



AMERICAN IMMIGRATION LAW FOUNDATION

2006 UPDATE ON THE CHILD STATUS PROTECTION ACT: NEW ADMINISTRATIVE INTERPRETATIONS Practice Advisory¹

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This Practice Advisory will discuss recent developments in the interpretation and implementation of the Child Status Protection Act (CSPA), Pub. L. 107-208 (Aug. 6, 2002) by the United States Citizenship and Immigration Services (CIS) and the Board of Immigration Appeals (BIA). There are no regulations yet implementing the Act. The agencies have continued to interpret the Act through policy memoranda and unpublished BIA decisions. Discussed below are three new agency interpretations:

- A CIS memorandum explaining a new and more expansive interpretation of the “opt-out” provision for unmarried sons and daughters of a Lawful Permanent Resident (LPR) who naturalizes while the petition is pending;
- An unpublished BIA decision finding that, under INA § 203(h)(3), the petition of a derivative beneficiary who has aged out automatically converts to the “appropriate category” vis-à-vis the principal beneficiary of the original petition;
- An unpublished Board decision finding that a Respondent was covered by the CSPA where he renewed a previously denied adjustment application before the IJ after the CSPA’s effective date.

This Practice Advisory is intended as a supplement to AILF’s “Updated Practice Advisory on the Child Status Protection Act,” March 8, 2004 (http://www.ailf.org/lac/lac_pa_010504.asp), which contains a more comprehensive discussion of the CSPA and to AILF’s “Aging Out: Recent Developments Related to the Child Status Protection Act and Other Provisions,” February 25, 2005 (http://www.ailf.org/lac/lac_pa_022405.pdf). The information in this advisory is accurate

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and authoritative, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

1. CIS broadens its interpretation of the CSPA opt-out provision for family-sponsored petitions of LPRs who naturalize.

Under a new policy issued in June 2006, CIS will allow a beneficiary to opt out under INA § 204(k)(2) even where the petition was first filed in the 2A preference category but then, prior to the parent's naturalization, automatically converted to the 2B category because the child aged out.

Section 6 of the CSPA amended INA § 204 by adding a new sub-section (k) entitled "Procedures for Unmarried Sons and Daughters of Citizens." 8 U.S.C. § 1154(k). This section addresses what happens to a visa petition for an unmarried son or daughter of an LPR when the parent naturalizes. Section (k)(1) provides that when an LPR naturalizes, a visa petition that he or she initially filed for an unmarried son or daughter under INA § 203(a)(2)(B) will automatically convert to a § 203(a)(1) petition (first preference for unmarried son or daughter of a citizen).²

Section (k)(2) provides an exception to this rule. This exception – or opt-out provision – benefits individuals from countries in which the visa availability date is more current in the second preference category than in the first preference category. It allows the son or daughter to elect in writing *not* to have the conversion occur, or if it has already occurred, to have it revoked. *See* 8 U.S.C. § 1154(k)(2).³ When a son or daughter makes this election, the CSPA provides that the petition is to be adjudicated as if the naturalization had not taken place. *Id.* Thus, the beneficiary's petition will continue to be processed in

² INA § 204(k)(1), 8 U.S.C. § 1154(k)(1), reads:

In general.—Except as provided in paragraph (2), in the case of a petition under this section initially filed for an alien unmarried son or daughter's classification as a family-sponsored immigrant under section 203(a)(2)(B), based on a parent of the son or daughter being an alien lawfully admitted for permanent residence, if such parent subsequently becomes a naturalized citizen of the United States, such petition shall be converted to a petition to classify the unmarried son or daughter as a family-sponsored immigrant under section 203(a)(1).

³ INA § 204(k)(2), 8 U.S.C. § 1154(k)(2), reads:

Exception.—Paragraph (1) does not apply if the son or daughter files with the Attorney General a written statement that he or she elects not to have such conversion occur (or if it has occurred, to have such conversion revoked). Where such an election has been made, any determination with respect to the son or daughter's eligibility for admission as a family-sponsored immigrant shall be made as if such naturalization had not taken place.

the 2B preference category as though the beneficiary was still the son or daughter of an LPR, rather than a citizen.

