ESTABLISHING, RETAINING AND CONVERTING PRIORITY DATES

by Robert Crane and Hector O. Barrera

Index:

I	Establishing the Priority Date of the Principal Alien			Page 1
II	Automatic Conversion of Preference with Retention of Priority Date			Page 9
III	Understanding the Child Status Protection Act			Page 10
IV	Using Table "A" and "B" of Visa Bulletin			Page 12
V	Reinstatement of Petition on Death of Petitioner or Beneficiary			Page 13
Appendix I	Example for Computing CSPA Age			Page 15
Appendix II	CHART:	Automatic Conversion of Family Based Preference		Page 16
Appendix III	CHART:	Effect of Death of Petitioner or Beneficiary		Page 18

Part I: ESTABLISHING THE PRIORITY DATE OF THE PRINCIPAL ALIEN

The regulation at 22 CFR §42.53:

> §42.53 ***Priority date of individual applicants.***
> *(a) Preference applicant. The priority date of a preference visa applicant under INA 203(a)* [family based] *or (b)* [employment based] *shall be the filing date of the approved petition that accorded preference status.*
>
> *(b) Former Western Hemisphere applicant with priority date prior to January 1, 1977. Notwithstanding the provisions of paragraph (a) of this section, an alien who, prior to January 1, 1977, was subject to the numerical limitation specified in section 21(e) of the Act of October 3, 1965, and who was registered as a Western Hemisphere immigrant with a priority date prior to January 1, 1977, shall retain that priority date as a preference immigrant upon approval of a petition according status under INA 203(a) or (b).*
>
> *(c) Derivative priority date for spouse or child of principal alien.*
> *A spouse or child of a principal alien acquired prior to the principal alien's admission shall be entitled to the priority date of the principal alien, whether or not named in the immigrant visa application of the principal alien. A child born of a marriage which existed at the time of principal alien's admission to the United States is considered to have been acquired prior to the principal alien's admission.*

Exceptions to the general rule laid out in part (a), that the priority date is the date of filing the preference visa petition, are:

1-- Priority Date for Labor Certification cases, visa classes EB2 (advanced degree) and EB3(professionals & skilled workers), is the date of filing the labor certification with the Department of Labor. 8 CFR 204.5(d)

2-- Priority Date of the earliest approved EB1, EB2 or EB3 I-140 petition awarded all subsequent petitions in classes EB1, EB2 or EB3.

In the Employment Based preferences, the beneficiary of multiple EB1, EB2 or EB3 petitions retains the priority date of the earliest approved employment based petition. It does no matter whether that priority date was the date of filing the labor certification application or the I-140 visa petition. This becomes the priority date for any subsequently filed first, second or third employment-based preference by the same or different employers, even if the original petition has been withdrawn and revoked by the petitioning employer. 8 CFR §204.5(e)

This exception contrasts with family-based beneficiaries, where priority dates are not generally transferable between preferences nor even for a petition in the same preference by a different petitioner.

3-- Second preference derivative children in Visa class F2A, Children of lawful permanent resident (LPR) retain the priority date of the original I-130 petition when a subsequent I-130 is filed in their behalf by the same petitioner.

This is true regardless of whether the principal beneficiary of the original petition immigrates. The priority date is the date to which the principal beneficiary of the original petition was entitled.

The retention of the priority date is independent of whether or not the child remains in Class F2A due to the Child Status Protection Act (CSPA), or age's out into Class F2B, Son/daughter of LPR.

USCIS regulation 8 CFR §204.2(a)(4) provides:

> *(a)(4) A child accompanying or following to join a principal alien under section 203(a)(2) [family based second preference] of the Act may be included in the principal alien's second preference visa petition.* ***The child will be accorded second preference classification and the same priority date as the principal alien.*** *However, if the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner...*

The first sentence restates the statute, INA§203(d). See also 22 CFR 42.31(b) and 42.32(b).

The highlighted sentence provides a unique exception for the children of a second preference principal alien beneficiary because the eligibility of a child of a principal alien in all other preferences is only a derivative beneficiary whose eligibility is conditioned on his "accompanying or following to join" the principal beneficiary.

The second preference (F2A) child is more than a derivative beneficiary. The F2A child is "*accorded second preference classification and the same priority date as the principal alien*". It is "as if" an individual petition had been filed for each child, whether or not named in the petition and whether or not born before the petition was filed (see "after acquired children" discussion below).

