



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

By Alan Lee^{† ‡}

III. Why a Restrictive Interpretation is not Warranted Concerning the Lock-In Date for Many Aged-Out Children.

The lock-in date of visa petition approval and priority date becoming current is applicable to situations where aged-out children seek to immigrate as children under the age of 21, but has no applicability where aged-out children have clearly missed that boat and are relying on CSPA Section 3 eligibility.

Section 3 of the CSPA describes the treatment to be afforded certain unmarried sons and daughters seeking status as family sponsored, employment based, and diversity immigrants. Part 1 defines how an alien can satisfy the age requirement of a child through looking at the age when an immigrant visa number becomes available or the date that the parent's number becomes available in derivative cases with credit given for the time that the petition was pending. In describing the petitions covered, Section 3, part (h)(2), subsection A includes those for children under the age of 21 and unmarried of permanent residents, and subsection B those for derivative beneficiary children (alien children who are not directly petitioned for, but piggyback on petitions for the parents) where the parents are immigrating on the basis of family relations, employment, or diversity visas (visa lottery).

Directly beneath, part 3 reads that if an alien after going through the calculation of age using the setoffs for time of petition pending [and 45 days under the Patriot Act] is over the age of 21 for purposes of any of the petitions described in parts of section 3, the petition is to be converted to the appropriate category, "[a]nd the alien shall retain the original priority date issued upon receipt of the original petition."¹

All five memos to date have dealt with situations in which petitions were approved and children aged out prior to the enactment date of the CSPA as these situations are immediate. BCIS and DOS should in the future issue guidance on the treatment of those cases falling within part 2 of Section 8 in which petitions are pending or filed on or after 8/6/02, the priority date will not be current for many years, and the derivative beneficiary ages out while the petition is pending but years before the priority date is available for visa issuance. As clear eligibility under the statute is present², BCIS can be expected to reference the retention of priority date part of section 3 to the effect that the petitions should be converted automatically to the appropriate category under which aged-out children would be eligible to immigrate at a later time when the priority date is current.

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In all cases, where applicable, aged-out children would convert to the F-2B category for unmarried sons and daughters of permanent residents with a retention of the parent's priority date. This would mean that in many cases involving extended waiting times for parents, the aged out children should be able to save years in immigrating to this country. For example, in the case of parents immigrating in 2018 on the basis of a fourth preference sibling petition with a 2002 priority date where the child was 15 years of age at the time for that petition was filed, the aged out child should be able to use the 2002 priority date for an automatically converted petition to the F-2B category in 2018. As the priority date under the F-2B category would most likely be current for visa issuance, the speed of immigration would depend upon the mechanism used by BCIS/DOS to effect the automatic conversion. In a regular conversion case today where a parent previously petitioned for his or her spouse and the child was a derivative beneficiary who aged out in the process, the law requires the petitioner to file a new I-130 petition to retain the old priority date³. In this case, a mechanism would have to be devised without the necessity of a further petition because of the automatic conversion provision. It is entirely possible that the parents can go through a notification process either through the BCIS or any other procedure that is acceptable to BCIS/DOS. Whether this automatic conversion would be made prior to the parents' immigration so that the family could immigrate together appears highly unlikely as the appropriate category for conversion would only become available when the parents actually immigrate. Because of the need to have an "appropriate category" under which to immigrate, aged out children who have married would most likely not be able to benefit as only U.S. citizen parents can sponsor married sons or daughters.

