *Verovkin v. Still*, No. 07-3987, 2007 U.S. Dist LEXIS 93904 (N.D. Cal. Dec. 21, 2007).[4] Because this issue is ripe for resolution, *Amici* respectfully request that the BIA consider the four pending cases (and any others that raise the issue) together and issue a precedent decision.

Immigration Council is a non-profit organization established to advance fundamental fairness, due process, and constitutional and human rights in immigration law. Immigration Council has a direct interest in ensuring that the provisions of the INA relating to adjustment of K-2 visa holders are fairly and accurately interpreted to achieve Congress's intent. Immigration Council has appeared as *amicus curiae* in numerous cases before the BIA and federal courts that examine the meaning of the adjustment provisions at 8 U.S.C. § 1255.

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[3] In one of these cases, *In re Chi,* A96-533-521, *Amici's* brief has been filed and accepted by the Board. In the other two cases, *Amici* will move to file amicus briefs with the BIA in the near future.

[4] DHS errs in its claim that the Ninth Circuit "essentially disagreed with the reasoning in *Verovkin.*" DHS Opening Brief at 8. To the contrary, the Ninth Circuit in *Jiang v. Still,* No. 07-15952, 2009 U.S. App. LEXIS 446, **3-4 (9th Cir. 2009) declined to rule on the issue, finding that the petitioner had waived the argument.

AILA is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

II. BACKGROUND

The Immigration and Nationality Act (INA) includes a special admission and adjustment procedure for non-citizens engaged to U.S. citizens and their children. The non-citizen fiancé(e) and his or her children may apply for nonimmigrant K visas in order to enter the United States so that the non-citizen fiancé(e) may marry a U.S. citizen. 8 U.S.C. § 1101(a)(15)(K)(i). Prior to 1970, the immigration laws posed serious difficulties for U.S. citizens who wished to marry a non-citizen within the United States.[5] In order to facilitate these marriages, Congress created the K visa, which allows the non-citizen fiancé(e) to enter the U.S. in order to marry the U.S. citizen within 90 days of admission. *See* Act of April 7, 1970, Pub. L. No. 91-225, 75 Stat. 534. A minor child of

[5] Because the non-citizen had, almost necessarily, a preconceived intent to remain permanently, he or she was ineligible for a nonimmigrant visa. *See* Act of April 7, 1970, Pub. L. No. 91-225, 75 Stat. 534. Because the non-citizen did not qualify as an "immediate relative" until the marriage took place, he or she also was unable to obtain an immigrant visa to travel to the United States to complete the marriage. *Id.* U.S. citizens therefore were forced to travel abroad in order to conduct the marriage ceremony. *Id.*

the fiancé(e) who is accompanying or following to join his or her parent is also eligible for nonimmigrant status and a K visa. *Id.* The nonimmigrant designation for a fiancé(e) is "K-1"; the nonimmigrant designation for the child of a fiancé(e) is "K-2." 8 C.F.R. § 214.1(a)(2).

A. Process of Adjustment

For the non-citizen fiancée to obtain a K visa, the U.S. citizen to whom she is engaged must file a petition with United States Citizenship and Immigration Services (USCIS) on Form I-129F. 8 U.S.C. § 1184(d); 8 C.F.R. § 214.2(k)(1). The non-citizen fiancé(e)'s child may be included on the petition and accorded the same nonimmigrant status if accompanying or following to join the parent. 8 C.F.R. § 214.2(k)(3). If the I-129F petition is approved, USCIS then forwards the petition to the relevant U.S. Consulate's office. Prior to issuing the nonimmigrant K visas, the Consulate's office must determine that the K visa beneficiaries are eligible to receive *immigrant* visas. 22 C.F.R. § 41.81(d).

When the K-1 beneficiary marries the U.S. citizen within 90 days of admission to the U.S., both she and her child, the K-2 beneficiary, become eligible to adjust their status to that of conditional lawful permanent resident under 8 U.S.C. § 1255(a). 8 U.S.C. 1255(d); *see also Choin v. Mukasey*, 537 F.3d 1116 (9th Cir. 2008); *Moss v. INS*, 651 F.2d 1091 (5th Cir. 1981). Section 1186a sets forth the conditions that are placed on the adjustment of K beneficiaries (and others subject to conditional residency) and also provides the procedure for removing these conditions. 8 U.S.C. § 1186a. This series of interlocking provisions was created by the Immigration Marriage Fraud Amendments

(IMFA), Pub. L. No. 99-639, 100 Stat. 3537, and the intended effects are best understood through a review of the legislative history surrounding the passage of IMFA.

B. Legislative History

From 1970 until 1986, non-citizen fiancé(e)s and their children adjusted status under 8 U.S.C. § 1184. If the marriage of the K-1 beneficiary was completed within 90 days of entry, the K visa beneficiaries were entitled to "automatic" adjustment of status to legal permanent residence. The Attorney General was directed to "record the lawful admission for permanent residence of the alien and minor children." 8 U.S.C. § 1184(d) (1982), *amended by* Pub. L. No. 99-639, 100 Stat. 3537 (1986). If the marriage was not completed within 90 days, the K-1 beneficiary and his or her children were required to depart the United States or face deportation, but the K-1 was not precluded from adjusting on alternate grounds, such as through marriage to a different U.S. citizen or by securing qualifying employment. *Id*.