There is no requirement that the F2A child be "accompanying or following to join" the principal alien. The F2A child can precede the principal alien, although a separate visa petition must be filed to accomplish this. The F2A child of the principal alien retains the preference and priority date even if the named principal beneficiary of the petition is divorced, dies, or chooses not to immigrate, or the child "ages out" into F2B classification. It is not necessary to protect against these eventualities by filing individual petitions for child beneficiaries. But when any of these possibilities arises, a separate petition must then be filed for the child to precede the principal alien beneficiary of the original I130 petition; and the child retains the second preference priority date he was "accorded" by the original petition. That priority date might be the petition filing date or it might be an earlier priority date the principal alien acquired as described below.

An illustrative case

LPR petitioner files second preference spousal visa petition in 2006. Petitioner and her husband have three children born in 1994, 2002 and 2007. The 1994 "child" is petitioner's stepchild, the 2002 "child" is an adopted child who was adopted in 2003 and the 2007 child is a biological child of the union. The 2006 petition listed only the step child and the adopted child as the biological child was not yet born. The parties divorced in 2008. In 2016 Petitioner files separate visa petitions for each of the three children. All three children have the priority date of the 2006 petition, but the eldest is now over age 21, so his CSPA age will need to be computed and Table "A" of the Visa Bulletin checked to determine whether he has aged out.

4-- The WESTERN HEMISPHERE PRIORITY DATE (WHPD) Exception

Before 1977, the number of immigrants from countries of the western hemisphere, i.e., North & South America, was limited by the Western Hemisphere Quota. The

Immigration Act of 1976 eliminated that quota but a savings clause, codified in subsection (b) of 22 CFR 42.53 above, provided that priority dates would not be lost by passage of time or loss of status on which they were based but could be used in any preference to which the person might later become entitled. The Immigration Act of 1965, effective in 1966, had a similar saving's clause so petitions awarded priority dates established in the late 1950s and 1960s are also possible.

Although a WHPD could not be established after 12/31/1976, by order of Federal Court about 100,000 WHPD visas continued to be issued until June, 1982. Visa Bulletin's for January 1977 through June 1982 listed cutoff dates by country for these "non preference" western hemisphere visas.

The WHPD or "non-preference" priority date was recorded on consular documents and annotated by interchangeable terms including any of the following: "Western Hemisphere", "WH", "non-preference", "O-1" "NP", "SA", "SA1", "padre residente", "madre residente", "esposo residente", "hijo", "hijo ciudadano", "hijo residente" and "hijo americano". Visa codes printed on old resident alien cards were "NP", "SA", "O-1" and "SA1".
To claim a WHPD date, it is useful to know how Western Hemisphere Priority Dates were established, how to documentarily prove a WHPD date, and what persons are entitled to claim the WHPD date.

How Western Hemisphere Dates Were Established

Western Hemisphere non-preference dates were established by presenting documents to a U.S. Consular Officer abroad. Generally there was no application form. The principal qualifying relationships and the evidence provided to the consular officer were:

Relationshipq	Evidence presented
U.S. Citizen Child	Original Certificate of Birth of the child
LPR Parent	Form I-550, INS certification of LPR status of parent
LPR Spouse	Form I-550, INS certification of LPR status of spouse
Employer	Offer of Employment form

The Consulate date stamped these documents and returned them to the applicant. Many families have retained these originals. Old black-negative Texas Birth Certificates with a Consular date stamp on the back side have often been retained in the family.

The Consulate also mailed a "second packet" and a "third packet" to the principal applicant (most often addressed to the father if registering through a child). The first page of these official packets often is still retained in the family. It shows the name of the principal applicant, the non-

preference priority date and one of the notations above as a visa-type code (an example is attached).

Documenting the non-preference priority date is discussed further below.

"Immediate Relative" filings also created a WHPD priority date.

Because a petition filed for an "immediate relative" established no priority date, the Department of State's position was that an immediate relative petition filed before 1977 did not establish a Western Hemisphere priority date for the children of the immediate relative beneficiary, i.e. if a United States citizen had petitioned for his wife, prior to 1977, their children did not thereby establish a priority date. Robert Mautino of San Diego, CA, litigated this issue in 1987 with the result that the Department of State agreed that the filing of an immediate relative visa petition for a native of the Western Hemisphere prior to 1-1-77 established a WHPD for the children of the immediate relative beneficiary.

A copy of a Department of State cable as printed in Interpreter Releases, Vol. 65, p. 617, June 13, 1988, establishing this rule is attached to this article. Notice in item number 3, the secondary evidence used to establish the actual priority date. The use of secondary evidence and the acceptance of an "earliest proven" date other than the actual priority date is not uncommon in such cases.

<u>How to prove the existence of a Western Hemisphere Priority Date.</u>

Note 4.2 to 9 FAM §42.53 pointed out several ways an alien may establish entitlement to a Western Hemisphere priority date.

