AMERICAN IMMIGRATION LAW FOUNDATION

UPDATED PRACTICE ADVISORY ON THE CHILD STATUS PROTECTION ACT

Practice Advisory[1]

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The Child Status Protection Act (CSPA), Pub. L. 107-208 (Aug. 6, 2002), was enacted to provide relief to children who "age-out" as a result of delays by the Citizenship and Immigration Services (CIS) in processing visa petitions and asylum and refugee applications. The Immigration and Nationality Act (INA) defines a "child" as an unmarried individual under 21 years of age. 8 U.S.C. § 1101(b)(1). The CSPA does not change this definition, but instead changes the point at which the child's age is calculated.

Prior to the CSPA, an application for permanent residency as a direct or derivative beneficiary child would be approved only if adjudicated prior to the child turning 21.[3] Upon turning 21, a child would "age out" and lose the preferential status of a child. As the result of agency backlogs and delays, many children aged out before their cases were complete. For cases to which it pertains, the CSPA now locks in the age of the child at an earlier date in the process, and in this way will preserve the status of "child" for many individuals who otherwise would age out.

 This Practice Advisory was originally published in December 2003. It has been updated to include recent developments in the law.

[2] AILF Legal Action Center would like to thank AILF Board of Trustee member Cyrus D. Mehta for his help with this practice advisory.

[3] The individual also must be unmarried to be considered a "child." 8 USC § 1101(b)(1). The CSPA did not change this requirement.

The new method of calculating a person's age varies depending on the type of immigration benefit that is sought. The CSPA applies to:

- Derivative beneficiaries of asylum and refugee applications;
- Children of U.S. citizens;
- Children of Lawful Permanent Residents (LPR); and
- Derivative beneficiaries of family-based, employment-based, and diversity visas.

According to the CIS, the CSPA does *not* apply to applicants for or derivatives of Nicaraguan Adjustment and Central American Relief Act; Haitian Refugee Immigration Fairness Act; Family Unity; Special Immigrant Juvenile status; or non-immigrant visas (including K and V visas). *See* The Child Status Protection Act – Memorandum No. 2, from Johnny N. Williams (Legacy INS) (Feb. 14, 2003) (*posted on AILA InfoNet at Doc. No. 03031040)*;[4] *see also* DOS Issues Revised Cable on Child Status Protection Act (*posted February 5, 2003 on AILA InfoNet at Doc. 03020550*) (CSPA does not apply to K, V or other non-immigrant visas).

This practice advisory provides an overview of the CSPA, its effective date, and its implementation to date by CIS and the Department of State (DOS). It also includes a discussion of the Ninth Circuit case, *Padash v. INS*, CA No. 02-70439, 2004 U.S. App. LEXIS 2788 (9th Cir. February 19, 2004), which rejects one aspect of the agency's narrow interpretation of the effective date of the Act.

Practitioners should be aware that the CSPA, which is complex, has yet to be fully implemented. Moreover, to-date, both the CIS and the DOS have interpreted the CSPA narrowly, even where an expansive interpretation is more consistent with the statute's purpose and language. However, no regulations exist yet, and the agency interpretations and memorandums cited here are subject to change. We encourage practitioners to think creatively and expansively about how the CSPA can benefit your clients. This practice advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

1. DERIVATIVE BENEFICIARIES OF ASYLEES AND REFUGEES

The child of an individual granted asylee or refugee status may be granted the same status if accompanying or following-to-join the parent. 8 U.S.C. §§ 1157(c)(2) and 1158(b)(3). The CSPA amends the asylum and refugee provisions by locking in the age of a child on the date that the parent files the asylum or refugee application, regardless of how old the child is when the asylum or refugee case is finally completed. CSPA §§ 4 and 5. Thus, a

[4] The legacy INS memoranda discussed here have not been repealed by the CIS and thus remain valid.

child who is 20 when the parent files for asylum will retain the status of a child even if the child is 22 when the asylum application is approved.[5]

There are two ways for a child to obtain derivative asylee status. First, when a child is present in the United States, the parent may include the child on the asylum application. 8 CFR § 208.3(a). In these circumstances, the CSPA will apply if 1) the child was under 21 when the asylum application was filed; and 2) the parent adds the child's name to the asylum application before it is adjudicated. *See* HR 1209 – Child Status Protection Act (INS Asylum Division) (Aug. 7, 2002) (*posted at AILA InfoNet at Doc. No. 02090531).* For example, the CSPA will apply if an asylum applicant adds a 22 year old child who is present in the United States to a pending asylum application, provided the child was under 21 when the asylum application was filed.