In 1986, Congress held hearings in response to a perceived increase in the number of fraudulent marriages being used to secure lawful permanent residence. Testimony identified two major problems with the K visa system as it existed: 1) an insufficient evaluation period to ensure that marriages were valid before a K visa holder was granted LPR status under the "automatic" recordation process; and 2) a lack of safeguards to prevent K visa holders from using the 90 day window to secure an alternate ground of eligibility for adjustment. *Immigration Marriage Fraud: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 99-43. In response to these concerns, Congress passed the Immigration Marriage Fraud Amendments of 1986 (IMFA). H.R. 3737, 99th Cong. (2d Sess. 1986).

IMFA repealed the last sentence of 8 U.S.C. § 1184(d), which contained the "automatic recordation" provision. *See* Pub. L. No. 99-639, §3(c).[6] In addition, language was added to INA § 1255(d) which precludes K beneficiaries from adjusting under § 1255(a) except under the newly-created conditionality requirements of § 1186a, and except as a result of the marriage to the citizen who filed the petition. *See id.*[7] Section 1186a states that the two-year conditional permanent resident status can be lifted only if the citizen spouse files a petition within 90 days of the second anniversary of the marriage. *See* 8 U.S.C. § 1186a(c)(1).[8] If such a petition is not filed, the permanent resident status of the non-citizen must be terminated. *See id.* at § 1286a(c)(2). Congress designed these provisions to combat fraud by limiting the ability of K visa holders to search for other grounds of adjustment while present within the United States, and by lengthening the period during which the Attorney General can evaluate the marriage, thereby making it more difficult for persons in a fraudulent marriage to maintain an appearance of validity. *See* H.R. Rep. No. 99-906, *as reprinted in* 1986 U.S.C.C.A.N. 5978, 5981-82 (1986).

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[6] The sentence that was removed by IMFA read: **"**In the event the marriage between the said alien and the petitioner shall occur within three months after the entry and they are found otherwise admissible, the Attorney General shall record the lawful admission for permanent residence of the alien and minor children as of the date of the payment of the required visa fees."

[7] The relevant portion of section 1255(d) currently reads: "The Attorney General may not adjust, under subsection (a), the status of a nonimmigrant alien described in section 1101(a)(15)(K) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 1101(a)(15)(K)."

[8] The petition must provide information about the actual residence and employment of each party during the marriage, and must avow, *inter alia,* that the marriage has not been terminated and was not entered into in exchange for a fee or other consideration. *See id.* at § 1186a(d)

In large part, however, the availability of the K visa was left unchanged. IMFA did not fundamentally alter the process for petitioning for a K visa, nor the class of persons to whom K visas may be granted. *Id.* The only change made by IMFA to eligibility requirements or the application process for K-1 visas was the addition of a requirement that the non-citizen applicant and the petitioning citizen have met in person at some point during the two years prior to filing of the petition, subject to a discretionary waiver by the Attorney General. *See* Pub. L. No. 99-639, § 3(a). The eligibility requirements for K-2 derivative visas, including age requirements, were not altered. *See id.*

C. USCIS Interpretation

By eliminating the automatic adjustment provision under §1184(d), however, IMFA inadvertently eliminated the explicit statutory authority for adjustment of K visa beneficiaries. This abrupt change, coupled with the addition of language in §1255(d) and § 1186a which acknowledged that such adjustment was possible, created a source of statutory ambiguity. *See Verovkin v. Still*, No. 07-3987, 2007 U.S. Dist LEXIS 93904 (N.D. Cal. Dec. 21, 2007). In recognition of this "gap," soon after the passage of IMFA, the former INS promulgated a regulation to clarify the adjustment process for K visa holders. *Id*. at *12; Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. of Domestic Ops. for USCIS, re. Adjustment of Status for K-2 Aliens (Mar. 15, 2007) [hereinafter "Aytes Memo"], *available at* www.uscis.gov/files/pressrelease/ K2AdjustStatus 031507.pdf. The regulation provides that "the K-1 beneficiary and his or her minor children may apply for adjustment of status" under § 1255, in accordance with the conditionality requirements of § 1186a. 8 C.F.R. § 214.2(k)(6)(ii).

USCIS further attempted to address the "gap" left by IMFA as it pertains to adjustment of K-2 beneficiaries in a 2007 memorandum. See Aytes Memo. The Aytes Memo instructs adjudicators that the "immediate relative" category is "inapplicable" to K-2 beneficiary adjustment applications and that K-2 beneficiaries are "NOT required to demonstrate a step-parent/step-child relationship with the petitioner" to be eligible for adjustment. Aytes Memo at 1-2 (emphasis in original). Rather, the memo posits that a K-2 beneficiary must be only a "minor child," which the memo defines as an unmarried child under 21. *Id.* (citing 8 C.F.R. §214.2(k)(6)(ii)). As a result of this interpretation, USCIS imposes an age limitation on K-2 adjustment applicants, and will deny petitions for those who turn 21 while their application is being adjudicated. *Amici* contend that USCIS has misread the regulation and, as a result, that its interpretation conflicts with Congress's intent.

