Children and the CSPA

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The Immigration & Nationality Act ("Act") defines the term child in a myriad of ways. It is important to reference the statutory definition applicable to each given scenario.[2] For example, as it relates to visa petitions and for those in removal proceedings the Act recognizes the term child to mean an unmarried person under twenty-one years of age who: (a) was born in wedlock; (b) is a stepchild (if the marriage creating the relationship occurred before 18); (c) is a legitimated child; as well as (d) certain children born out-of-wedlock; and (e) certain adopted children.[3]

For naturalization purposes, the definition of child retains the age limitation of twenty-one years but is otherwise slightly different.[4] There is no provision recognizing step-children for naturalization purposes.[5] As a result, the automatic acquisition of United States citizenship pursuant to the Child Citizenship Act[6] does not apply to children whose only citizen parent is a step-parent.

CHILD STATUS PROTECTION ACT

An issue which frequently arises is what to do in cases where the child is going to turn twenty-one. Although there are routinely delays in visa processing and visa backlogs, the passage of time does not stop. As a result, many who qualify for a visa as a child will often turn twenty-one and risk ageing out. The Child Status Protection Act (CSPA)[7] was

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[2] INA § 101(b) and (c).

[3] INA § 101(b)(1)(A)-(C), (D), and (G).

[4] INA § 101(c).

[5] INA § 101(c)(1).

[6] Codified in part at INA § 320(a).

[7] Pub. L. No. 107-208 (Aug. 6, 2002).

enacted to help prevent children who age out from losing immigration status as a child due to either visa backlogs or processing delays. The CSPA governs the point at which a child's age is calculated, and governs what happens if a child ages out.

For immediate relatives of United States citizens (USC), the CSPA generally freezes the age of a child of a USC on the date that the immediate relative visa petition is filed.[8] For F2A petitions filed by lawful permanent resident (LPR) parents for minor children, the CSPA will also freeze the age of the child if the LPR parent naturalizes before the child turns twenty-one while the petition is pending.[9] If the child is over 21 on the date the parent naturalizes, the petition will convert to the F1 preference category for adult unmarried children of USCs.[10] As discussed further below, the beneficiary will have the option of opting out of this conversion. Also, if a USC parent files an F3 petition for a married son or daughter, and the beneficiary legally terminates the marriage before turning twenty-one while the petition is pending, the beneficiary's age will freeze on the date that the marriage is legally terminated. The petition will thus convert to an immediate relative petition.[11]

For children of LPRs[12] and derivative children of other preference categories[13] the age determination is not as simple. The beneficiary's CSPA age is determined[14] by calculating the beneficiary's biological age on the date the visa becomes available (if the beneficiary seeks to acquire the visa within one year)[15] and reducing it by the number of days the petition was pending.[16]

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[8] INA §201(f)(1).

[9] INA §201(f)(2).

[10] The beneficiary can choose to "opt out" and remain in the F2B category, but will not be able to convert to the F2A category.

[11] INA § 201(f)(3)

[12] INA § 203(a)(2)(A)

[13] INA § 203(d).

[14] INA § 203(h)(1).

[15] INA § 203(h)(1)(A).

[16] INA § 203(h)(1)(B). I've always enjoyed converting such formulas into equations. Thus: CSPA age = n – (x – y), where n = biological age on the date the visa becomes available, x = date petition approved, and y = date petition filed.

If the beneficiary ages out, then the petition automatically converts to the appropriate category and the original priority date is retained.[17] In *Scialabba v. Cuellar de Osorio*,[18] the Supreme Court upheld the BIA's interpretation of this provision of the CSPA in *Matter of Wang*,[19] regarding what occurs when a beneficiary ages out. As a result of the Supreme Court's decision, only principal and derivative children beneficiaries of F2A visa petitions will be able to retain the original priority date after automatic conversion if they age out. Derivative beneficiaries of the remaining categories will not be able to retain the original priority date. Instead, they will have to start the process again as principal beneficiaries of a new visa petition with a new priority date.