> **9 FAM 42.53 N4.2 Establishing Entitlement to Western Hemisphere Priority Dates**
> (TL:VISA-173; 11-10-1997)
> An alien may establish entitlement to a Western Hemisphere priority date in several ways:
>
> (1) The applicant may present documents received from a consular office indicating that the applicant was registered as Western Hemisphere immigrant with a priority date prior to January 11, 1977.
>
> (2) The consular office may still have records reflecting the applicant's pre-1977 registration as a Western Hemisphere applicant.
>
> (3) The applicant may present proof of the principal applicant's priority date and proof that the required relationship existed at the time.
>
> (4) The alien establishes proof of the principal alien's priority date and evidence that he/she is the child of a marriage which prior to the principal alien's admission to the United States.

The best proof of a Western Hemisphere date is a current confirmation notice from the American Consulate of the priority date. If a Mexican principal applicant never immigrated, the Juarez consulate should still have a record of his application. Even though the initial application may have been filed at a consulate in Monterrey, Mexico, D.F., or Tijuana, all records were transferred to Cd. Juarez when immigrant visa issuance was consolidated there in the mid 1980s. These old filings seem to have become inaccessible and with the sealing up of the consulate this may be lost as a source.

However old confirmation notices and third packet notices from the Consulate years or decades ago containing notations of the preference and priority date (as discussed above) are excellent proof of such dates. A copy of such a notice follows this article.

Sometimes an obsolete consular "Form FS497", application form is found. It will bear the priority date and is excellent evidence of a WHPD.

Consular date stamps placed on documents presented to qualify are also excellent proof of such dates. Look for consular date stamps on the back of old U.S. birth certificates. These are accepted as valid evidence of WHPD.

Old documents showing appointment at a visa hearing interview prior to 1977, are sufficient evidence of a non-preference priority date as of the date of the hearing. Even a dated refusal notice has served as sufficient evidence. See item number 3 of the Barajas case cable from Department of State accompanying this article.
If your client can't find any of these documents and if the principal applicant was actually admitted from a Western Hemisphere country prior to 1977 that is evidence of his WHPD. Or if he was admitted with a non-preference visa (read the visa class code on his I-151 or I-551 Alien Registration Card or old passport); this could have been any date up to June, 1982. To use date of admission as proof where the admission date is after 1977, a copy of the monthly Visa Bulletin from the Department of State for the month in which the principal alien was issued a visa together with a copy of his visa has routinely been accepted as proof of the WHPD date, using the cutoff date for the month of admission as an LPR as the priority date. A copy of the principal alien's actual visa can also be obtained by filing a G-639 FOIA request. This will show the date of visa issuance and date of admission and is good evidence of the principal alien's WHPD.

If the principal applicant (parent) immigrated as an immediate relative based on a petition filed before 1977, the priority date will be date stamped on the I-130 visa petition and the original petition will be in his or her A-file. A FOIA request will get it. If the principal applicant (parent) has a pre-1977 "Notice of Approval" of the immediate relative visa petition, that will also be sufficient proof of the priority date.

Who is entitled to use the Western Hemisphere non-preference priority date?

A child or spouse of a "principal alien" existing on the date of establishment of a Western Hemisphere priority date is of course entitled to the date, whether or not the principal alien ever actually immigrates. The spouse and children are deemed to registered for the priority date as if they were principal aliens. The term "child" is used here as defined in INA §101(b)(1) which of course includes step children, out-of-wedlock children, and adopted children. There is authority for the proposition that later expansion of the definition of illegitimate children to include certain illegitimate children of the father does not retroactively permit them to claim to have been a child when the date was established.

A spouse acquired after the date of establishment of a Western Hemisphere priority date but **prior to admission of the principal alien** for lawful permanent residence is entitled to the principal alien's Western Hemisphere non-preference priority date. One consular decision awarded such a spouse the priority date even though the principal alien did not immigrate on the theory that there was no mechanism for the after-acquired spouse to otherwise be registered other than the re-registration of the principal alien -- but this decision would have been different if the marriage had occurred after 1-1-1977.

A spouse acquired after the date of admission of the principal alien and who became the resident's spouse during a temporary absence abroad, may be accorded a priority date as of the date of the marriage if the marriage occurred before August 31, 1978. This provision was removed from the FAM on that date. However, some consular officers believe it became ineffective on 1-1-1977 and others believe the date must have been "claimed" prior to August 31, 1978. A copy of the older FAM relevant section is attached.