D. Response of Immigration Judges

A number of immigration judges have now decided this issue. In the present case, the Immigration Judge relied upon the reasoning of *Verovkin*, 2007 U.S. Dist. LEXIS at *20, as well as that of another immigration judge, and held that Mr. Zhang was eligible to adjust his status despite his age, because the statutory framework, the legislative history and Congressional policy all demonstrated that Congress did not intend to impose an age limit on eligibility of K-2 visa holders to adjust status. This holding is consistent with at least five other immigration judge decisions that *Amici* have located. *See* Attachments A. The only exceptions of which *Amici* are aware are the decisions of the immigration judges in *In re Chi,* A96-533-521 and *In re Lin Chen*, A096-673-820, currently pending on appeal before the Board.

III. ARGUMENT

A. The Only Reasonable Construction of All Relevant INA Provisions, When Read as a Whole and Consistent with Congress's Intent, Is that a K-2 Visa Holder May Adjust Status Even After Turning 21.

Adjudicators who have decided the issue of whether a K-2 visa holder can "age-out" of eligibility for adjustment of status agree that Congress – after removing the automatic adjustment provision that existed prior to IMFA amendments – inadvertently failed to delineate fully and explicitly the path by which K-2 visa holders are to adjust. *See, e.g., Verovkin*, 2007 U.S.Dist LEXIS 93904 at *11; Attachment A; *see also* Aytes Memo. As such, the Board must employ tools of statutory construction to discern Congress's intent. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 448, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984)). Such interpretation must be consistent with Congress's intent; consider the statutory structure as a whole; give meaning to all words used by Congress; consider prior versions and legislative history; and avoid results that are absurd or in conflict with other provisions. *See, e.g., Matter of Nwozuzu,* 24 I&N Dec. 609, 612 (BIA 2008) (considering terms of a statute in the context of the statute as a whole); *Matter of Crammond,* 23 I&N Dec. 9, 10 (BIA 2001) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Matter of Rosas-Ramirez,* 22 I&N Dec. 616, 618 (BIA 1999) (noting that when interpreting a statute, Board must construe the entire law, including its object and policy, to discern the intent of Congress).

Employing these tools of statutory construction, the only reasonable interpretation of the K visa provisions is that Congress intended that a K-2 visa beneficiary be able to

adjust status within the U.S. even after turning 21. Any other interpretation produces absurd results. Congress explicitly provided that the child of a fiancé(e) K-1 visa holder was eligible for a K-2 visa and admission to the U.S. up until he or she turned 21. Under DHS' interpretation, K-2 beneficiaries – such as the Respondent here – who are admitted to the U.S. shortly before their 21st birthday, and who thus have insufficient time to complete the adjustment process, must immediately depart the U.S. upon turning 21.[9] Congress certainly did not intend for some K-2 visa beneficiaries to be restricted to a *visit* to the U.S. – in some cases, for only a matter of days – the result that flows inevitably from DHS's interpretation of the statute. Instead, as demonstrated below, the statute can and must be interpreted to allow *all* K-2 visa holders, no matter their age after admission, a viable path to adjust to lawful permanent residence status.

1. A K-2 visa holder adjusts as the derivative of the K-1 parent; INA provisions relating to immediate relatives, the I-130 petition process, and derivatives to the I-130 petition process are all irrelevant to the K-2 visa holder's path to adjustment.

A K-2 visa holder is eligible for an immigrant visa and adjustment of status as the derivative of the K-1 visa holder. This path to legal permanent residency is distinct from

[9] In addition to the present case, the Immigration Judge decision in the case from Bloomington, Minnesota, Attachment A, illustrates this factual situation precisely. The respondent there was granted admission on a K-2 visa five days before his 21st birthday. His mother, the K-1 beneficiary, arrived with him and promptly married the U.S. citizen petitioner one day after arrival. In these circumstances, it would have been next to impossible to file the adjustment application in the three days before the respondent's 21st birthday. Even had that been possible, however, USCIS would not have been able to decide the application in a matter of days. Thus, under DHS' interpretation of the statute, this K-2 visa holder was admitted to the U.S. for no purpose whatsoever, as he had no viable route to adjust to lawful permanent residence. Such a result is nonsensical. *See also* March 11, 2009 decision of Immigration Judge Michael H. Bennett, Attachment A (K-2 visa holder admitted on January 12, 2007; his father married the U.S. citizen on January 30, 2007; he filed adjustment application on February 1, 2007; he turned 21 on February 3, 2007).

that followed by non-citizen family members immigrating under the immigrant visa petition process found in 8 U.S.C. § 1154. Understanding this distinction is essential to understanding why a K-2 visa holder does not lose eligibility for adjustment of status upon turning 21.