In *Cuellar de Osorio*, the Supreme Court supported its decision by reasoning that the conversion allowed "is merely from one category to another; it does not entail any change in the petition, including its sponsor, let alone any new filing. And more, that category shift is to be 'automatic'—that is, one involving no additional decisions, contingencies, or delays."[20] Citing INA § 203(h)(3), the Supreme Court then noted that "[t]he operation described is, then, a mechanical cut-and-paste job—moving a petition, without any substantive alteration, from one (no-longer-appropriate, child-based) category to another (now-appropriate, adult) compartment. And so the aliens who may benefit from § [203](h)(3)'s back half are only those for whom that procedure is possible."[21] The Supreme Court went on to provide the following examples:

> For example, the regulation provided that when a U.S. citizen's child aged out, his "immediate relative" petition converted to an F1 petition, with his original priority date left intact. See § 204.2(i)(2). Similarly, when a U.S. citizen's adult son married, his original petition migrated from F1 to F3, *see* § 204.2(i)(1)(i); when, conversely, such a person divorced, his petition converted from F3 to F1, *see* § 204.2(i)(1)(iii); and when a minor child's LPR parent became a citizen, his F2A petition became an "immediate relative" petition, *see* § 204.2(i)(3)—all again with their original priority dates. Most notable here, what all of those authorized changes had in common was that they could occur without any change in the petitioner's identity, or otherwise in the petition's content. In each circumstance, the "automatic conversion" entailed nothing more than picking up the petition

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[17] INA § 203(h)(3).

[18] 134 S. Ct. 2191 (2014).

[19] 25 I. & N. Dec. 28 (2009).

[20] 134 S. Ct. at 2204.

[21] *Id*.

> from one category and dropping it into another for which the alien now qualified.[22]

Again, the result is that generally speaking only F2A beneficiaries will be able to take advantage of section 203(h)(3)'s automatic conversion and priority date retention provisions.

For unmarried sons and daughters of LPRs, the CSPA allows them to opt out of the automatic conversion from the F2B to the F1 category. If they have already been converted, beneficiaries may also revoke the conversion. This provision assists beneficiaries by allowing them to choose between the F1 and F2B visa categories. By opting out, the CSPA allows them to select the category which will benefit them more quickly.

To take advantage of a CSPA calculated age, a beneficiary must have "sought to acquire" LPR status within one year of visa availability.[23] In *Matter of O. Vazquez*, the BIA held that the "sought to acquire" provision may be met by filing an application for adjustment of status or by showing that there are other extraordinary circumstances, including instances where the failure to timely file was due to circumstances beyond the applicant's control.[24] The Board also held that technical rejections (e.g. due to absence of a signature) of adjustment applications could nevertheless meet the "sought to acquire" requirement.[25] The Board also suggested that an attorney's failure to file an application prior to the one year deadline and depriving an aged out child from the protection of the CSPA would be an exceptional circumstance.[26] Merely seeking the advice of an attorney or other similar sorts of efforts, however, were not deemed sufficient by the Board to satisfy the "sought to acquire" requirement.[27]

With the advent of the new Visa Bulletin which provides a filing date and a final action date, a recent question is which date is to be used to determine the beneficiary's CSPA age? In some circumstances, the new Visa Bulletin allows for the early filing of applications for lawful permanent residency. The final action date will be the date when visas can actually be issued. The filing date thus allows for the early submission of

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[22] *Id*.

[23] INA § 203(h)(1)(A)

[24] 25 I. & N. Dec. 817, 820-21 (BIA 2012).

[25] *Id*. at 821.

[26] *Id*. at 821-22.

[27] *Id*. at 822.

adjustment applications prior to the date when visas become available. This is similar to those who are outside the United States and processing an immigrant visa abroad. The filing date allows applicants who are consular processing to submit the DS-260 immigrant visa application ahead of the date the visa becomes available.

There has been no official guidance on this topic, but if necessary you should argue that the age of the child should be protected under the CSPA when the visa becomes current under the filing date. Since this date is often much earlier than the final action date, more children would be protected by the CSPA under this rule. It would run counter to the CSPA for a child beneficiary to age out when the delay is due to agency backlog. Note that given the lack of official guidance, it is quite possible that USCIS will deny an application for adjustment of status where the beneficiary was still a child under the CSPA on the filing date, but aged out before reaching the final action date.