On June 14, 2006, CIS changed and expanded its interpretation of who can benefit from the opt-out provision. See “Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under The Child Status Protection Act Section 6 And Form I-539 Adjudications for V Status,” <http://www.uscis.gov/graphics/lawsregs/handbook/CSPA6andV061406.pdf>. Previously, CIS interpreted the statutory phrase “initially filed,” found in § 204(k)(1), as limiting the opt-out election to beneficiaries of petitions that *originally* were filed in the 2B preference category. Thus, in earlier guidance on this issue, CIS stated that it would not allow a beneficiary to exercise the opt-out election if the petition was filed originally as a 2A petition for the child of an LPR and then converted to a 2B petition because the child aged-out prior to the parent’s naturalization. In our practice advisory, AILF noted the inconsistency of this interpretation and argued for a broader reading of the statute.⁴

CIS has now changed its position and will allow a beneficiary to opt out under § 204(k)(2) regardless of whether the petition was initially filed in the 2B preference category or was first filed in the 2A preference category and later converted to the 2B category because the child aged out. CIS now reads the language “initially filed” to mean that the petition was *initially filed* for a beneficiary who is *now* in the 2B unmarried son or daughter classification, regardless of whether the petition was originally filed in the 2A category.

In this memo, CIS also clarified that the age out calculation has no bearing on the opt-out provision. Thus, a beneficiary may opt out regardless of his or her age.

2. Unpublished Board decision gives expansive interpretation to the term “appropriate category” in INA § 203(h)(3) as applied to derivative beneficiaries.

In Matter of Garcia, the Board determined that where a derivative beneficiary has aged out, the petition will automatically convert to the appropriate category as determined vis-à-vis the principal beneficiary.

The CSPA does not protect all beneficiaries from “aging out.” Some individuals will be found to be over 21 when the CSPA formula for determining the age of the beneficiary is

⁴ See “Aging Out: Recent Developments Related to the Child Status Protection Act and Other Provisions,” February 25, 2005 (http://www.ailf.org/lac/lac_pa_022405.pdf). We pointed out that the term “initially filed” appeared only in section (k)(1), the section dealing with automatic conversions from 2B to 1st preference. Considering the placement of the term “initially filed,” it made no sense for CIS to automatically convert these petitions – even if initially filed in the 2A category rather than the 2B category – but then refuse to allow an opt-out under (k)(2).

applied. However, despite having aged-out, the statute provides other benefits for certain of these individuals.

Section 3 of the CSPA includes a new provision at INA § 203(h)(3) that states that if the age of a beneficiary is determined to be 21 years or older for purposes of INA §§ 203(a)(2) (petitions filed by LPRs) or 203(d) (derivative beneficiaries of family, employment and diversity visa petitions), “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.” 8 U.S.C. § 1153(h)(3).⁵

In *Matter of Garcia*, A789-001-587 (June 16, 2006)

(<http://www.bibdaily.com/pdfs/Garcia%20web1034.pdf>), the BIA addressed what the “appropriate category” for the automatic conversion would be in the case of a derivative beneficiary. The Board determined that “where an alien is classified as a *derivative* beneficiary in the original petition, the ‘appropriate category’ for purposes of section 203(h)(3) is that which applies to the ‘aged-out’ derivative vis-à-vis the *principal beneficiary* of the original petition.” *Id.*

In *Garcia*, the Respondent had been a derivative beneficiary on a 4th preference petition filed for her mother – the principal beneficiary – by the mother’s U.S. citizen sister while Respondent was a young child. This petition remained pending for years. A visa finally became available and Respondent’s mother adjusted her status to LPR, but only after Respondent had turned 21. Subsequently, Respondent filed an adjustment application in 1997 that remained pending until 2004. Removal proceedings were instituted against the Respondent when she was well over 21. During the proceedings, the Respondent renewed her application for adjustment. For purposes of adjustment eligibility, the Board had to determine whether a visa was immediately available; this, in turn, required a determination of whether the Respondent was eligible for any benefits under the CSPA.