The same solution should apply for children who aged out prior to August 6, 2002, where petitions for the parents were approved prior to that date, but in which final determinations had not yet been made on the parent's cases by that date. Section 8 part 1 clearly speaks about a final determination being made on the "beneficiary's" application rather than the derivative beneficiary's. The first lines of section 8 delineate derivative beneficiaries as being covered by the section. Ageing out of the derivative beneficiaries prior to the priority date becoming current cannot foreclose eligibility under the CSPA as such a reading would be in violation of the rules of statutory construction that all terms in a statute are to be given effect⁴ and that the widest possible range should be given to possible beneficiaries of the statute⁵. Thus these aged out children should be deemed covered by Section 3, part 3 and allowed to retain the original priority date of the parent's petition for purposes of their own immigration in the appropriate category. For example, where the parent is a beneficiary of an F-4 sibling petition with a priority date of 1991, the petition is approved in 1992, the beneficiary ages out in 1995, and the parent is only now immigrating, the aged out child should be able to swiftly immigrate under the F-2B category using the parent's 1991 priority date. Of course, if the parent immigrates under other categories with later priority dates, the aged out child would have to wait longer to immigrate, e.g.-With a parent's priority date of March 15, 1998, under the EB-3 category for professional/skilled workers, the aged out child would have to wait for some years for the date to clear under the F-2B category which as of June 2003 is open for individuals filing prior to October 22, 1994.⁶

IV. A Less Restrictive Interpretation is Not Refuted by the Legislative Record

DOS in answer to questions posed by the American Immigration Lawyers Association (AILA) on March 27, 2003, as to whether the CSPA would cover petitions that had been approved and the beneficiary aged out--both events happening before 8/6/02-- in situations where the beneficiary had not made applications for immigration and thus not had "final determinations" which would bar them from eligibility under the CSPA, stated that ageing out could be considered a final determination and that CSPA section 8's reference to the "beneficiary's application" could be interpreted as requiring that the beneficiary actually have made an application⁷. DOS then said that AILA's interpretation "which would result in resurrecting cases where the alien had aged out years ago and failed to apply because of that, would present very serious problems of administration and would not appear to effectuate Congress's intent to place a meaningful limits on the law's retroactivity."⁸ However, this view is not supported by the legislative history as there was no debate on the question of retroactivity. The only material on this subject is a Department of Justice letter contained in House Report 107-45 accompanying the House bill, H.R. 1209, in April 2001 when the legislation only allowed relief to immediate relatives of U.S. citizens.⁹ Concerns were raised by the Department of Justice as the bill at that stage would have applied to all cases in which children aged out during the time of processing with either agency "before, on, or after" the date of enactment.¹⁰ The Justice Department opined that H.R. 1209 's retroactivity could affect determinations made as long ago as 1952.¹¹ DOJ undoubtedly envisioned the retroactivity clause as affecting all past adjudications since 1952 because aged-out children who had immigrated since then in the F-2B or other category would have to have been reclassified as immediate relatives on INS entry records. The Department of Justice then wrote,

The general practice with respect to changes in the law is that the amendments apply to future petitions and those pending on the date of enactment, but not to determinations made before the date of enactment. We understand, however, that Congress may seek to address cases of children who have aged out in the past. Therefore, if Congress considers it necessary to address past cases, we would prefer reasonable limits to retroactivity, such as making the changes retroactively applicable only to petitions denied as a result of the beneficiary aging out within a specified period of time. A more limited retroactivity would provide relief in recent ageout cases under current or recent immigration law while avoiding the harmful effects and legal complications of potentially reopening cases decided decades ago.¹²

Retroactivity under the correct interpretation of the CSPA as outlined above would not upset this expectation of the Justice Department. Congress did give a limited retroactivity to the CSPA and the BCIS or DOS will not have to look back any further than August 6, 2002 with limited exceptions as delineated by the BCIS/DOS¹³. The Act requires the beneficiary's case to still be alive on August 6, 2002¹⁴. Therefore it would not apply where no case was before either the BCIS or DOS on that date. Neither agency would have to worry about digging out cases concluded decades ago. The Act only provides that a derivative beneficiary who aged out prior to August 6, 2002 now

immigrate under the "appropriate category."¹⁵ Nothing compels either BCIS or DOS to reopen files from long ago to assign parents' preference categories to aged out children who may have immigrated under other categories.