Second, if a child is not present in the United States or was not named in the asylum application, the parent may still claim the child as a derivative by filing a Form I-730, Refugee/Asylee Relative Petition, within two years of being granted asylum. 8 CFR § 208.21(c) and (d). Although CIS has not yet addressed this situation, the Executive Office for Immigration Review (EOIR) has provided insight into how the CSPA may be applied to these cases. In a memorandum on conditional grants of asylum due to coercive population control policies, EOIR explained that the CSPA will apply if:

- The child was under 21 at the time the asylum application was filed; and
- The parent is granted asylum *on or after* August 6, 2002, provided the parent follows all of the regulatory requirements for filing the I-730; or
- The parent is granted asylum *prior to* August 6, 2002 and the child turns 21 *prior to* August 6, 2002, but only if the I-730 was filed *prior to* August 6, 2002 and remained pending on that date.

See Conditional Grants of Asylum Based on Coercive Population Control Policies (EOIR) (Sept. 30, 2003) (*posted on AILA InfoNet at Doc. No. 03100642 (Oct. 6, 2003))*.[6]

2. IMMEDIATE RELATIVE – CHILD OF A U.S. CITIZEN

Under the CSPA, when a U.S. citizen parent petitions for the immigration of a child, the age of the child will be locked in as of the date that the parent files the I-130 Petition for Alien Relative. CSPA § 2. Thus, if a U.S. citizen father files an I-130 for his unmarried

[5] Prior to the CSPA, the asylum office adjudicated some cases nunc pro tunc to avoid the consequences of a child ageing out before having adjusted status. The asylum office has indicated that it will continue to make nunc pro tunc adjudications when requested even if the individual is eligible under the CSPA. *See* Asylum HQ/NGO Liaison Meeting Minutes (Sept. 9, 2003) *(posted on AILA InfoNet at Doc. No. 03102711 (Oct. 27, 2003)).*

[6] Although this EOIR memorandum pertains to a limited group of asylees, there is no reason why these cases should be treated differently from other cases. Additionally, it appears that EOIR consulted with CIS regarding this policy.

daughter when the daughter is 20, the daughter will retain the status of a "child" even if the visa petition or adjustment of status application is not adjudicated until the daughter is 22 years old.

There are two modifications to this general rule, both of which involve conversions of a petition from a preference category to the Immediate Relative category. First, when an LPR petitions for a child under the 2A preference category, and the LPR naturalizes while the petition is pending, the age of the child will be locked in on the date of the parent's naturalization. If the child is under 21 on that date, the petition will be converted to an Immediate Relative petition. CSPA § 2; s*ee also* Child Status Protection Act, memorandum from Johnny N. Williams (Legacy INS) (Sept. 20, 2002) (*posted on AILA InfoNet at Doc. No. 0292732).*

Second, when a USC parent files a petition for a married son or daughter, and the son or daughter legally terminates the marriage while the petition is pending, the son or daughter's age will be locked in on the date that the marriage is legally terminated. If under 21, the petition will be converted to an Immediate Relative petition. *Id.*

Additionally, although not in the statute, DOS has made clear that it will allow a beneficiary who is eligible for Immediate Relative status due to the CSPA to opt out of the CSPA and instead be processed under the first preference category if the beneficiary requests this, and if the priority date falls within the first preference cut-off date. A beneficiary with children might chose to opt out of the CSPA in order to bring in his or her children as derivatives – an option that is not open to Immediate Relatives. *See* DOS Issues Revised Cable on Child Status Protection Act (*posted on AILA InfoNet at Doc. 03020550* (Feb. 5, 2003)).

3. CHILD OF AN LPR OR THE DERIVATIVE CHILD OF A FAMILY-BASED, EMPLOYMENT-BASED, OR DIVERSITY VISA

The process for determining the age of the child of an LPR, or the derivative of a family-based, employment-based or diversity visa is more complicated. In these cases, the beneficiary's age will be locked in on the date that the priority date of the visa petition becomes current, less the number of days that the petition is pending, but only if the beneficiary seeks to acquire the status of an LPR within one year of the date the visa became available. CSPA § 3. This formula can be broken down into three steps:

- First, determine the child's age at the time a visa number becomes available;
- Second, subtract from this age the number of days that the visa petition was pending; and
- Third, determine whether the beneficiary sought LPR status within one year of the visa availability date.

