U.S. Department of Justice
Immigration and Naturalization Service

HQADN 70/6.1.1

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

February 14, 2003

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MEMORANDUM FOR REGIONAL DIRECTORS
DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER,
IMMIGRATION SERVICES DIVISION
ACTING DIRECTOR,
OFFICE OF INTERNATIONAL AFFAIRS

FROM: Johnny N. Williams /s/
Executive Associate Commissioner
Office of Field Operations

SUBJECT: The Child Status Protection Act – Memorandum Number 2

Purpose

On August 6, 2002, the President signed into law the Child Status Protection Act (CSPA), Public Law 107-208, 116 Stat. 927, which amends the Immigration and Nationality Act (Act) by permitting an applicant for certain benefits to retain classification as a "child" under the Act, even if he or she has reached the age of 21. On September 20, 2002, this office issued a memorandum providing preliminary guidance to Immigration and Naturalization Service (Service) officers concerning the amendments made to the Act by the CSPA. The purpose of this memorandum is to provide additional guidance to Service officers concerning this new law. As with the previous memorandum, while this memorandum will provide examples of cases that may be affected by the CSPA, it is impossible to anticipate and address every possible scenario. This memorandum should be read in conjunction with the September 20, 2002, memorandum (attached).

CSPA Coverage

In determining whether an alien's situation is covered by the CSPA, begin the analysis by using section 8 of the CSPA. Pursuant to section 8 of the CSPA, the provisions of the CSPA took effect on the date of its enactment (August 6, 2002) and are **not** retroactive. For adjustment applications based upon a provision of section 204 of the Act, the amendments made by the CSPA to the Act benefit an alien who aged out on or after August 6, 2002.[1]

[1]In determining whether an alien aged out before or after August 6, 2002, officers should keep in mind the special 45-day Patriot Act rules discussed in section 424 of the USA PATRIOT Act. Under this rule, 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

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. 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, or; 2) been approved before August 6, 2002, with an adjustment application filed on or before August 6, 2002, and no final determination made prior to August 6, 2002. "Pending" for purposes of the visa petition means agency action on the petition, including an appeal or motion to reopen filed with the Administrative Appeals Office (AAO) or the Board of Immigration Appeals, if such appeal or motion was filed and/or pending on August 6, 2002. "Final determination" for purposes of the adjustment application means agency approval or denial issued by the Service or Executive Office for Immigration Review.

Inapplicability of the CSPA

Nonimmigrant visa (e.g. K or V)[2], NACARA, HRIFA, Family Unity, and Special Immigrant Juvenile applicants and/or derivatives will not benefit from the provisions of the CSPA.

Immediate Relatives

Section 2 of the CSPA addresses eligibility for retaining classification as an immediate relative. The CSPA does not apply to an alien obtaining K2 or K4 visas or extensions. While nothing would necessarily prohibit an alien who once was a K4 from seeking to utilize the CSPA upon seeking adjustment, an alien who is a K2 cannot utilize the CSPA when seeking to adjust.

Preference Categories

Direct Beneficiaries

Section 3 of the CSPA addresses whether certain aliens will be able to adjust as a "child" of a lawful permanent resident (LPR) even if they are no longer under the age of 21. As discussed in the previous memorandum, the 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

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turning 21.

[2] Under the literal language of the statute, the CSPA applies only to immigrant visa categories specified in the statute and the law does not contain a provision allowing for its application to V visa/status, K, or other nonimmigrant visa cases.

preference category. Of course, if upon approval of the Form I-130, Petition for Alien Relative, a visa number is already available according to the DOS Visa Bulletin, the date that a visa number becomes available is the approval date of the Form I-130. From that age, subtract the number of days that the Form I-130 was pending, provided the beneficiary files a Form I-485, Application to Register Permanent Residence or Adjust Status, based on the subject petition, within one year of such visa availability. The "period that a petition is pending" is the date that it is properly filed (receipt date) until the date an approval is issued on the petition.

Derivative Beneficiaries – Family and Employment-Based

In addition to the direct beneficiary family-based preference category examples provided in the previous memorandum and above, section 3 of the CSPA also applies to derivative beneficiaries in both family-based and employment-based preference categories. Just as with the case of the Form I-130, with an adjustment based upon an approved Form I-140, Immigrant Petition for Alien Worker, [and other immigrant petitions filed under section 204 of the Act for classification under sections 203(a), (b), or (c) of the Act], the beneficiary's age is to be calculated 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 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. If, upon approval of the immigrant petition, a visa number was not available, then the date for determining age is to be the first day of the month of the DOS Visa Bulletin which indicates availability of a visa for that preference category. From that age, subtract the number of days that the petition was pending, provided the beneficiary files a Form I-485,[3] based on the subject petition, within one year of such visa availability. The "period that a petition is pending" for the Form I-140 is the date that the Form I-140 is properly filed (receipt date and ***not*** priority date) until the date an approval is issued on the petition.

Visa Availability Date Regression

If a visa availability date regresses, and an alien has already filed a Form I-485 based on an approved Form I-130 or Form I-140, the Service should retain the Form I-485 and note the visa availability date at the time the Form I-485 was filed. Once the visa number again becomes available for that preference category, determine whether the beneficiary is a "child" using the visa availability date marked on the Form I-485. If, however, an alien has not filed a Form I-485 prior to the visa availability date regressing, and then files a Form I-485 when the visa availability date again becomes current, the alien's "age" should be determined using the subsequent visa availability date.

