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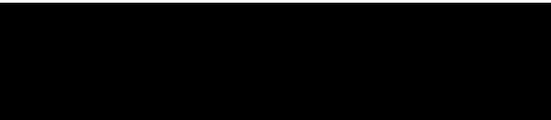
Date: SEP 09 2005

IN RE:



APPLICATION: Application for Adjustment of Status under Section 209(B)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1159(b)(3)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION:

The application for adjustment of status was granted by the Acting District Director, Miami (district director), and is now before the Administrative Appeals Office (AAO) on certification. The district director's decision will be withdrawn, and the application denied.

The applicant is a thirty-year-old native and citizen of Bolivia who is seeking adjustment of status pursuant to section 209(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1159(b)(3), as an alien who is a refugee within the meaning of section 101(a)(42)(A) of the Act or the spouse or child of such a refugee. In the applicant's case, he seeks adjustment of status by virtue of being the child of a refugee, i.e., his mother, [REDACTED] who was granted asylum on March 7, 1994, in Miami Florida.

The district director found that the applicant was eligible to adjust status by virtue of having been previously granted asylum. According to the district director's decision, the provisions of section 209(b)(3) of the Act, which condition the adjustment of derivative aliens on their continuing to be the spouse or child of a refugee, conflicted with the provisions of section 208(b) which provide that a spouse or child of an alien granted asylum shall also be accorded asylum status. *Decision of the Acting District Director*, dated July 15, 2002, at pp. 4-5. The district director resolved the perceived conflict by determining that a derivative asylee, such as the applicant, could adjust status independent of the principal and without regard to the provisions of section 209. The application was approved accordingly and certified to the AAO.

On certification, the record consists solely of the record that was before the district director. Although the district director's decision notified the applicant that the case was being certified to the AAO and gave him an opportunity to submit a brief or other written statement, no such statement appears in the record.¹ *Id. at p. 1.* The entire record was reviewed and considered in rendering a decision.

Factual Background

Before addressing the specific issues raised, the AAO will review the facts of the case as they are critical to an analysis of the unique and complex issues presented. In addition, the AAO notes that the district director's decision does not accurately reflect the facts relating to the applicant's case. It appears that the decision incorporates the facts of another case. The AAO will provide the facts of the applicant's case as determined from the record.

The record reflects that the applicant is a thirty-year-old native and citizen of Bolivia. The applicant's mother, a native of Bolivia, was granted asylum by the Miami Asylum Office on March 7, 1994. The applicant's mother filed a Refugee-Asylee Relative Petition (Form I-730), on behalf of the applicant and his sister as derivative family members on October 24, 1994. The petition was approved on November 30, 1994. The applicant subsequently applied for adjustment of status on May 21, 1997. The district office began processing

¹ The AAO notes that the district director treated the applicant as self-represented on certification. The record contains a copy of a Notice of Appearance as Attorney or Representative (Form G-28), submitted by counsel on behalf of the applicant in connection with the adjustment of status proceedings. The AAO is reflecting counsel as the applicant's representative as the record contains no indication from the applicant or counsel that the applicant is now representing himself.

the application and the applicant was scheduled for an interview on March 21, 2002.² The file reflects that during the interview it was determined that the applicant had aged out of eligibility for adjustment under section 209, having attained the age of twenty-one on February 1, 1996. It was also learned that the applicant had married, and that his mother, through whom he derived asylum status, had adjusted status as an immediate relative and not pursuant to section 209.

The district director's decision described the issue in the case as whether or not a derivative child of an alien granted asylum could adjust his status to that of a lawful permanent resident even though the principal had not adjusted status as an asylee. *Decision of the District Director*, dated July 15, 2002, at p. 2. The decision did not note the fact that the applicant had attained the age of majority, and had married. This was likely due to the error made by the district director in interposing the facts of the case with those of another applicant. The district director determined that there existed a conflict between the provisions of section 208 and section 209, that a derivative asylum applicant obtained independent asylum status that enabled him to adjust status regardless of the principal alien having adjusted status under a different provision of law or becoming a naturalized U.S. citizen. The district director's finding that the applicant had an independent ability to adjust his status rendered irrelevant the issues that would normally result in a finding of ineligibility, as those matters would not affect the analysis. The AAO does find these matters to be significant because, as will be discussed below, it does not accept the district director's analysis of the case as one involving a conflict between section 208 and section 209 of the Act. Consequently, the issues raised by the case are matters that must be carefully analyzed to determine whether they adversely affect the applicant's ability to adjust his status.