The first two steps will determine the child's age. This age will only lock in, however, if the third step is met. Each of these steps is discussed briefly below. Both the INS memoranda and DOS cables cited in this Practice Advisory contain useful examples

illustrating how this formula is to be applied in a variety of case situations. DOS also provides a worksheet to calculate age. *See* DOS Issues Revised Cable on Child Status Protection Act (*posted on AILA InfoNet at Doc. 03020550* (Feb. 5, 2003)).

A. How do I determine when a visa number has become available?

The first step is to determine the child's age at the time that a visa number became available for the child, or in the case of derivatives, when a visa number became available for the child's parent. Both the CIS and the DOS state that a visa number becomes available on the first day of the month that the DOS Visa Bulletin says that the priority date has been reached.

If the visa number is already available when the I-130 is approved, however, the agencies interpret the "visa availability" date for the CSPA as the date that the I-130 is approved. *See* The Child Status Protection Act – Memorandum No. 2 by Johnny N. Williams (Legacy INS) (Feb. 14, 2003) (*posted on AILA InfoNet at Doc. No. 03031040);* DOS Cable on Child Status Protection Act (*posted on AILA InfoNet at Doc. No. 02090940 (Sept. 9, 2002)).* DOS rejected an alternate interpretation advanced by AILA that a *visa number* is distinguishable from a visa, and that a *visa number* becomes available when the priority date becomes current, even if the visa itself is not available yet. For a discussion of this alternate interpretation, s*ee* DOS Answers to AILA Questions (*posted on AILA InfoNet at Doc. 03040340 (Apr. 3, 2003)).*

If a visa availability date retrogresses after the individual has filed an application for adjustment of status (Form I-485) based upon an *approved* visa petition, CIS states that it will retain the I-485 and note on it the visa availability date at the time that the I-485 was filed. When a visa number again becomes available, CIS is to calculate the beneficiary's age by using the earlier visa availability date marked on the I-485. *See* The Child Status Protection Act – Memorandum No. 2, by Johnny N. Williams (Legacy INS) (Feb. 14, 2003) (*posted on AILA InfoNet at Doc. No. 03031040).* CIS says that it will not follow this practice if the I-485 was not filed at the time that the visa availability date retrogressed. *Id.*

B. How do I determine how long a visa petition has been pending?

A child's age will be determined by subtracting the number of days that the visa petition was pending from the child's age at the time a visa number became available. Generally, a petition is pending between the date that the petition is properly filed and the date that an approval is issued. Both CIS and DOS state that, for a derivative of a diversity visa, a petition is considered pending between the first day of the DV mail-in application period for the program year in which the principal has qualified and the date on the letter notifying the principal applicant that the application was selected. *See* The Child Status Protection Act – Memorandum No. 2, by Johnny N. Williams (Legacy INS) (Feb. 14, 2003) (*posted on AILA InfoNet at Doc. No. 03031040);* DOS Cable on Child Status Protection Act (*posted on AILA InfoNet at Doc. No. 02090940 (Sept. 9, 2002)).*

C. How do I determine whether the beneficiary sought LPR status within one year of the visa availability?

The child's age – determined by the first two steps described above – will only lock in if the beneficiary has sought to acquire the status of a lawful permanent resident within one year of the visa availability. For a child beneficiary who is adjusting status, CIS indicates that the date that the child seeks to acquire LPR status is the date that the I-485 is filed.

The DOS has indicated that in cases in which the principal applicant was processed for a visa at a consular post, the date that a child seeks to acquire LPR status is the date Form DS 230, Part I is submitted by the child, or by the child's parent on the child's behalf. DOS has stressed that in derivative cases, it must be Part I of an application filed specifically on behalf of the derivative child; it is not enough for the principal to seek LPR status within the one-year time frame. *See* DOS Issues Revised Cable on Child Status Protection Act (*posted on AILA InfoNet at Doc. 03020550* (Feb. 5, 2003)). In cases in which no record of Part I of the visa packet for a derivative child exists at the post, DOS places the burden on the derivative to demonstrate sufficient alternate proof. *Id.*

In cases in which the principal adjusted status in the U.S. and the derivative is applying for a visa abroad, the derivative will be considered to have sought LPR status on the date that the principal filed Form I-824 to initiate the child's follow-to-join application. Because Form I-824 is not the only way to initiate this process, DOS instructs posts to seek an advisory opinion in cases in which some other "concrete" step was taken. What constitutes a "concrete" step has not been delineated. *See* DOS Issues Revised Cable on Child Status Protection Act (*posted on AILA InfoNet at Doc. 03020550* (Feb. 5, 2003)).

