The Child Status Protection Act

The CSPA went into effect on August 6, 2002. Since that date, USCIS and the Department of State (DOS) have together issued more than a dozen memos interpreting the statute and providing detailed information on how it will be implemented. The CSPA will help many children of U.S. citizens immigrate faster than they would have under the prior law. It provides a more limited form of relief for the unmarried children of LPRs and derivatives in the preference categories.

Children of U.S. Citizens

The children of U.S. citizens are now allowed to preserve the status they held at the time their parent filed the I-130 petition. If they were immediate relatives on that date—unmarried and under 21—they will still be considered immediate relatives should they turn 21 before they obtain permanent residency.[1] In other words, they will never "age out." Under the prior law, they would have automatically moved into the first-preference category upon turning 21. The CSPA does not change their status, however, should they marry before immigrating. In that case, the son or daughter still converts to the third-preference category.[2]

The children of LPR parents who naturalize also are able to take advantage of the CSPA. If the children are unmarried and under 21 on the date of the petitioning parent's naturalization (*i.e.*, they are direct beneficiaries in the second-preference F-2A category), they then convert to immediate-relative status. They preserve that status if they subsequently turn 21 before immigrating.[3] Some LPR petitioners filed only one I-130 for their spouse with the intention that their children immigrate as derivatives. Keep in mind that when these parents naturalize, they will need to file a separate I-130 petition for each child, since the children will lose their derivative status.[4] The current USCIS position is that these children will need a separate I-130 on file before they turn 21 in order to preserve their immediate-relative status.

The married children of U.S. citizens (*i.e.*, direct beneficiaries in the third-preference category) also benefit from the CSPA. If they divorce before turning 21, they convert to immediate-relative status. They will preserve that status even if they turn 21 before immigrating, since it is their age at the time of the termination of the marriage that controls.[5] If they divorce after turning 21, the CSPA does not affect their status—they would still convert to the first-preference category.

Children of LPRs and Derivatives

The CSPA provides a different form of relief to children of LPR parents who do not naturalize, and to derivative children in the preference categories. Children in the

[1] INA §201(f)(1).

[2] 8 CFR §204.2(i)(1)(ii).

[3] INA §201(f)(2).

[4] 8 CFR §204.2(a)(4).

[5] INA §201(f)(3).

second-preference category previously would have converted from the F-2A to the F-2B category upon turning 21. Derivative children in the family-preference categories previously would have lost their derivative status upon turning 21. But under the CSPA, their age for purposes of determining their preference category and derivative status will be reduced by the period of time the I-130 petition was pending.[6] In other words, look at the biological age of the second-preference child, son, or daughter at the time the F-2A preference category becomes current for the priority date. If they are over 21, they still might qualify, depending on how long their I-130 was pending.

For example, take the case of an LPR who files an I-130 for his son. If USCIS took one year to approve the I-130 petition, subtract that period from the son's biological age (or add that period to the son's date of birth) to arrive at his "adjusted age." Use the son's adjusted age on the date the second-preference F-2A category becomes current to determine if he is under 21. If he is, he will be considered in the F-2A category (even though his biological age is over 21) and he will retain that status, assuming he does not marry.

Such children will preserve their F-2A status provided they seek to acquire lawful permanent resident status within one year of visa availability.[7] The USCIS has defined that to mean filing for adjustment of status.[8] DOS has defined it to include submitting a completed DS-230 Part 1 or a Form I-824.[9] This latter form is most commonly used by principal beneficiaries who adjusted status but have derivative family members who will be consular processing. In a published decision, the Board of Immigration Appeals has found that an alien may satisfy the "sought to acquire" requirement by filing one of the three applications or by establishing "extraordinary circumstances" that prevented filing within the one-year window. Such circumstances might include retaining an immigration attorney, completing the application within the one-year period, but then having the attorney unnecessarily delay the filing.[10]

The same age-adjusting principle applies for derivative beneficiaries.[11] Look at the date that the principal beneficiary's priority date becomes current. If the derivative beneficiary is under 21 using his or her adjusted age, then he or she retains derivative status, even if he or she subsequently turns 21.

---

[6] INA §203(h)(1).

[7] INA §203(h)(1)(A).

[8] INS Memorandum, J. Williams, "The Child Status Protection Act—Memorandum Number 2" (Feb. 14, 2003), *published on* AILA InfoNet at Doc. No. 03031040 (*posted* Mar. 10, 2003), replaced by USCIS Memorandum, D. Neufeld, "Revised Guidance for the Child Status Protection Act (CSPA)" (May 6, 2008), *published on* AILA InfoNet at Doc. No. 08050669 (*posted* May 6, 2008).

[9] Child Status Protection Act of 2002: ALDAC #2, State 015049 (Jan. 2003), *published on* AILA InfoNet at Doc. No. 03020550 (*posted* Feb. 5, 2003).

[10] *Matter of O. Vasquez*, 25 I&N Dec. 817.

[11] INA §203(h)(2)(B).

For example, take the case of a U.S. citizen who files a third-preference petition for his married son. The son's wife and minor daughter are derivatives. When the daughter turns 21, she loses derivative status, and the only way for her to immigrate is through a separate petition filed by her father or mother after they immigrate. But use the derivative child's adjusted age (biological age minus the time the I-130 was pending) on the date the third-preference visa became current to determine if the child retains derivative status. To preserve derivative status the child would need to seek to adjust status or consular process within one year.

