A CRITICAL LOOK AT BCIS'/DOS' INTERPRETATIONS OF THE CSPA: Part 1 of 2

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To date, the Bureau of Citizenship and Immigration Services (BCIS) and Department of State (DOS) have issued five memos on the critical issue of who is eligible under section 204 of the Immigration & Nationality Act (covering family based, employment based, and diversity visa cases) for the benefits of the Child Status Protection Act (CSPA)[1] which was signed into law on August 6, 2002[2]. Regulations have been drafted but not yet implemented. The BCIS has also been sending representatives from Washington to explain BCIS thinking on the law to local BCIS officers and the public. This article will take a critical look at BCIS and DOS' on-going interpretations to determine basic eligibility under section 204. The Department of State has said that it is working closely with the BCIS on questions of interpretation[3], and so it must be assumed that DOS' view is that of the BCIS.

An overview of official thinking in 204 cases (not including immediate relative situations) as expressed in the memos and BCIS meeting with the public in New York on April 10, 2003, is that the first step is determining whether the case itself qualifies for CSPA consideration[4] and that—with few exceptions—the CSPA will only benefit individuals with adjustment of status or immigrant visa applications pending on August 6, 2002, where a visa petition under section 204 was previously approved and individuals aged out before that day[5]. The Department of State has postulated that the CSPA will also apply if the visa petition was approved before August 6, 2002, but a child did not turn the age of 21 until August 6, 2002[6]. The official thinking also is that the CSPA will apply if a petition under section 204 was still pending on August 6, 2002 regardless of whether the child aged out before or after that date[7].

BCIS and DOS- after making this initial determination of whether the case qualifies under the CSPA- instruct that the next step is determining whether the particular individual qualifies under the CSPA as a child[8]. For petitions qualifying under a preference classification, the child's age is only locked in for CSPA benefits where a visa petition has been filed and approved, and the priority date is available[9]. From the "lock-in" date, the child's age must with few exceptions be finally calculated to be under 21 on August 6, 2002, to qualify. Setoffs that individuals can use are the period of time that a petition has been pending and the 45 days available to many individuals under the Patriot Act[10].

In examining the BCIS/DOS interpretations in light of the CSPA statute and legislative history, the final analysis must be that the official thinking in Washington thus far is

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incomplete, strained and incorrect. The restrictive interpretation on eligibility cannot be said to stem from the congressional debate.

I. The CSPA's Relevant Sections to 204 Eligibility

To have a proper understanding of the issues at stake here requires an in-depth look at the CSPA statute itself, in particular sections 3 and 8:

> Sec. 3. Treatment of Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based, and Diversity Immigrants.
> Section 203 of the Immigration and Nationality Act (8 U.S.C. 1153) is amended by adding at the end the following:
> "(h) Rules for Determining Whether Certain Aliens Are Children.—
> "(1) In General.—For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using—
> "(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
> "(B) the number of days in the period during which the applicable petition described inparagraph (2) was pending.
> "(2) Petitions described.—The petition described in this paragraph is—
> "(A) with respect to a relationship described in subsection (a) (2) (A), a petition filed under section 204 for classification of an alien child under subsection (a) (2) (A); or
> "(B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).
> "(3) 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) (4) and (d), 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."

> Sec. 8. Effective Date.
> 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—
> (1) a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) approved before such date but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition;

(2) a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 154) pending on or after such date; or
(3) an application pending before the Department of Justice of the Department of State on or after such date.

Close reading of the law demonstrates the errors of the BCIS/DOS interpretations.

II. Why a Restrictive Interpretation is not Warranted Concerning Already Approved Petitions on the Date of Enactment for Derivative Beneficiaries.

The first lines of the effective date section (Section 8) clearly state that the CSPA takes effect on the date of enactment (August 6, 2002) and that it applies to any alien "who is a derivative beneficiary or any other beneficiary.... " This phrase modifies and connects with all 3 parts of section 8. The initial question here is whether the word "is" should be construed as meaning the child must have been under 21 on the date of enactment since the logical argument is that a child no longer qualifies as a derivative beneficiary or any other type of beneficiary if he/she has already aged out. However, this cannot serve as the line of demarcation as both BCIS and DOS have taken the position under the second part of section 8 eligibility affecting beneficiaries of "(2) a petition for classification under section 204 of the Immigration and Nationality Act (8 USC 1154) pending on or after such day," that this situation would still qualify for CSPA benefits regardless of whether the individual aged out before or after August 6, 2002[11].

To practitioners in the field, the most important interpretation deals with Part 1 of section 8, where a petition was already approved prior to August 6, 2002, and the beneficiary or derivative beneficiary also aged out prior to that date. Indeed DOS stated that most of the cases posts would be likely to see in the first few years would be cases in which the petition was approved before August 6, 2002[12]. Part 1 places a restrictive clause on pre-August 2002 approved petitions that individuals can only benefit if a final determination had not yet been made on the "beneficiary's application" by that date. BCIS and DOS have taken Part 1 to mean that, with few exceptions, any beneficiary or derivative beneficiary had to have a pending immigrant visa or adjustment of status application on August 6, 2002 to qualify[13]. Yet the statute does not warrant this reading as applied to derivative beneficiaries. Part 1 clearly states that a final determination must not have been made on the beneficiary's application, not on a derivative beneficiary's application. In point of fact, the statute does not require any application at all by a derivative beneficiary. The fact that both "derivative beneficiary" and "any other beneficiary" are mentioned in the first lines of section 8 but only the "beneficiary's application" is mentioned in Part 1 shows that, in a proper reading of the statute, the burden is upon the principal beneficiary to maintain a live application as of the date of enactment, and that any derivative beneficiary should be able to benefit even if aged out by August 6, 2002. As stated above, the word "is" in the first lines of section 8 has not been construed by either BCIS or DOS as a limitation on age as of August 6, 2002.