The "after acquired child" exception discussed below applies fully to non-preference priority dates and applications. Children born of a marriage which existed on the date of admission of the principal alien are entitled to their parent's non-preference priority date. It is not unusual to see children born in Mexico in the 1980s or later who are thus entitled to a parent's pre-1977 priority date. It is not unusual to see such children who are now married adults and the same U.S. citizen sibling who "petitioned" as a baby to establish his parent's priority date is now an adult who can petition for his non-citizen married sibling. Of course, under the "accompanying or following to join" rules for derivative spouse and children, the brother's spouse and children all have the pre-1977 priority date and everybody is at the head of the F4 waiting line! The grandchildren retain the grandparent's priority date!

How far back can you go?

In 1968, the following regulation (later renumbered §41.51) was in effect:

> *22 CFR §42.62(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, an alien who, before February 1, 1966, was registered as an unqualified non-preference registrant and who subsequently qualified... ...or any alien who between February 1, 1966, and July 1, 1968, qualified for registration as a non-preference immigrant under Departmental regulations in effect at that time maya retain his original priority date until such time as a non-preference visa shall become available for his use: Provided however, that no alien shall be given a priority date earlier than January 1, 1944.*

For the 1968 savings clause, if on July 1, 1968, beneficiary was a child or spouse of a principal alien who had established a priority date or had immigrated, then your client has a pre-1968 priority date or can use the date of admission of the principal alien as the priority date.

A "Western Hemisphere" priority date is not lost by change in the relationship on which it was based. It can only be lost by:

> --By using it. A person who has been admitted using a "Western Hemisphere" date who later loses resident status cannot use the date again. But it is not lost when a person immigrates without actually using the "western Hemisphere" date to which he was entitled.
>
> --By operation of INA §203(g) terminating registration for failure to prosecute within one year after notification to the alien of availability of the visa.

5-- The Exception for "after acquired children"

22 CFR § 22.53 (c) provides that a child born of a marriage which existed at the time of the principal alien's admission is entitled to the preference and priority date of the principal alien..

Practice Pointer: One should not file a second preference visa petition for a child entitled to the benefits of subsection (c) because the priority date Merely set up a following to join visa application through NVC or the Consulate, or if the beneficiary is eligible to adjust status, file the I-485 with proof of the principal alien's admission, preference class and priority date. Best practice is to file a form I-824 to notify NVC to set up this record. However proof can be a copy of the

visa obtained by FOIA of the principal alien's file if not otherwise available. An old FAM note continues to state that the Principal Alien's I-551 card is sufficient to set up the "following to join" dependent's visa classification and the date of admission may be used for the priority date if that makes it current.

6-- Rules of "Alternate State Chargeability"

The rules of alternate state chargeability are found in INA §202(b) and 22 CFR §42.12 These rules permit the "accompanying or following to join" spouse or children AND the principal alien to be charged either to the principal alien's foreign state or the spouse or child's foreign state. The term "accompanying or following to join" in this context means the derivative beneficiaries in every preference petition and the direct beneficiary children of a second preference petition. Note 7 to 9 FAM §40.1

Strictly speaking, these rules are not an exception to the general rule that the petition filing date is the priority date, however use of alternate state chargeability is an important tool in the use of priority dates to move your client forward in the waiting line. This is so due to priority date cutoff variability between countries.

Consideration of your client's priority date issues is incomplete without consideration of the possibility of foreign state chargeability.

Part II: AUTOMATIC CONVERSION OF PREFERENCE WITH RETENTION OF PRIORITY DATE

When the principal beneficiary of a visa petition marries or divorces or the petitioner naturalizes the petition may automatically convert to a different visa classification and the priority date of the original petition is retained. The rules for such automatic conversions were modified and complicated by enactment of the Child Status Protection Act (CSPA) in 2002, and by a series of BIA and court decisions which extended the CSPA's reach and eventually by a Supreme Court decision that clarified but narrowed the reach of the act. We have prepared a chart for all such conversions as Appendix II to this paper.

Although it was not retroactive, the **CSPA ended the ageing out of immediate relative children beneficiaries of visa petitions (visa class IR2).** An immediate relative visa petition, form I-130, filed before the child's 21st birthday eliminates age-out without further qualification. For an immediate relative child, there is no "CSPA Age" calculation needed and there is no requirement that the immediate relative child seek visa issuance within one year of visa availability.

For family based preference visa petitions, the CSPA provides that the age of child beneficiaries for purposes of computing when the child loses status at age 21 shall be reduced by however long USCIS takes to adjudicate the petition. However, the child must seek the visa by filing form I-485 or form I-824 or form DS-260, within one year from the date a visa becomes available based on Visa Bulletin Table "A".