[3] An alien may benefit from section 3 of the CSPA if the alien "sought to acquire" the status of an LPR within one year of visa number availability. The filing of the Form I-485 within one year of the immigration petition approval date (or visa becoming available subsequent to petition approval date, whichever is later) has been determined to meet that definition.

Diversity Visa (DV) Applicants

Section 3 of the CSPA also applies to derivative DV applicants. Because the DV application and adjudication process differs substantially from the application and adjudication process for preference categories, the treatment of DV derivatives will also be somewhat different. For the purpose of determining the period during which the "petition is pending," Service officers should use the period between the first day of the DV mail-in application period for the program year in which the principal alien has qualified and the date on the letter notifying the principal alien that his/her application has been selected (the congratulatory letter). That period should then be subtracted from the derivative alien's age on the date the visa became available to the principal alien.

Motions to Reopen and/or Reconsider

As discussed above, if a denial had been issued on an application for adjustment of status based on a petition for classification under section 204 prior to enactment of the CSPA, then the CSPA cannot benefit such alien. As such, it appears that no motion to reopen or reconsider could be granted based solely on an allegation that the alien is now eligible for CSPA consideration. In addition, it appears that no motion to reopen or reconsider could be granted where the motion was filed prior to enactment of the CSPA alleging solely a "due process / Service delay" argument where the alien was properly denied due to not being a child under the law at the time. While such motion may have been pending on August 6, 2002, such motion could not be granted where the alien was properly denied due to not being a child under the law at the time.

Expediting of Cases

The CSPA should dramatically reduce the amount of requests for expeditious adjudication of cases due to an impending age-out. For immediate relative adjustments, as the age is locked in on the date of filing, no expediting should ever be needed. However, given that preference category adjustments retain the possibility of aging out, it is suggested that any practices regarding expedites in existence prior to enactment of the CSPA be continued for preference category cases where the CSPA will not benefit the alien.[4]

[4] It appears that most preference category aliens will gain significant benefits from the CSPA. However situations could arise where an alien does not meet the section 3 requirements and be on the verge of turning 21. For example, an alien on whose behalf a Form I-140 was filed and approved a year and a half ago today files a Form I-485 and will soon turn 21. Such alien does not qualify for CSPA benefits and may age-out if not adjudicated before the alien's 21st birthday.

Unmarried Sons and Daughters of Naturalized Citizens

As discussed in the September 20, 2002, memorandum, section 6 of the CSPA provides for the automatic transfer of preference categories when the parent of an unmarried son or daughter naturalizes, but also provides the unmarried son or daughter the ability to request that such transfer not occur. If an unmarried son or daughter does not want such automatic transfer of preference categories to occur upon his or her parent's naturalization, the Service shall accept such request in the form of a letter signed by the beneficiary. If the beneficiary does make this written request to the Service, then the beneficiary's eligibility for family-based immigration will be determined as if his or her parent had never naturalized.

Examples

If a Form I-140 was filed in 1998 when the derivative beneficiary was 20, the priority date became available at that time, the Form I-140 was not adjudicated until today, and a Form I-485 was filed one month after approval, the derivative beneficiary's "age" for CSPA purposes would be 20 (the beneficiary is 24 today, but the Form I-140 was pending for 4 years). Thus, this derivative beneficiary would be able to retain classification as a child.

If a Form I-140 was filed in 1998 when the derivative beneficiary was 20, the Form I-140 was adjudicated in 2000, a visa number was available at the time of approval, and the Form I-485 was filed today, the derivative beneficiary's "age" for CSPA purposes would be 20 (the beneficiary was 22 at the time the visa number became available, and the Form I-140 was pending for 2 years). This beneficiary, however, could not benefit from the provisions of the CSPA because (s)he did not file a Form I-485 within one year of visa availability. Thus, this derivative beneficiary would be unable to retain classification as a child.

If a Form I-130 was filed in 1998 when the derivative beneficiary was 20, the priority date became available at that time, the Form I-130 was not adjudicated until today, and a Form I-485 was filed nine months after petition approval, the derivative beneficiary's "age" for CSPA purposes would be 20 (the beneficiary is 24 today, but the Form I-130 was pending for 4 years). Thus, this beneficiary would be eligible to retain classification as a child.

If a Form I-130 was filed in 1998 when the derivative beneficiary was 20, the Form I-130 was approved one year later, but the priority date did not become available until 2003, the derivative beneficiary's "age" for CSPA purposes would be 24 (the beneficiary will be 25 at the time of visa availability, but the Form I-130 was pending for 1 year). Thus, this beneficiary would be unable to retain classification as a child.

If a Form I-140 was filed and denied in 1998 when the derivative beneficiary was 20; the petitioner filed a timely appeal with the AAO which, in 2003, sustains the appeal, remands the matter, and approves the petition (on grounds other than the new availability of the CSPA); the

alien files a Form I-485 six months later, then the derivative beneficiary's "age" for CSPA purposes would be 20 (the beneficiary is 24 today, but the Form I-140 was pending for 4 years). Thus this beneficiary would be eligible to retain classification as a child.

If a Form I-130 was filed and denied in 1998 when the beneficiary was 20; the petitioner filed a timely motion to reopen; today the motion to reopen is granted (on grounds other than the new availability of the CSPA) and the petition is approved; the alien files a Form I-485 nine months later, then the beneficiary's "age" for CSPA purposes would be 20 (the beneficiary is 24 today, but the Form I-130 was pending for 4 years). Thus, this beneficiary would be eligible to retain classification as a child.

Attachment