[1] Child Status Protection Act (CSPA) of 2002, Public Law 107-208, 116 Stat 927.

[2] The Child Status Protection Act – 9/20/02 memo by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations, hereafter "CSPA 9/20/02 memo"; The Child Status Protection Act – Memorandum Number 2 – 2/14/03 by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations, hereafter "CSPA 2/14/03 memo"; Child Status Protection Act of 2002: ALDAC No. 1 unclas State 163054, August 26, 2002, hereafter "CSPA ALDAC No. 1"; Child Status Protection Act: ALDAC No. 2, unclas State 015049, January 17, 2003, hereafter "CSPA ALDAC No. 2."; Child Status Protection Act: ALDAC No. 4, unclas State 131625, May 17, 2003, hereafter "CSPA ALDAC No. 4"

[3] DOS Answers to AILA Questions (3/27/03), answer to question 58 – "The guidance in the January 17 cable (CSPA ALDAC No. 2) was arrived at after long and careful intra- and inter-agency deliberation, in close consultation with INS/BCIS, with the statutory language, as always, the driving force behind our joint interpretation…."

[4] CSPA ALDAC No. 2, paragraph 2; CSPA 2/14/03 memo, page 1

[5] CSPA 2/14/03 memo, page 2: "If the alien aged out prior to August 6, 2002, the only exception allowed by the CSPA is if the petition for classification under section 204 of the Act was pending on or after August 6, 2002; or the petition was approved before August 6, 2002, but no final determination had been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition." DOS recently refined its definition of "final determination" in CSPA ALDAC No. 4, to allow CSPA eligibility to aged-out children in the above situation who had applied for immigrant visas and been refused between August 6, 2001 and August 5, 2002, on grounds that DOS regulations provide that an alien has a one year window within which to overcome any refusal without the need to file a new application. Therefore, a refusal that is less than one year would not be considered a final determination, even if the refusal involved a permanent, nonwaivable ineligibility. Previously DOS stated in CSPA ALDAC No. 1, paragraph 17, that individuals who never made an application for visa prior to August 6, 2002, would receive no benefit from CSPA section 3 and that those who did but were refused on 221 (g) grounds (general catch-all refusal provision) would receive benefits under Section 3 as long as the applications were otherwise pending on August 6, 2002. DOS elaborated on visa refusals in CSPA ALDAC No. 4, paragraph 5, that a 221 (g) refusal would not be considered a final determination, " regardless of whether it occurred within a year of August 6, 2002, or earlier," with the exception if the alien's case was ultimately terminated for failure to make reasonable efforts to overcome the 221 (g) refusal. CSPA ALDAC No. 4, paragraph 4 also reiterated that a refusal on grounds other than 221 (g) more than a year before the effective date of the CSPA would be considered a final determination except if the alien applied for a waiver and the waiver application was still pending as of August 6, 2002.

[6] CSPA ALDAC No. 2, paragraph 2: " The CSPA may also apply to certain cases involving petitions approved before August 6, 2002, but only if either: (a) the alien aged out on or after August 6, 2002…."

[7] CSPA 2/14/03 memo, page 2: "Thus if an alien aged out prior to August 6, 2002, the petition must have been filed on or before August 6, 2002, and either: 1) remained pending on August 6, 2002…."; CSPA ALDAC No. 2, paragraph 2: "Under the revised guidance, the CSPA may apply to any case involving a petition approved on or after August 6, 2002…." In paragraph 11: "Posts should note that whether the alien aged out before or after 8-6-02, and whether the alien applied for a visa before 8-6-02, are only relevant if the petition was approved before 8-6-02. If the petition was approved on or after 8-6-02, then the CSPA may be applied to the case, even if the alien aged out before 8-6-02 or even if the alien did not apply for a visa before 8-6-02."

[8] Ibid.

[9] CSPA 2/14/03 memo, pages 2-3: "[t]he beneficiary's "age" is to be calculated for CSPA purposes by first determining the age of the alien on the date that a visa number becomes available. The date that a visa number becomes available is the first day of the month of the Department of State (DOS) Visa Bulletin, which indicates availability of a visa for that preference category…The date that a visa number becomes available is the approval date of the immigrant petition if, according to the DOS Visa Bulletin, a visa number was already available for that preference category on that date of approval."

[10] The CSPA allows the period of time the visa petition has been pending with the BCIS/INS to be deducted from the age of the child. The U.S.A. Patriot Act adds another 45 days after the age of 21 where a petition was filed before September 11, 2001 and the child aged out after 9/11/01—the additional time given because of delays in processing applications occasioned by the 9/11 attacks. CSPA ALDAC No. 2, paragraph 10: "NOTE: In determining whether an alien aged out before or after August 6, 2002, post

should keep in mind that the special 45-day Patriot Act rules discussed in Ref B ALDAC still apply. Under those rules, if the alien is the beneficiary of a petition filed before Sep. 11, 2001, the alien remains eligible for child status for 45 days after turning 21." In paragraph 12: "—For Principals in F2A Cases, and For Derivatives in Preference and DV cases: Age is determined by taking the age of the alien on the date that a visa first became available (i.e., the date on which the priority date became current and the petition was approved, whichever came later) and subtracting the time it took to adjudicate the petition (time from petition filing to petition approval)."

[11] Supra, footnote 7.

[12] Supra, CSPA ALDAC No. 2, paragraph 7.

[13] Supra, footnote 5.