V. Rules of Statutory Construction Demand that the CSPA be Construed Liberally

The rules of statutory construction of legislation hold that all words in the law be given effect. Only by ignoring the significance of the word "beneficiary's" in Section 8 part 1 when seen in light of the words "derivative beneficiary or any other beneficiary" in the first lines of that section and the entire text of CSPA Section 3 (h) (3) can BCIS/DOS justify their present interpretations of the CSPA. Such selective use of terms in legislation is not allowed.¹⁶ The plain meaning of the words is controlling¹⁷, and they mean that a derivative beneficiary is an intended beneficiary even when he/she aged out and the petition was approved before the date of enactment so long as the beneficiary (in most cases the parents) had not yet had a final determination on their applications for immigrant visas or adjustment of status to permanent residence pursuant to the approved petition by August 6, 2002. Also that aliens who age out and cannot be classified as children are entitled to immigrate under an "appropriate category" using the priority date of the original petition. The canons of construction lend support here in dictating that ameliorative legislation be given full effect, and that interpretations which restrict the benefits of the legislation not be upheld.¹⁸ Further, if there are ambiguities in the law, they are to be interpreted in favor of the alien.¹⁹

VI. Conclusion

The CSPA serves a wonderful purpose allowing families to keep together who have been waiting many years to immigrate together to the United States. Why should the child of 15 when the petition was filed who is now still single and many times still living with the parents but has unfortunately aged out in the intervening years of waiting be barred from coming to the U.S. another 7 to 10 years after his/her parents immigrate to this country? As ameliorative legislation, the CSPA deserves to affect the widest group of aged out children that it can reach.

¹ CSPA, Section 3 (h)(3).

² 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. 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....”

³ CO 204.21-C, January 4, 1990.

⁴ “[I]t is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.” See 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction § 46:06 (6th ed. 2002) (“Singer”); see also United States v. Menasche, 348 U.S. 528, 528-39, 75 S. Ct. 513, 99 L. Ed. 615 (1955).

⁵ It is the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion with the goal of promoting congressional intent. This is particularly so in the immigration context where doubts are to be resolved in favor of the alien.” See U.S. v. Sanchez-Guzman, 744 F.Supp. 997 (E.D. Wash.1990.) citing Janvier v. U.S., 793 F.2d 449 (2d Cir. 1986). See also Scott v. INS, 385 U.S. 214, 255 (1996); Costello v. INS, 376 U.S. 120, 128 (1964). The Supreme Court has held that “remedial legislation should be construed broadly to effectuate its purpose,” Tcherepnin v. Knight, 389 U.S. 332 (1967).

⁶ Visa bulletin, Department of State, June, 2003.

⁷ 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....”

⁸ Ibid.

⁹ Department of Justice letter from Cheryl L Walter, acting assistant attorney general, to Rep. James Sensenbrenner Jr., Chairman of the Committee on the Judiciary, House Report 107-45 on HR. 1209, 107th Congress, 1st Session, pages 6-7.

¹⁰ H.R. 1209, 107th Congress, 1st session, on 3/26/01 introduction of bill by Representatives George Gekas (PA) and Sheila Jackson Lee (TX) and referral to Judiciary Committee.

¹¹ Supra, footnote 9.

¹² Ibid.

¹³ Supra, footnote 2.

¹⁴ CSPA, Section 8, part 1.

¹⁵ CSPA, Section 3 (h)(3).

¹⁶ Supra, footnote 4.

¹⁷ Chevron USA v. Natural Res. Def. Council, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). (“The first and most important step in construing a statute is the statutory language itself.”); Robinson v. Shell Oil Co., 519 U.S. 337, 40, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997). (“The court must look to the text of the statute to ‘determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.’”); Food and Drug Admin. V. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). (“The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context...” [I]t is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917). (“Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.”); see also Rubin v. United States, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981). (“When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.”)

¹⁸ Supra, footnote 5.

¹⁹ INS v. Cardoza-Fonseca, 480 U.S. 421, 107 S.Ct. 1207, 94 L. Ed 2d. 434 (1987).