To determine the adjusted age, it will be necessary to know the priority date and the date on the I-797 approval notice. It also will be necessary to know when the F-2A category—or other family– or employment-preference category for derivatives—first became current for the specific priority date. The date that a visa number becomes available is the first day of the month that the *Visa Bulletin* indicates availability of a visa for that preference category. Visa bulletins dating back to February 1995 can be accessed at *http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html*.

The CSPA codifies prior policy when a beneficiary ages out from the F-2A into the F-2B category. It now formally states that "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."[12] While on its face, it appears that the petitioner does not need to file a separate I-130, this is currently not the USCIS position, which still mandates the filing of a separate petition. But the F-2B category beneficiary retains the original priority date.

Practitioners have argued that this conversion and retention language should apply to derivatives in all of the other family-based preference categories, and that they should automatically convert to the F-2B category upon aging out of derivative status. For example, a third or fourth preference derivative child, upon aging out, should be able to retain the original priority date when the principal beneficiary immigrates and files a separate petition in the F-2B category. At the present time, however, the USCIS does not agree with this interpretation and the BIA has similarly rejected it.[13] Nevertheless, two courts of appeal have agreed with this interpretation,[14] while one court of appeals has rejected it.[15] Practitioners must wait until the government decides if it will appeal the recent Ninth Circuit decision by filing a writ of certiorari to the U.S. Supreme Court. If it does, and if the Court grants the writ, it will be another year until this issue is resolved.

---

[12] INA §203(h)(3).

[13] *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009).

[14] *Osorio v. Mayorkas*, 2012 U.S. App. Lexis 20177 (9th Cir. 2012); *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011).

[15] *Li v. Renaud*, 654 F.3d 376 (2nd Cir. 2011).

Relief for Filipinos

Based on current demand, the first-preference category is now backlogged much further than the second-preference 2B category for beneficiaries from the Philippines. Therefore, when their parents naturalized, and these sons and daughters over 21 converted from 2B to first preference, they actually extended the time they needed to wait for their visa to become current. The CSPA eliminates this disparity and penalty by allowing these beneficiaries to elect whether they want to automatically convert to the first preference or opt out and stay in the 2B category.[16] Applicants for adjustment of status should write a simple letter attached to their application serving as notice of this election.[17] Beneficiaries residing abroad will need to submit a similar statement when consular processing, but this formal election will have to be sent to and acknowledged by the Department of Homeland Security before the consulate proceeds with the immigrant visa application. Of course, if the children were under 21 at the time the parent naturalized, then they became immediate relatives and would not need to make this special election. The provision applies to petitioners who naturalized before, on, or after the effective date of the CSPA.

This same opt-out option is not available for children over 21 but who are still in the F-2A category based on their CSPA or adjusted age. The first preference is backlogged farther for all nationalities, and therefore it would advantageous for those persons to remain in the F-2A category when their petitioning parent naturalizes. Unfortunately, the BIA has held that that option is only available for those in the F-2B category.[18]

Effective Date

At the time of passage, the CSPA potentially affected thousands of cases pending before USCIS and DOS. Section 8 of the CSPA states unequivocally that the new law applies to I-130 petitions, adjustment of status applications, and immigrant visa applications pending before the agencies on August 6, 2002. It also applies to I-130 petitions approved before August 6, 2002, provided no final determination had been made on the subsequent adjustment or immigrant visa application. USCIS and DOS originally took the position that the CSPA required the filing of an application for adjustment of status or an immigrant visa prior to August 6, 2002, for those children who had approved I-130 petitions but who turned 21 before August 6, 2002. In other words, the agencies' position was that if such children did not have an application or petition pending on that date, the CSPA did not apply. But after a precedent BIA decision held that the CSPA applied retroactively,[19] the agencies reversed their prior

[16] INA §204(k).

[17] INA §204(k)(2).

[18] *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011).

[19] *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007).

positions.[20] Now, according to the agencies, as long as the child had not received a final denial on an application by August 6, 2002, the CSPA principles will apply.

Authority

Statutes

The following statutory cites provide legal authority for the issues discussed above:

- INA §201—the immigrant-visa selection system
- INA §202—numerical limitations and distribution of 2nd-preference visas
- INA §203—family-based preferences and order of consideration

Regulations

The following regulatory cites provide legal authority for the issues discussed above:

- 8 CFR §204.1—substantive basis for immediate relative and family preference petitions; evidentiary and documentary requirements
- 8 CFR §204.2—elements to be proven and the documentation to be submitted to establish each type of family relationship
- 22 CFR §40.1—definition of terms
- 22 CFR Part 42—documentary requirements

Agency Guidelines

The following guidelines provide additional authority for the issues discussed above:

- USCIS *Adjudicator's Field Manual* (AFM)—a comprehensive "how to" manual detailing policies and procedures for all aspects of the adjudications program. USCIS employees follow these detailed procedures and the agency's interpretation of the law when adjudicating petitions and applications. The AFM is available at *www.uscis.gov* (Laws & Regulations tab, link to Immigration Handbooks, Manuals, and Policy Guidance).
- *Foreign Affairs Manual* (FAM)—provides guidance and interpretation of regulations for DOS officials. The FAM defines qualifying relationships, provides guidelines regarding immigrant visas, and availability of foreign documents. The portions relating to immigrant visas are located in volume 9. Portions of the FAM are available at *www.travel.state.gov/law/law_1734.html*. See also AILA*Link* Online to access FAM volume 9 (visit *www.ailalink.org* for more information on how to subscribe to this service).

[20] USCIS Memorandum, D. Neufeld, "Revised Guidance for the Child Status Protection Act (CSPA)" (May 6, 2008), *published on* AILA InfoNet at Doc. No. 08050669 (*posted* May 6, 2008).