Applying the formula for determining age under the CSPA,⁶ the BIA first determined that Respondent was over 21. The Board next considered how to apply the benefits of INA § 203(h)(3). It agreed with the Respondent’s argument that, because Respondent’s mother – the principal beneficiary of the original petition – was now an LPR, the petition automatically converted to a 2B classification (unmarried son or daughter of an LPR). Moreover, the BIA also determined that the Respondent retained the original priority

⁵ INA § 203(h)(3), 8 U.S.C. § 1153(h)(3), reads:

Retention of priority date.—If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d), the alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date entered upon receipt of the original petition.

⁶ See INA § 203(h)(1), 8 U.S.C. § 1153(h)(1); see also AILF’s “Updated Practice Advisory on the Child Status Protection Act,” March 8, 2004 (http://www.ailf.org/lac/lac_pa_010504.asp).

date. With the priority date and preference classification determined, the Board found that a visa was immediately available and that the Respondent was eligible to apply for adjustment.⁷

There remains a question under the statute about the mechanics of how such a conversion would operate when, as here, a case involves a derivative beneficiary. In such a case, the original petition is filed for the principal beneficiary, not the derivative. Thus, technically, there is no petition already on file for the derivative that can automatically convert under the CSPA. In *Garcia*, Respondent's mother had actually filed a 2B preference petition for Respondent after becoming an LPR. The Board appears to indicate that it is not this petition that is being converted, however. Specifically, the Board states:

[T]he IJ apparently focused on the respondent's eligibility for a visa number through the visa petition that her mother filed on her behalf in 1997. However, Respondent's entitlement to a visa number under section 203(h)(3) does not derive from the 1997 visa petition, but rather from the original 1983 petition, which is "automatically ... converted" to a second- preference petition upon an administrative determination that she is 21 years old or older for purposes of section 203(h)(1).

This is a sensible interpretation of how § 203(h)(3) should be applied that is consistent with Congress' specific reference to derivative beneficiaries in § 203(h)(3). While this is an unpublished, non-precedential case – and is currently not CIS' interpretation – practitioners can make the same arguments in their cases and attach the *Garcia* case for support.

3. Unpublished Board decision interprets CSPA effective date provision in favor of the Respondent.

In Matter of Ki Na Kim, the Board determined that a Respondent was covered by the CSPA when, after the effective date of the CSPA, he renewed his adjustment application before the IJ.

Section 8 of the CSPA states that the amendments made by the Act will take effect on August 6, 2002, the date that the CSPA was enacted. This provision also specifies three categories of beneficiaries to whom the Act will apply. Under the third category, the

⁷ The Board also rejected the IJ's conclusion that the CSPA did not apply retroactively to the petition filed on behalf of the Respondent. The Board noted that the CSPA applied in any case in which a final determination had not been made on an application for adjustment of status. CSPA § 8. Here, the Respondent's adjustment application, filed in 1997, was pending on the effective date of the CSPA (August 6, 2002). Thus, the Board found that CSPA was applicable to the original adjustment application and remained applicable to the renewed application she filed in proceedings.

CSPA will apply to a derivative or other beneficiary of “an application pending before the Department of Justice or the Department of State” on or after August 6, 2002.⁸

In the unpublished decision *Matter of Ki Na Kim*, A-78-706-954 (June 7, 2006) (<http://www.aila.org/Content/default.aspx?docid=20263>), the Board applied this provision. The Respondent in the case originally applied for adjustment before the District Director and his application was denied prior to August 6, 2002 because he had turned 21. At some point after August 6, 2002, the Respondent was placed in proceedings and renewed his adjustment application. The Board found that he was covered under CSPA § 8(3) because he had an application pending before the immigration court after August 6, 2002. Thus, it was immaterial that the adjustment application had first been denied by CIS prior to CSPA’s effective date.

While this is an unpublished, non-precedential case, practitioners can make the same arguments in their cases and attach the *Ki Na Kim* case for support.

⁸ CSPA § 8 (3) reads:

The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to any alien who is a derivative beneficiary or any other beneficiary of –

(3) an application pending before the Department of Justice or the Department of State on or after such date.