The adjusted age for purposes of the CSPA is the age of the child minus the time the petition remained pending before approval. Appendix I provides an example.

Appendix II, titled AUTOMATIC CONVERSION OF FAMILY BASED PREFERENCE, is a complete summary of the automatic conversion rules for each preference. **In all conversions the original priority date is retained**.

As shown on the chart, there are four different rules for the F2A children of lawful permanent residents due to the interplay of the CSPA cutoff dates and the fact that the child can file an application to adjust status, form I-485, under Table "B" of the visa bulletin yet ultimately age out before Table "A" makes a visa available. This same problem arises for the derivative children in the F3 and F4 preferences.

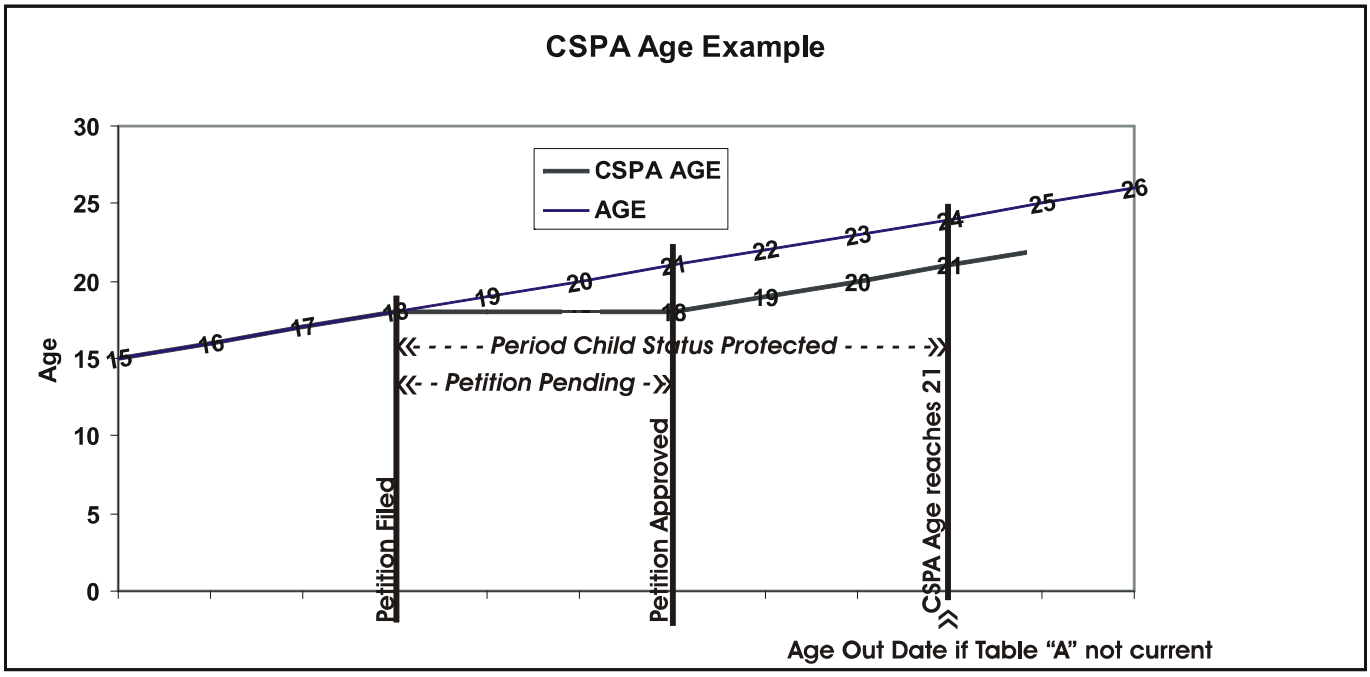
The chart does not include the rules for the derivative child of an F1 (unmarried adult child of USC) nor of a derivative child of an F2A principal alien child because these situations are rare and unlikely to involve a child at age 21. The chart is otherwise exhaustive.

Part III: Understanding the Child Status Protection Act (CSPA)

With the issue resolved by the Supreme Court that the CSPA does not convert the aged-out dependent derivative children to another preference, the CSPA has become straight forward. Children subject of an IR2 visa petition are protected as children without limit nor other requirement. Children subject of a preference visa petition are protected as children beyond their 21st birthday only for the period of time that the I-130 visa petition was pending approval. If the priority date becomes available during that time they have one year to take action by either filing an I-485 or a DS-230 or an I-824. The CSPA Age

calculation is needed to determine whether the beneficiary remains “under 21" and thus remain protected in that preference as a child. The CSPA Age is calculated as illustrated in Appendix I by subtracting from the child’s biological age, the period of time the petition remained pending before approval.