K-2 beneficiaries derive their eligibility for both a nonimmigrant visa and adjustment of status from their non-citizen parent's eligibility for status as a fiancé(e) of a U.S. citizen. If the parent is not granted a K-1 visa, the child is not eligible for a K-2 visa. 8 U.S.C. § 1101(a)(15)(K). Similarly, if the non-citizen parent does not marry the petitioning U.S. citizen within 90 days, the K-2 visa beneficiary loses eligibility for adjustment and is required to depart the United States or be subject to removal. *See* 8 U.S.C. § 1184(d). Conversely, where the non-citizen parent does marry the U.S. citizen parent within 90 days, the K-2 visa beneficiary is eligible to adjust immediately with the parent. 8 C.F.R. § 214.2(k)(6)(ii); *see also* "Instructions for I-485, Application to Register for Permanent Residence or Adjust Status" (http://www.uscis.gov/files/form/i-485instr.pdf).[10] Thus, the K-2 visa applicant has no independent eligibility for admission or adjustment, but instead, as a derivative, is dependant entirely upon the K-1's status.

Consistent with this, there is no need for an immigrant visa petition to be filed on behalf of the K-2 visa holder by the U.S. citizen who marries the K-2 visa holder's

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[10] In answer to the question "Who may file form I-485", these instructions read:

3. Based on admission as the fiancé(e) of a U.S. citizen and subsequent marriage to that citizen.
   A. You may apply to adjust status if you were admitted to the United States as the K-1 fiancé(e) of a U.S. citizen, and you married that citizen within 90 days of your entry.
   B. You were admitted as the K-2 child of such a fiancé(e), you may apply to adjust status based on your parent's Form 1-485.

parent. *See* 8 C.F.R. § 214.2(k)(6)(ii).[11] The K-2 visa holder is not adjusting pursuant to a relationship with this U.S. citizen. Because no immigrant visa petition under 8 U.S.C. § 1184 *et seq.* is filed on behalf of the K-2 beneficiary, the age-out restrictions that apply under these provisions are not relevant.[12]

Specifically, because the K-2 beneficiary is not adjusting as an immediate relative of the U.S. citizen that his or her parent married, a K-2 beneficiary does not face the age-limitation faced by immediate relative children. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i) and (f)(1) (limiting status to "child" as defined in 8 U.S.C. § 1101(b)(1)). Similarly, the K-2 beneficiary is *not* a derivative under 8 U.S.C. § 1153(d), which is limited to family members of beneficiaries of visa petitions filed under the preference categories of 8 U.S.C. §§ 1153(a), (b), and (c). As such, the age limitation of § 1153(d) is inapplicable to the K-2 beneficiary.

Instead, the K-2 beneficiary is a derivative of the K-1 visa holder and entitled to the same immigration status as that of the K-1 visa holder even though not independently eligible for this status.[13] It is on this basis that the K-2 beneficiary is eligible for a visa and has a visa immediately available at the time of adjustment, as required by 8 U.S.C. §

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[11] USCIS will accept an I-130 visa petition by a U.S. citizen for a K-2 visa holder where the K-2 visa holder qualifies as the "stepchild" of the citizen; that is, in cases in which the parents' marriage took place before the child was 18. This is an alternate path to legal permanent residency. The child adjusts status as an immediate relative to the U.S. citizen and not as a K-2 visa holder. This alternative path is not available to K-2 visa holders such as Respondent, who are over 18 when their parents marry.

[12] Similarly, the Child Status Protection Act provisions discussed by DHS in its opening brief are not applicable for the same reason. In fact, Congress's reason for not including K-2 beneficiaries within the protection of the CSPA may well have been because it understood that these children already were protected from aging out and not in need of further protection.

[13] This is a basic premise for derivative beneficiaries in any status. *See, e.g.,* 8 U.S.C. §§ 1153(d) (derivative beneficiaries of preference visa petitions); 1157(c)(2) (derivative beneficiaries of refugees); 1158(b)(3) (derivative beneficiaries of asylees).

1255(a). Moreover, as discussed below, there are no statutory age restrictions imposed upon a K-2 beneficiary after his or her admission to the U.S., unlike family members who adjust pursuant to a petition filed under § 1154.[14] Instead, Congress fully intended that K-2 beneficiaries – who necessarily would have been *admitted* to the U.S. while under age 21 – would remain eligible for adjustment of status even after they turned 21.

2. Congress imposed no age limit on the adjustment eligibility of a K-2 visa holder in any statutory provision.

    a. The reference to "minor child" in 8 U.S.C. § 1255(d) is for identification purposes but does not impose an eligibility restriction on adjustment; instead, the only age restriction for a K-2 visa holder is one imposed at the time that the K-2 visa is granted and the minor child is admitted to the U.S.

Congress used the term "minor child" three times when referring to the offspring of a K-1 visa holder: in 8 U.S.C. §§ 1101(a)(15)(K)(iii); 1184(d); and 1255(d). Only the first of these references is intended as an eligibility requirement that imposes an age limit.