The Statutory Framework

Before addressing the issues in detail, it is useful to set forth the statutes considered by the district director, i.e., section 208(b)(3) and section 209(b).³ Those provisions set forth the treatment of the spouse and children of principal asylum applicants and the availability of adjustment of status for such derivative aliens.

The provisions of sections 208 and 209 of the Act at issue before the district director provide as follows:

Section 208(b)(3) Treatment of Spouse and Children.—A spouse or child (as defined in section 101(b)(1)(A), (B), (C), (D), or (E) [1101]) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

....

² The record reflects that the applicant had previously been scheduled for an interview on September 10, 2001, but failed to appear, resulting in a denial of the adjustment application. The application was reopened on December 10, 2001, following a motion to reopen submitted by counsel that asserted that neither counsel nor the applicant had received notice of the interview.

³ As will be discussed later in this decision, section 209, relating to adjustment of status for asylees, was amended by the provisions of the Child Status Protection Act, P.L. 107-208. Those amendments enabled derivative children who had aged out to retain their status as children for purposes of adjustment of status in certain circumstances. However, those provisions were not in effect when the district director issued his decision. Therefore, in analyzing the decision the AAO sets forth the version of section 209 pursuant to which the district director adjudicated the case.

Section 209(a) Criteria and Procedures Applicable for Admission as Immigrant; Effect of Adjustment. —(1) Any alien who has been admitted to the United States under section 207—

- (A) whose admission has not been terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe,
- (B) who has been physically present in the United States for at least one year, and
- (C) who has not acquired permanent resident status, shall, at the end of such year period, return or be returned to the custody of the Service for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 235, 240, and 241 [1125, 1229a, and 1231].

(2) Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before an immigration judge to be admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of the alien's inspection and examination shall, notwithstanding any numerical limitation specified in this Act, be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States.

(b) Maximum Number of Adjustments; Record Keeping.—Not more than 10,000 of the refugee admissions authorized under section 207(a) in any fiscal year may be made available by the Attorney General, in the Attorney General's discretion and under such regulations as the Attorney General may prescribe, to adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—

- (1) applies for such adjustment,
- (2) has been physically present in the United States for at least a year after being granted asylum,
- (3) continues to be a refugee within the meaning of section 101(a)(42)(A) or a spouse or child of such a refugee,**
- (4) is not firmly resettled in any foreign country, and
- (5) is admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of examination for adjustment of such alien.

....

(Emphasis supplied.)

Reasoning Underlying the District Director's Decision Granting Adjustment of Status

The district director concluded that the applicant continued to be eligible to adjust status. In reaching this conclusion, he referenced, with varying degrees of specificity, the statute, legal opinions issued by the INS' Office of the General Counsel (GENCO) [now known as the Office of Chief Counsel (OCC)]; and a response

from Headquarters to a query posed by the Miami District. The premise behind the district director's decision was the determination that notwithstanding the language in section 209(b) of the Act, which addresses the statutory requirements for adjustment of status for asylees, and which requires that the individual continue to be a refugee within the meaning of section 101(a)(42)(A) of the Act or a spouse or child of such a refugee, an applicant could, nonetheless, adjust status regardless of whether or how the principal adjusted status and regardless of whether the applicant continued to be the spouse or child of the principal. The district director reasoned that the section 209(b) requirements conflict with the language in section 208(b)(3), which provides that the spouse and children of an alien granted asylum are likewise accorded asylum status. Consequently, the district director concluded that having been granted asylum, the derivative alien relatives were in a position to seek adjustment of status independent from the principal alien.

The district director's decision also referenced two legal opinions, GENCO Opinion 89-55, dated July 27, 1989, and GENCO Opinion [not numbered], dated January 11, 1994, and a guidance letter issued by the former INS dated March 20, 1984, and referenced in the 1989 legal opinion. The district director characterized the GENCO opinion as determining that a spouse or child of an asylee is unable to adjust status prior to the adjustment of the principal asylee, and the guidance letter as providing that derivative aliens ineligible to adjust through the principal, should pursue their own asylum applications, which, if approved, would enable them to pursue adjustment of status independently.⁴ Despite this interpretation, the district director, nevertheless, proceeded to find that the adjustment was authorized due to the conflict he perceived between section 209(b) of the Act, and section 208(b)(3) and his resolution of it in favor of the alien's ability to adjust on his own.