Contrary to the agencies' interpretations, there is an argument that this statutory requirement is met if the beneficiary applied for an immigrant visa or adjustment of status within one year of the effective date of the statute. For a discussion of this argument, *see* "The Child Status Protection Act – Is Your Child Protected?", Tammy Fox-Isicoff and H. Ronald Klasko, *Interpreter Releases, Federal Publications, Immigration Communiqué* (July 21, 2003).

The statute also provides that if the beneficiary's or derivative's age is determined to be 21 years of age or older, the petition shall automatically be converted to the "appropriate category" and the individual shall retain the priority date of the original petition. CSPA § 3. Thus, if a child of an LPR is determined to be over 21, the petition will automatically convert to the 2B preference category for the son or daughter of an LPR. There has not yet been an agency interpretation of this provision as it applies to derivatives of family based petitions. For discussion of how this provision can be interpreted expansively, *see* "Pushing the Envelope with the Child Status Protection Act," Cyrus D. Mehta, http://www.cyrusmehta.com (November 14, 2003); and "A Critical Look at BCIS'/DOS' Interpretations of the CSPA," Alan Lee, http:www.alanleelaw.com (July 7, 2003).

4. CONVERSION OF A 2B PREFERENCE CATEGORY TO A 1ST PREFERENCE CATEGORY

The CSPA also provides that a family-based visa petition filed by an LPR on behalf of an unmarried son or daughter (who is over 21) will automatically convert to a first preference petition if the LPR naturalizes while the petition is still pending. CSPA § 6. If the beneficiary was assigned a priority date prior to the conversion of the petition, he or she will maintain that priority date after the conversion. *Id.*

The beneficiary may elect not to have the petition converted – or if already converted, to have the conversion revoked – by submitting a letter to CIS, and the case will continue as if the parent had not naturalized. CSPA § 6; *see also* The Child Status Protection Act – Memorandum No. 2, by Johnny N. Williams (Legacy INS) (Feb. 14, 2003) (*posted on AILA InfoNet at Doc. No. 03031040).* This option will primarily benefit Filipinos because the backlog for the first preference category for the Philippines is longer by several years than the backlog for the 2B preference category.

5. DOES THE CSPA APPLY RETROACTIVELY?

The CSPA was effective on August 6, 2002. It applies to all children who turn 21 after this effective date, provided all other requirements of the CSPA are met. The statute also directs that it applies to three sets of cases that were not finally adjudicated on August 6, 2002, even where the child turned 21 prior to the effective date of the statute:

- Cases in which the visa petition was approved prior to August 6, 2002, but a final determination has not been made on a beneficiary's application for an immigrant visa or adjustment of status pursuant to the approved petition;
- Cases in which the visa petition is pending on or after August 6, 2002; and
- Cases in which the application for an immigrant visa or adjustment of status is pending on or after August 6, 2002.

CSPA § 8, 8 USC § 1151 (note).

Both CIS and DOS have interpreted the statute's effective date narrowly. In contrast, the Ninth Circuit has rejected one aspect of the CIS' interpretation, and instead interpreted the statute more broadly. *See Padash v. INS*, CA No. 02-70439, 2004 U.S. App. LEXIS 2788 (9th Cir. February 19, 2004)

A. CIS will apply the CSPA to the following:

- Cases in which the child ages out after August 6, 2002;[7]

[7] Both CIS and DOS agree that the statute applies to a child who ages out after August 6, 2002, the statute's effective date. In determining whether a child aged out before or after this date, it is important to remember the 45 day extension contained in the Patriot Act. Under this provision, the child beneficiary of a petition filed prior to September 11, 2001,

- Cases in which the child aged out prior to August 6, 2002, if the visa petition was filed prior to and remained pending on that date;
- Cases in which the child aged out prior to August 6, 2002 and the visa petition was approved prior to August 6, 2002, but only if the beneficiary applied to adjust prior to this date and there was not yet a final determination on this application.