Without question, 8 U.S.C. § 1101(a)(15)(K)(iii) imposes an age-limit on when the offspring of a K-1 visa beneficiary is eligible for a K visa. This section defines as a nonimmigrant, "an alien who …. *is* the minor child" of a K-1 visa beneficiary and who *is* accompanying or following to join the K-1 beneficiary. *Id.* (emphasis added). In accord with its plain language, this section requires that the K-2 recipient be the "minor child" of the K-1 visa recipient and that he or she accompany or follow to join the K-1 parent to the United States. *See* 8 C.F.R. § 214.2(k)(3). The use of "is" – the present tense of the verb "to be" – in the definition of this category of nonimmigrants demonstrates that the

[14] This distinguishes K-2 derivatives from certain other categories of derivatives, for whom Congress specifically limited eligibility to the status to those under 21. *See, e.g.*, 8 U.S.C. §§ 1153(d) (parenthetically defining "child" by reference to 8 U.S.C. § 1101(b)); 1157(c)(2) (same); 1158(b)(3) (same).

K-2 visa beneficiary must *be* a child at the time that the visa is issued and at admission to the United States. *See Matter of R—R—*, 6 I&N Dec. 55, 57 (BIA 1953) (relying on use of the present tense of verb in statute to define its meaning). As such, age is an eligibility requirement for a K-2 visa and admission upon that visa.

In contrast, it is equally clear that the term "minor child" in §§ 1184(d) and 1255(d) is not an eligibility requirement and does not impose an age limit. Instead, in both sections, the term is used as shorthand to identify the party to whom Congress was referring – the K-2 beneficiary who was a "minor child" under the definition in § 1101(a)(15)(K)(iii) at the time of his or her admission. To read these terms as eligibility requirements would be contrary to Congress's intent.

For example, in § 1184(d), Congress imposed a "depart or be subject to removal" mandate on K-1 and K-2 visa holders in cases in which the marriage does not take place within 90 days of admission.[15] Congress could not have intended that the term "minor children" define who was required to depart or be subject to removal because this would result in those over 21 being exempt from the rule. Because DHS is authorized by statute to admit K-2 visa holders up until the day before their 21st birthday, and does in fact admit them until that point (*see, e.g.,* Attachment A, Immigration Judge decision from Bloomington, Minnesota), some K-2 beneficiaries necessarily will turn 21 in less than 90 days following their admission. Should the K-1 parent fail to marry the beneficiary within 90 days in such a case, the statute must be read as subjecting the over-21 K-2 visa holder to § 1184(d)'s departure or removal mandate, just as is true for K-2 visa holders

[15] The relevant sentence in this section reads: "In the event the marriage with the petitioner does not occur within three months after the admission of the said alien and minor children, they shall be required to depart from the United States and upon failure to do so shall be removed in accordance with sections 240 and 241." 8 U.S.C. § 1184(d).

under 21. Thus, the use of the term "minor child" in § 1184(d) is not an age limit. Instead, the term must be interpreted as simply a shorthand method for identifying the K-2 recipient, who Congress defined in § 1101(a)(15)(K)(iii) as under 21 at the time of admission.

In the same way, the term "minor child" is used as an identifier in 8 U.S.C. § 1255(d) rather than as a means of imposing an eligibility requirement on the adjustment of the K-2 visa holder. First, had Congress intended age as an eligibility requirement, it would have phrased it in the same way that it did in § 1101(a)(15)(K)(iii), by using the verb "is" in connection with the term "minor child." Instead of doing this, Congress, through the word "or" at the beginning of the parenthetical, linked the term "minor child" to the term "nonimmigrant" in the same sentence. "Nonimmigrant" as used in this section refers to the "nonimmigrant alien described in section 1101(a)(15)(K)." 8 U.S.C. § 1255(d). In turn, § 1101(a)(15)(K) applies to a "fiancé or fiancée" of a U.S. citizen "who seeks to enter the U.S. to conclude a valid marriage … within 90 days." 8 U.S.C. § 1101(a)(15)(K). Had Congress intended that the term "nonimmigrant described in section § 1101(a)(15)(K)" impose an adjustment eligibility requirement, K-1 beneficiaries would never be able to adjust. To be eligible for adjustment they necessarily would no longer meet the definition of a nonimmigrant in § 1101(a)(15)(K) (*i.e.*, fiancé(e)s who intended to marry within 90 days of admission); rather, at the time of applying for adjustment they would have become married spouses of U.S. citizens.[16]

[16] The Ninth Circuit, within which this cases arises, recently examined the meaning of § 1255(d) to find that a K-1 visa beneficiary who was no longer married to the qualifying U.S. citizen at the time her adjustment application was adjudicated was eligible to adjust. The court examined the statutory language outlining when a K visa holder is eligible for adjustment, specifically the phrase, "as a result of the marriage." *Choin*, 537 F.3d at

Instead of imposing an age limit, this description of the K-1 beneficiary is Congress's shorthand method of identifying to whom the section pertains. The term minor child, which is linked to the term nonimmigrant, is used for the same purpose.

b. Congress's use of the terms "son" and "daughter" in 8 U.S.C. § 1186a(a) and (g) further demonstrates its intent that K-1 visa holders over the age of 21 are eligible to adjust to lawful permanent residence on a conditional basis.

Section 1255(d) instructs that K-1 and K-2 visa holders adjust under § 1255(a) subject to the provisions of § 1186a. In § 1186a, Congress's choice not to use the term "child" or "children" is significant, and indicates an intent that such offspring not be limited to those under 21 years of age.