Assessment of the Miami District's Analysis Including Its Interpretation of and Reliance Upon the Legal Opinions

The district director's decision references two legal opinions addressing adjustment of status under section 209 of the Act. The district director's decision attributes to those opinions the conclusion that a spouse or child of an asylee may not adjust prior to the principal asylee's adjustment of status. Furthermore, the district director also cites the opinions as supporting a finding that asylum derivatives may not adjust their status under section 209 in those situations where the principal has adjusted status under a different section of law, or has naturalized. *Decision of the District Director*, dated July 15, 2002, at p.4.

However, an examination of the GENCO opinions discloses no finding that there is a bar to adjustment by asylum derivatives in those situations where the principal has not yet adjusted or has adjusted through a different provision of law.⁵ The following is a summary of the two opinions in the order that they were issued:

⁴ This particular guidance letter is not contained in the record and is not available to the AAO. Consequently, the context in which the response was provided is not entirely clear.

⁵ Whether such a prohibition exists is another matter, which will be discussed later in this decision. However, the legal opinions themselves did not make such a finding, as that specific issue was not presented and the opinions did not otherwise address it.

GENCO Opinion 89-55 dated July 27, 1989

The question addressed was whether a derivative asylee spouse was eligible to adjust status under section 209(b) when the marriage had been terminated by divorce. The legal opinion concluded that an alien spouse who received a divorce prior to the adjudication of an adjustment of status application would cease to be eligible for such immigration benefit. In discussing the issue, the legal opinion noted that it had been the position of the INS that alien children seeking adjustment of status would not be eligible for adjustment if they had reached the age of majority before the application was adjudicated. *See Legal Opinion at p.2, citing INS Instructions to all Field Offices, May 18, 1984.* The opinion noted that the remedy in such cases was for the derivative to file his or her own asylum application, which could be favorably considered, based upon a presumption of future persecution due to the alien's relationship to the principal. The opinion reasoned that similarly, the remedy available to a spouse who was divorced prior to the final adjudication was to seek asylum independently and, if granted, then pursue adjustment of status under section 209 of the Act.⁶

GENCO Opinion dated January 11, 1994

This opinion addressed the issue of whether a person admitted as the spouse of a refugee remained eligible for adjustment of status under section 209 after the death of the principal alien. The conclusion reached was that the spouse remained eligible for adjustment of status. The basis of the conclusion was that although section 207 linked the admission of the non-refugee spouse to the status of the refugee spouse, the statute explicitly vested the non-refugee spouse with independent refugee status. The opinion noted that section 207(c)(2) did not condition the grant of refugee status upon a continued relationship with the original refugee and further noted that section 209(a) governing adjustment of status of refugees, likewise did not contain such a requirement. The opinion contrasted the absence of such a requirement for refugees with the requirement in section 209(b), which conditions asylee adjustment for derivatives upon the continued existence of the relationship.⁷

Consequently, it does not appear that either of these legal opinions addressed the issue of the eligibility of the derivative alien to adjust status in the event that the principal adjusted under a different provision of law. Rather, the opinions addressed the eligibility of the derivative to adjust in situations where the *relationship* that led to the alien having derivative status *no longer existed* either because of a legal termination of marriage, or because the alien no longer qualified as a child of the principal. The primary value of the legal opinions was to highlight the different requirements applicable to the derivative beneficiaries of refugees and asylees, and if anything, GENCO Opinion 89-55 supported denying the applicant's adjustment of status application on the basis that he had aged out and was thus no longer a child of the principal alien under the adjustment provisions of section 209.

⁶ The AAO notes that the CIS Asylum Office has adopted a practice of issuing nunc pro tunc asylum grants to derivatives in such situations, with the grant of asylum relating back to the date of the asylum grant to the principal asylum applicant, or the date that the derivative's I-730 was approved for derivatives in the United States, or the date that the derivative entered the U.S. on an approved petition. This practice is intended to allow the derivative asylee to adjust status sooner than would be the case if eligibility for adjustment had to be measured from the date of his or her own grant of asylum. *See Affirmative Asylum Procedures Manual, Revised February 2003.*

⁷ It appears, from the AAO's review of the opinion and the statutory provisions, that the status accorded to the spouse and children of asylees is similar in nature and that the key difference is the conditions placed on the ability of the spouse and children of asylees to adjust status which are not similarly present in the provisions addressing the adjustment of the spouse and children of refugees.