See The Child Status Protection Act – Memorandum No. 2, by Johnny N. Williams (Legacy INS) (Feb. 14, 2003) (*posted on AILA InfoNet at Doc. No. 03031040)*. A visa petition is considered pending if an appeal or motion to reopen was filed and/or pending on August 6, 2002. *Id.*[8]

The CIS has interpreted a "final determination" to mean *agency* approval or denial issued by CIS or EOIR. *Id.* In contrast, in the only court decision on the CSPA to date, the Ninth Circuit rejected the interpretation of a "final determination" as limited to an agency determination, and instead found that there was no final determination of an adjustment application when an appeal of the agency's denial of the application was pending in federal court. *Padash v. INS*, CA No. 02-70439, 2004 U.S. App. LEXIS 2788 (9th Cir. February 19, 2004). In *Padash,* the Petitioner was a derivative beneficiary of a 4th preference visa petition. He was a child at the time that the visa became available, and applied for adjustment of status within one year of that date. He turned 21, however, while his adjustment application was pending before an Immigration Judge. In decisions pre-dating the effective date of the CSPA, both the IJ and the BIA denied his adjustment application because he had "aged out." Padash filed a petition for review, which was pending on the effective date of the CSPA. The Court first found that he satisfied the definition of a child under Section 3 of the CSPA (8 USC §1153(h)(1)). The Court next considered whether the CSPA applied to him. Following basic rules of statutory interpretation, the Court determined that because the appeal of his adjustment of status application was pending before the court on the effective date of the statute, no "final determination" had yet been made on the application and the CSPA did apply to him. The Court reached this conclusion based upon the plain meaning of the term, the legislative history, and legislative intent behind the statute.

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will remain eligible for child status for 45 days after turning 21. USA Patriot Act of 2001, Pub.L. No. 107-56, 115 Stat. 272. Where this rule applies, children who turn 21 within the 45 day period prior to August 6, 2002 will actually be considered to have aged out after that date. *See* DOS Issues Revised Cable on Child Status Protection Act (*posted on Feb. 5, 2003 on AILA InfoNet at Doc. 03020550*).

[8] In an interpretation that is subject to challenge, CIS has indicated that the motion to reopen cannot be based solely on the fact that the individual would now be eligible for CSPA benefits or based solely on a due process/agency delay claim. *See* The Child Status Protection Act – Memorandum No. 2, by Johnny N. Williams (Legacy INS) (Feb. 14, 2003) (*posted on AILA InfoNet at Doc. No. 03031040).*

Following *Padash*, it is clear that in the Ninth Circuit, a "final determination" is not limited to a final agency determination. Individuals in other Circuits can use *Padash* to challenge the CIS' narrow interpretation of this point. Moreover, the Ninth Circuit's reliance on Congress' beneficial intent in enacting the CSPA may assist in other challenges to narrow agency interpretations.

B. DOS will apply the CSPA to the following:

- Cases in which the visa petition is filed after August 6, 2002;
- Cases in which the visa petition is approved after August 6, 2002;
- Cases in which the visa petition was approved prior to August 6, 2002 if the child aged out after August 6, 2002;
- Cases in which the visa petition was approved prior to August 6, 2002 and the child aged out prior to that date, if the child applied for an immigrant visa and the visa was refused between August 6, 2001 and August 5, 2002;
- Cases in which the visa petition was approved prior to August 6, 2002, and the child applied for an immigrant visa which was refused prior to August 5, 2001, but only if:
    - the refusal was based on INA § 221(g), 8 U.S.C. § 1201(g); or
    - the child applied for a waiver and the waiver application remained pending.

See DOS Cable Provides Guidance on Applications Adjudicated Prior to the Effective Date of the CSPA (*posted on June 2, 2003 on AILA InfoNet at Doc. No. 03060246).*

Both of these interpretations require that, where the visa petition is approved prior to August 6, 2002, the application for an immigrant visa or adjustment of status have been filed prior to August 6, 2002. DOS specifically rejected an alternate interpretation advanced by AILA that the statute does not require that the child have applied for a visa prior to August 6, 2002. *See* DOS Answers to AILA Questions (*posted on Apr. 3, 2003 on AILA InfoNet at Doc. 03040340).* For a discussion as to why the agency interpretation conflicts with the statute on this point, *see* "The Child Status Protection Act – Is Your Child Protected?", Tammy Fox-Isicoff and H. Ronald Klasko, Interpreter Releases, Federal Publications, Immigration Communiqué (July 21, 2003). For further discussion on why the agency's interpretation may be erroneous as applied to derivative beneficiaries, *see* "A Critical Look at BCIS'/DOS' Interpretations of the CSPA," Alan Lee, http:www.alanleelaw.com (July 7, 2003).