8 U.S.C. § 1186a(a) states that "an alien son or daughter (as defined in subsection (g)(2)) shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section." In turn, subsection (g)(2) defines "alien son or

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1119. Section § 1255(d) states that the Attorney General may only adjust a nonimmigrant K visa holder to a person "lawfully admitted to the United States on a conditional basis under section 216 *as a result of the marriage* of the nonimmigrant . . . to the citizen…" 8 U.S.C. § 1255(d) (emphasis added); *Choin*, 537 F.3d at 1120. The court found the language "as a result of the marriage" to mean that the application must be "based on the fact of the marriage," not that the marriage must exist on the date the adjustment application is adjudicated.

The court found that statute did not support an interpretation of "result of the marriage" that would prevent a K-1 visa holder from adjusting because his or her good faith marriage ended before the expiration of the two year conditional period. The reasoning in *Choin* applies with even greater force to Mr. Zheng. Just as the statutory framework and the purpose of the statute do not support a finding that a K-1 visa holder must be married at the time his or her adjustment application is adjudicated, the statutory provisions and Congress' intent do not support a finding that a K-2 visa holder must be under 21 years old at the time of adjustment.

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." 8 U.S.C. § 1186a(g)(2). Finally, a "qualifying marriage" includes a marriage between a K-1 visa holder and the petitioning U.S. citizen.

A K-2 visa holder thus is a "son" or "daughter" within the meaning of § 1186a(a). By choosing not to use the term "child" in § 1186a(a), Congress made clear its intent that a K-2 beneficiary over 21 at the time of adjusting status is eligible to obtain lawful permanent residence status on a conditional basis. This is particularly true in light of the grammatical structure of § 1186a(a), which indicates that the K-2 beneficiary is a "son" or "daughter" at the time of adjustment. Had Congress intended to limit eligibility for adjustment to those under 21, this is the place where it would have used the term "child." *See Padash v. INS*, 358 F. 3d 1161, 1169 n. 7 (9th Cir. 2003) (finding that Congress's use of different terms is "legally significant" and refusing to import the meaning of one term into a provision in which Congress intentionally used a different term); *Matter of Lei*, 22 I&N Dec. 113, 125 (BIA 1998) ("Congress's use of two different terms in two subsections of the same statute must be construed in a manner that gives each independent effect").

3. Prior to IMFA, a K-2 Visa Holder Could Adjust Status Regardless of His or Her Age; Congress Did Not Intend, Through IMFA, to Change This Pre-Existing Structure.

Prior to the changes implemented under IMFA, the adjustment process for K-2 applicants was relatively straightforward. After the K-2 visa holder was admitted to the United States, and after the K-1 parent married the U.S. citizen, the K-2 visa holder automatically adjusted. 8 U.S.C. § 1184(d) (1970), *amended by* Pub. L. 99-639, § 3(b)

(1986). At the time of this automatic adjustment, the adjudicating agency did not re-examine the age of the K-2 applicant. *See Verovkin*, 2007 U.S. Dist. LEXIS at *16 (there was no indication, prior to IMFA, that INS "considered whether K-2 applicants were still under 21 at the time their status was to be adjusted") (citing 8 C.F.R. § 245.2(d) (1985)).

When Congress passed IMFA, it repealed the provision of the statute that provided for automatic adjustment. Pub. L. 99-639, § 3(b) (1986). Subsequent to this change, the agency began to deny adjustment applications filed by K-2 visa holders who had turned 21 after admission to the United States. This interpretation of the statute has effectively placed new age requirements on K-2 visa holders seeking to adjust.

As outlined in previous sections, IMFA amendments do not support an interpretation of the statute that requires a person to be under 21 at the time an adjustment application is adjudicated. In addition, the legislative history surrounding the passage of IMFA – legislation enacted to combat marriage fraud – does not support a change in treatment of K-2 visa holders who turned 21 before either applying for adjustment or having an adjustment application granted.

Congress passed IMFA to combat marriage fraud by limiting the ability of K visa holders to adjust through other means, and by lengthening the period during which the Attorney General can evaluate the marriage. *See generally* 132 Cong. Rec. H8585-02 (1986) (discussing the need for legislation in light of INS estimates that large numbers of marriage-based petitions were fraudulent and that common types of marriage fraud involve situations where a U.S. citizen accepts cash in exchange for marriage vows or a non-citizen abandons the citizen spouse after receiving a green card). Through IMFA,

Congress amended several significant parts of the statute affecting K visa applicants – all directly related to fraud and unrelated to a K-2 visa holder's age.