The AUTOMATIC CONVERSION rules chart at Appendix II includes consideration of the CSPA and the effects of Table “B” and Table “A” cutoff dates.



This graph shows the relationship between the biological age and the CSPA Age. In this example a preference visa petition was filed at age 18 and remained pending for three years before USCIS approved it. Thus the child was age 21 when it was approved. The CSPA Age subtracts the period of time the petition remained pending from the biological age; so the child is CSPA Age 18 when the petition was approved. After approval the child continues to be protected as his “CSPA Age” advances. His child status is protected until his “CSPA Age” advances to 21. If his priority date has not become available using Table “A” cutoff date, he loses child protected status at CSPA Age of 21.

If he had already filed an I-485 application for adjustment of status when his priority date reached the Table “B” cutoff date, he is in limbo. USCIS may handle this situation similar to the procedures followed when cutoff dates retrogress but no announcement has been made and the situation is not analogous because a visa does not eventually become available.

This graph is useful for understanding why an applicant for adjustment of status filed using Table "B" of the Visa Bulletin while the CSPA age is less than 21 might still reach CSPA Age of 21 before Table "A" of the Visa Bulletin allows final grant of LPR status.

Part IV: Using TABLE "A" AND TABLE "B" of the Visa Bulletin.

For about 40 years continuing until October, 2015, the Department of State has published a monthly visa bulletin with cutoff dates for each preference for every country and worldwide. Visa availability requires a priority date earlier than the cutoff date for the month of immigrant visa issuance abroad or granting of adjustment of status in the U.S. Such dates are now known as Table A of the monthly visa bulletin. The monthly visa bulletin publishes tables for both Employment Based preferences and for Family Based preferences.

Beginning in October, 2015, the Department of State began publishing an earlier set of cutoff dates for the National Visa Center. These are cutoff dates for commencing final consular processing of the visa application, Form DS230, and possibly also for filing of form I-485 Application to Adjust Status with the USCIS. These dates are Table B of the monthly visa bulletin.

This change has been advantageous to applicants, particularly those eligible to file form I-485 because the dates in Table "B" are as much as 19 months earlier than Table "A" (see April, 2016 data below).

USCIS publishes a web page at *www.uscis.gov/visabulletininfo* updated when each monthly visa bulletin is published. It shows whether USCIS is using Table "B" or Table "A" cutoff dates for filing Form I-485 application to adjust status. During April, 2016, USCIS is using Table "B" cutoff dates for Family Based and Table "A" cutoff dates for Employment Based applications to adjust status.

Practice Pointer: Only the USCIS web site should be used for determining cutoff dates and eligibility to file Form I-485, Application for Adjustment of Status because USCIS may or may not use Table "B" of the Visa Bulletin in any particular month.

Below is shown Table "A" and "B" data and the months separating them for April, 2016:

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
TABLE "A" DATES FOR FINAL ACTION :					
F1	22-Sep-08	22-Sep-08	22-Sep-08	22-Jan-95	1-Jul-04
F2A	22-Oct-14	22-Oct-14	22-Oct-14	22-Jul-14	22-Oct-14
F2B	15-Jun-09	15-Jun-09	15-Jun-09	8-Sep-95	1-Apr-05
F3	22-Nov-04	22-Nov-04	22-Nov-04	1-Oct-94	22-Dec-93
F4	22-Jul-03	22-Jul-03	22-Jul-03	8-Apr-97	1-Sep-92
TABLE "B" DATES FOR FILING :					
F1	1-Oct-09	1-Oct-09	1-Oct-09	1-Apr-95	1-Sep-05
F2A	15-Jun-15	15-Jun-15	15-Jun-15	15-Jun-15	15-Jun-15
F2B	15-Dec-10	15-Dec-10	15-Dec-10	1-Apr-96	1-May-05
F3	1-Aug-05	1-Aug-05	1-Aug-05	1-May-95	1-Aug-95
F4	1-May-04	1-May-04	1-May-04	1-Jun-98	1-Jan-93
Length of Time Between Table "A" and Table "B" :					
F1	12 months	12 months	12 months	2 months	14 months
F2A	8 months	8 months	8 months	11 months	8 months
F2B	18 months	18 months	18 months	7 months	1 months
F3	8 months	8 months	8 months	7 months	19 months
F4	9 months	9 months	9 months	14 months	4 months

Part V: Reinstatement of Petition on Death of Petitioner or Beneficiary

In 2010 Congress enacted legislation waiving the death of family based petitioners and of both employment and family based principal alien beneficiaries. Such waivers are automatic on request if at least one of the beneficiaries is residing in the U.S. at the

time of the death and continues to reside in the U.S. until any pending petition is approved and has a qualifying relative to act as substitute sponsor for the affidavit of support, Form I-864.

To be a substitute sponsor, an individual must be a U.S. citizen or lawful permanent resident; be at least 18 years old; and must be the applicant's spouse, parent, mother/father-in-law, sibling, child, son/daughter, son/daughter-in-law, sister/brother-in-law, grandparent, grandchild, or legal guardian.

Because of the requirement that a beneficiary reside in the U.S. the previous regulation which allowed USCIS to grant a discretionary waiver on the basis of humanitarian considerations has remained in force for cases where no beneficiary was residing in the U.S. at the time of the death of the petitioner or principle beneficiary. The older humanitarian waiver was historically granted rarely and with no beneficiary living in the U.S. it is likely to be even more rarely granted in the future. But it is still there for those who enjoy tilting at windmills.

The rules governing the death of petitioners and principal beneficiaries are presented in a chart with citations to relevant law in the "Notes" column at Appendix III, "EFFECT OF DEATH OF PETITIONER OR PRINCIPAL ALIEN".

April 4, 2016

Example for computing CSPA AGE		Formula
Date of Birth:	15-Nov-85	A
Date of Petition Filing:	18-Apr-05	B
Date of Petition Approval:	21-Oct-08	C
Calculate Years Petition Pending:	3.51	d = C - B
Date for Age Calculation:	1-May-10	E
Calculate Biological Age:	24.47	f = E - A
CSPA AGE	20.96	g = f + d

Date calculations are easy using a spreadsheet program such as EXCEL which gives number of days when one date is subtracted from another.

AUTOMATIC CONVERSION OF FAMILY BASED PREFERENCE			
Original Visa Class	**Event**	**Converted Visa Class**	**Notes**
IR2 (child of USC)	Marriage of Beneficiary	F3 (married son/daughter of USC)	9 FAM § 503.3-3(B)(2)(1)(b)
IR2 (child of USC)	Beneficiary reaches biological age 21	Remains IR2 due to CSPA. [CSPA not retroactive to age outs before 2002]	Not subject to one year requirement of CSPA to seek visa
F1 (unmarried son/daughter of USC)	Marriage of Beneficiary	F3 (married son/daughter of USC)	9 FAM § 503.3-3(B)(2)(1)(a)
F2A (spouse of LPRt)	Petitioner Naturalizes	IR1 (spouse of USC)	9 FAM § 503.3-3(B)(2) (3)
F2A, (child of LPR)	Marriage of Beneficiary	Both the Preference and the Priority Date are lost	Priority date not recaptured by marriage termination
F2A, (child of LPR)	Beneficiary reaches Biological Age 21 before Visa becomes Available per Table A of Visa Bulletin	No effect as not yet at CSPA Age	Must fseek visa, I.e. file I-485, DS260 or I-824 within one year of visa availability.
F2A, (child of LPR)	Visa becomes Available per Table B of Visa Bulletin before Beneficiary reaches CSPA Age 21	Can file I-485 or start processing for consular appointment, but could still lose protected child status.	Beneficiary could still reach CSPA Age Out before visa available per Table A.
F2A, (child of LPR)	Visa becomes Available per Table A of Visa Bulletin before Beneficiary reaches CSPA Age 21	F2A class child status protected	Reverts to F2B if fails to seek visa within one year of visa availability
F2A, (child of LPR)	Beneficiary reaches CSPA Age 21 before Visa becomes Available under Table A of Visa Bulletin	Converts to F2B (unmarried son/daughter of LPR)	However, if I-485 filed using Table B of Visa Bulletin it should remain pending until current. No authority for this yet
F2A, (child of LPR) and biological age under 21	Petitioner Naturalizes	IR2 (child of USC)	Not subject to one year requirement of CSPA to seek visa
F2A, (child of LPR) and biological age over 21 but CSPA age under 21 and priority date unavailable per Table A of Visa Bulletin	Petitioner Naturalizes	F1 (unmarried son/daughter of USC) and can NOT Opt Out to F2B - see Zamora Molina 25 I&N Dec. 606 (BIA 2011) reversing prior USCIS guidance.	However, if I-485 filed using Table B of Visa Bulletin it should remain pending until current.
F2B (son/daughter of LPR) and both biological and CSPA age over 21	Petitioner Naturalizes	F1 (unmarried son/daughter of USC) but can Opt Out to F2B to take advantage of visa availability	However, if I-485 filed using Table B of Visa Bulletin it should remain pending until current.
F2B (son/daughter of LPR)	Marriage of Beneficiary	Both the Preference and the Priority Date are lost	Not subject to recapture by marriage termination
F3 (married son/daughter of USC)	Principal Beneficiary's marriage terminated while under age 21	IR2 (child of USC)	9 FAM § 503.3-3(B)(2)(1)(c)
F3 (married son/daughter of USC)	Principal Beneficiary's marriage terminated while over age 21	F2B (unmarried son/daughter of LPR)	9 FAM § 503.3-3(B)(2)(1)(c)