First, Congress revised 8 U.S.C. § 1184(d) by 1) repealing the last sentence of 8 U.S.C. § 1184(d), which previously allowed K visa holders to automatically adjust at the time of the marriage to the U.S. citizen, and 2) adding language that required the citizen and non-citizen to have met in person within two years of the date of filing the K-1 visa petition. Pub. L. No. 99-639 (1986); *see* 132 Cong. Rec. H8585-02 (1986) (statement of Rep. Mazzoli) (explaining that the in-person meeting between the non-citizen and citizen was one of the ways the bill would address the rise in fraudulent marriages). Second, Congress changed 8 U.S.C. § 1255(d) to require 1) that the K-1 visa holder marry only the citizen who filed the petition on his or her behalf and 2) that the K visa holders comply with newly-created conditional permanent resident requirements under § 1186a. Pub. L. 99-639 (1986); *see* H.R. Doc. No. 99-906, at 9-10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5978, 5981 (1986) (explaining that the conditional residence period addresses fraud because "it is difficult to sustain the appearance of a *bona fide* marriage over a long period"). Third, Congress provided that the two-year conditional permanent resident status would be lifted within 90 days of the second anniversary of the marriage if the citizen spouse files a petition confirming the marriage was "proper" by providing certain facts and information. *See* 8 U.S.C. §1186a(c)(1), (d)(1). *See* 132 Cong. Rec. H8585-02 (1986) (statement of Rep. McCollum) (the process of removing the conditions on residency allows the "Immigration Service and the Attorney General . . . a second look, at that marriage" to determine if fraud existed).

Each of these changes directly related to concern about the validity of the marriage between the citizen and non-citizen K-1 visa holder. IMFA's effect on K-2 visa holders was largely collateral. For example, if a K-1 visa holder did not comply with the new statutory requirement to marry the person who petitioned on her behalf, the K-2 visa holder would be barred from adjustment and would suffer the collateral consequences of the K-1 parent failing to comply with the new statutory adjustment requirements. However, there is no indication that Congress intended, through changes to the adjustment process related to fraud prevention, to bar the adjustment of K-2 adjustment applicants, who had been eligible prior to IMFA, because they turned 21 after being admitted to the United States.

In addition, the government's interpretation of the statute to deny adjustment applications of K-2 visa holders over 21 years old frustrates the purpose of the K-2 visa program. When it created the K nonimmigrant classification, Congress was concerned primarily with family unification. Prior to the K classification, fiancé(e)s had to apply for immigrant visas and often had to wait for long periods of time before a visa became available. H.R. Rep. No. 91-851, at 8 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2750, 2758. The other option was for the U.S. citizen to travel abroad to marry the non-citizen fiancé(e). *Id*. Recognizing 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. *Id*.; *see also* H.R. Doc. No. 99-906, at 8-9 (1986), *reprinted in* 1986 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").

Thus, both in creating the K visa and subsequently enacting IMFA, Congress did not demonstrate any intent to place new age requirements on K-2 visa holders. It was solely concerned with unifying families and preventing marriage fraud. A requirement that a K-2 visa holder remain 21 years-old until the time of adjustment does nothing to advance these objectives. *Accord Choin,* 537 F.3d at 1120 (rejecting interpretation of the K-1 adjustment provisions at odds with legislative purpose); *Moss v. INS,* 651 F.2d 1091, 1093 (5th Cir. 1981) (same); *Matter of Briones,* 24 I&N Dec. 355, 369 (BIA 2008) (relying on legislative purpose to resolve statutory ambiguity).

4. The Government's Interpretation of the Statute Produces Absurd Results

The Ninth Circuit has rejected statutory interpretations of immigration related provisions that "frustrate congressional intent and lead to [ ] absurd result[s]." *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 808 (9th Cir. 2009) (quotations omitted); *see also Freeman v. Gonzales,* 444 F.3d 1031, 1043 (9th Cir. 2006) (rejecting government interpretation of the "immediate relative" provision that renders status of non-citizen spouse dependant on timing of DHS adjudications); *Bona v. Gonzales,* 425 F.3d 663 (9th Cir. 2005) (rejecting government regulation that excludes paroled arriving aliens from adjusting in removal proceedings because it "creates absurd results when viewed in the light of the larger statutory scheme"); *see also Matter of Briones*, 24 I. & N. Dec. 355, 361 (BIA 2007) (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1991)) (a court should look past the text of the statute 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.'").

Here, the government's interpretation of the statute produces an absurd result when a person who holds a valid K-2 visa and who is admitted to the United States,

might immediately be ineligible for adjustment. If only days after admission, the K-2 visa holder reaches the age of 21, he or she would not meet the government's current age requirement and would no longer be eligible to adjust. This interpretation of the statute would allow a person to receive a K-2 visa that could be "worthless the next day." *Verovkin v. Still*, No. 07-3987, 2007 U.S. Dist. LEXIS 93904, * 20 (Dec. 21, 2007); *see also Akhtar v. Burzynski*, 384 F.3d 1193, 1201 (9th Cir. 2004) (finding that legislative history of the V visa "provides affirmative evidence that Congress did not intend the statute to reseparate families after fulfilling its acknowledged purpose of reuniting them"); *Moss*, 651 F.2d at 1093 (interpreting former § 1184(d) as applied to K-1 beneficiaries and finding "[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").

In addition, the government's application of an age requirement produces absurd results because two K-2 holders who were the exact same age upon admission to the United States could experience opposite outcomes based exclusively on the agency's speed in adjudicating their adjustment applications. 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.