F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Marriage of Beneficiary	Both the Preference and the Priority Date are lost	Priority date not recaptured by marriage termination
F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Beneficiary reaches Biological Age 21 before Visa becomes Available per Table A of Visa Bulletin	No effect	
F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Visa becomes Available per Table B of Visa Bulletin before Beneficiary reaches CSPA Age 21	Can file I-485 or start processing for consular appointment	Beneficiary could still reach CSPA Age Out before visa available per Table A.
F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Visa becomes Available per Table A of Visa Bulletin before Beneficiary reaches CSPA Age 21	F33 or F44 visa class child status protected	Preference & Priority Date lost if fails to seek visa within one year of visa availability
F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Beneficiary reaches CSPA Age 21 before Visa becomes Available under Table A of Visa Bulletin	Both the Preference and the Priority Date are lost	What if I-485 has been filed using Table B of Visa Bulletin?

Effect of Death of Petitioner or Principal Alien

Visa Classification	Circumstances on date of death	Effect on Petition	Notes
E1 through EB5 Employment Based Preferences	**Principal Beneficiary** dies while I-140 pending or approved; and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-140 will be reinstated or approved if that beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)
IR1 Spouse of U.S. Citizen	**Petitioner** dies while I-130 pending or approved.	Petition I-130 reinstated and treated as I-360 or, if pending, adjudicated as an I-360. (2-year marriage requirement eliminated in 2009)	Children included as derivative beneficiaries of the I-360
IR1 Spouse of U.S. Citizen	**Petitioner** dies and no I-130 was ever filed	May file I-360 as Widow/widower within two years of death.	Children included as derivative beneficiaries of the I-360
IR2 Child of U.S. Citizen	**Petitioner** dies while I-130 pending or approved and Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l) [8 CFR204.2(I)(2) is obsolete]
IR2 Child of U.S. Citizen	**Petitioner** dies after approval of I-130 and Beneficiary NOT residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)
IR2 Child of U.S. Citizen	**Petitioner** dies while I-130 remains pending, Beneficiary NOT residing in U.S. at time of death	Petition not approvable.	8 CFR 204.
F2A Spouse of LPR (includes derivative children)	**Petitioner** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F2A Spouse of LPR (includes derivative children)	**Petitioner** dies after approval of-130; NO Beneficiary residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)
F2A Spouse of LPR (includes derivative children)	**Petitioner** dies while I-130 remains pending; NO Beneficiary residing in U.S. at time of death	No waiver available. Petition not approvable.	
F2A Spouse of LPR (includes derivative children)	**Principal Beneficiary** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F2A Child of LPR (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death (Note: principal alien could have derivative child)	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F2A Child of LPR (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies after approval of I-130; NO Beneficiary residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)

F2A Child of LPR (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies while I-130 remains pending; NO Beneficiary residing in U.S. at time of death	Petition not approvable.	
F2A Child of LPR (includes derivative children of the unmarried principal beneficiary)	**Principal Beneficiary** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	Not real sure about this one
F1 Adult Son or Daughter of USC (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies while I-130 pending or approved and Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F1 Adult Son or Daughter of USC (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies after approval of I-130 and Beneficiary NOT residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)
F1 Adult Son or Daughter of USC (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies while I-130 remains pending, Beneficiary NOT residing in U.S. at time of death	Petition not approvable.	
F3 Married Son or Daughter of USC and derivatives, or, F4 Sibling of USC and derivatives	**Petitioner** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F3 Married Son or Daughter of USC and derivatives, or, F4 Sibling of USC and derivatives	**Petitioner** dies after approval of-130; NO Beneficiary residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)
F3 Married Son or Daughter of USC and derivatives, or, F4 Sibling of USC and derivatives	**Petitioner** dies while I-130 remains pending; NO Beneficiary residing in U.S. at time of death	Petition not approvable.	
F3 Married Son or Daughter of USC and derivatives, or, F4 Sibling of USC and derivatives	**Principal Beneficiary** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request**, the I-130 will be reinstated or approved if that beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*

* Section 204(l) is not retroactive to petitions adjudicated before 28-Sep-2009