The Ninth Circuit recently examined the absurd results of a statutory interpretation that would leave applicants at the mercy of the agency's processing times. *Freeman*, 444 F.3d at 1039-43. Examining the meaning of the "immediate relative" provision, § 1151(b)(2)(A)(i), the government had taken the position that a non-citizen,

whose citizen-spouse filed an immediate relative petition under 8 U.S.C. §§ 1154, 1255(c)(4), but died within two years of the qualifying marriage, did not qualify as a "spouse" for purposes of the immediate relative provision of the INA. *Id.* Put another way, DHS contended that a non-citizen widow or widower ceased to be a "spouse" if, at the time of the citizen-spouse's death, she or he had not been married for two years.

Considering whether or not the government's reading of the statute produced absurd results, the court focused on the fact that the likelihood of approval of the adjustment application would be arbitrarily determined by the agency's speed in adjudicating the application. As the court explained: "an alien's status as a qualified spouse should not turn on whether DHS happens to reach a pending application before the citizen spouse happens to dies." *Id.*, 444 F.3d at 1043. Thus, two non-citizen spouses, whose citizen-spouses died a year after filing the petitions on their behalf, would have entirely different results.

Like the non-citizen I-130 petitioners in *Freeman*, Mr. Zhang and another K-2 visa holder of the exact same age might experience opposite results based solely on the timeframe in which the agency adjudicates their adjustment applications. In addition, K-1 and K-2 applicants must attempt to predict how long DHS might take to adjudicate the K-2 adjustment application in order to ensure the K-2's arrival in the U.S. sufficiently in advance of his or her 21st birthday. Such predictions are impossible; DHS adjudications vary depending on the complexity of cases and fluctuations in workload. Placing an age requirement on K-2 visa holders that essentially requires them to remain younger than 21 years old for an indefinite period of time beyond their control creates arbitrary results.

As outlined in the previous section, the legislative history surrounding IMFA amendments provides no evidence of Congressional intent to impose additional age requirements on K-2 adjustment applicants. The absurd result of this interpretation encourages the reading of the statute set forth here – one that is consistent with Congress's intent when it created the K visa framework, which IMFA did not change: to allow children under the age of 21 to follow their parents to the United States and to adjust, no matter their age, after the requisite marriage takes place.

B. The Governing Regulation, 8 C.F.R. §214.2(k)(6)(ii), Can and Must be Read Consistent with Congress's Intent as Delineated Above.

Interpretations of regulations which would make law are not favored. *See, e.g., Bona* 425 F.3d at 670 (finding that DHS exceeded its delegated authority by adopting a regulation that limited who was eligible for adjustment of status); *Carey v. Local Brd. No. 2, Hartford, Conn.*, 297 F. Supp. 252, 260 (D. Conn. 1969). To the contrary, agency regulations will not withstand judicial review if "they construe a statute in a way that is contrary to congressional intent or that frustrates congressional policy." *Akhtar*, 384 F.3d at 1198 (striking down immigration regulations that impermissibly placed an age limit on V visas for offspring of lawful permanent residents) (citations omitted); *see also Matter of Aguilar-Aquino*, 24 I&N Dec. 747, 750 (BIA 2009) ("Any ambiguities [in a regulation] should be resolved in favor of an interpretation consistent with the statutory and regulatory scheme") (citations omitted). Moreover, regulations, like statutes, must be interpreted in such a way to avoid constitutional questions. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 688-702 (2001).

Here, the use of the phrase "minor child" in 8 C.F.R. §214.2(k)(6)(ii) can and should be read consistently with the statutory framework, as merely identifying the derivative children of a K-1 visa holder. Similar to its use in 8 U.S.C. § 1255(d) (*see supra* Section III, Part A2.a), the phrase "minor child" in 8 C.F.R. §214.2(k)(6)(ii) is paired with a reference to the "K-1 beneficiary." 8 C.F.R. § 214.2(k)(6)(ii). The regulation, however, refers to the K-1 and K-2 visa holders *after* the K-1 fiancé(e)'s marriage to the U.S. citizen. At this point in time, the non-citizen parent is no longer, technically, a "K-1 beneficiary." Upon her marriage, she is no longer a "fiancée" and therefore, no longer a K-1 beneficiary as defined in § 1101(a)(15)(K)(i) . Thus, references to the non-citizen parent as a "K-1 beneficiary" and to the offspring as a "minor child" are shorthand measures to identify the parties, referring to their status at the time of admission and not imposing an age limitation. To impose an age requirement would constitute the addition of a substantive legal requirement for adjustment and is therefore impermissible. *See Carey*, 297 F. Supp at 259 (refusing to read broad language from a regulation accompanying the Military Selective Service Act as expanding a narrow exception provided by the statute itself).

IV. CONCLUSION

For all the reasons discussed above, *Amici* urge the Board to uphold the decision of the immigration judge in this case, and hold that Congress did not intend to impose an age limit on the adjustment of status of K-2 beneficiaries whose non-citizen parent married the petitioning citizen within 90 days. Such an interpretation is particularly important because the K-2 visa statute is an ameliorative one and thus subject to the rule

of statutory interpretation that requires that it be interpreted in an ameliorative manner. *See Akhtar*, 384 F.3d at 1200.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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