Despite recognizing that the legal opinions found that asylee derivatives, unlike refugee derivatives, are ineligible to adjust their status under section 209 in situations where the original qualifying relationship with the principal no longer existed, the district director's decision simply concluded that the difference in treatment between the ability of derivatives of refugees and asylees to adjust status independent of the relationship to the principal was unfair and found that denying adjustment of status to derivative asylees conflicted with section 208(b) and therefore the applicant could adjust status independent of the principal. *See Decision of the District Director*, at Part III. Consequently, the district director found it unnecessary to address the issues relating to the principal's adjustment, or whether the derivative alien continued to be the child of the principal.

The District Director's Conclusion that the Derivatives Remained Eligible for Adjustment of Status By Virtue of Having Obtained Status as Asylees Permitting Them to Adjust Independently

The district director's decision is premised on the belief that a derivative asylee may adjust status notwithstanding the identified basis of ineligibility for the derivative, i.e., divorce, aging out, or the failure of the principal to seek adjustment. The district director's belief is that such factors have no bearing on the ability of the derivative alien to adjust status because, having obtained asylum, the derivative is on equal footing with the principal and may adjust based on his independent status as an asylee. *See Decision of the District Director*, dated July 15, 2002, at Part III.

However, while recognizing that section 209 conditions the adjustment of derivatives on continuing to be the spouse or child of the refugee, the decision does not adequately explain why those restrictions do not apply. The decision simply notes that section 208 provides that the derivatives are accorded asylum status, and concludes that this means that a conflict exists between section 208 and section 209. The decision misconstrues the nature of the asylum status granted to a principal as compared to that granted a derivative beneficiary and the effects of that difference. It also misconstrues the nature of the differences between the section 208 and 209 provisions as conflicts when, instead, the provisions are complementary in nature with each focusing on a different stage of the process.

Section 208 of the INA contains the procedures for granting asylum to aliens in the United States. Subsection (b) sets forth the conditions that must be met before an alien qualifies for a grant of asylum. An individual seeking asylum must be a refugee within the meaning of section 101(a)(42)(A) of the Act. If such alien is determined to be a refugee and satisfies the other conditions contained in section 208, he or she may be granted asylum. In contrast, while section 208 provides an avenue for the spouse and children of an alien granted asylum to be afforded similar status, it is predicated on a very different premise; its premise is that it grants asylum status to derivative aliens in order to maintain the family unit recognized by statute, as opposed to granting the status individually to an alien who meets the definition of a refugee and has been recognized as such. While the derivatives may be granted asylum status, and may thereafter be considered to be equivalent for purposes of how they are admitted and categorized, the status is not identical to that of the principal because it was not granted due to the individual's status as a refugee, but rather because of the derivative's relationship to the principal and the desire to allow the spouse or child to join the principal as part of a family unit.

This distinction between principal and derivatives has consequences for the subsequent application for adjustment of status, and further highlights the fact that the asylum status granted to derivatives is different in nature from that granted to the principal. Section 209(b) sets forth the process by which aliens granted asylum may adjust status. Subsection (b)(3) addresses the conditions for both the principal and the derivatives and makes clear that although both enjoy asylum status, different requirements apply. The principal's ability to adjust status is dependent upon his continued status as a refugee. In contrast, the derivatives, not having acquired the status of a refugee, do not adjust based upon being a refugee, but based upon their continuing relationship to the principal as a "spouse or child of such refugee."

Therefore, reading sections 208 and 209 together, it is clear that derivative asylees have an asylum status fundamentally different from that of the principal, and which continues to be linked to the principal in terms of the continuing viability of the relationship. It is the continued existence of that relationship which enables the derivative to adjust status and its absence which prevents the adjustment.

The constraints upon the derivative asylee's ability to adjust status if no longer the spouse or child of the principal asylee are highlighted by the different manner in which refugees are treated under section 207 and 209 of the INA. Unlike the case with the requirements for adjustment by asylee derivatives, the refugee derivatives are, in fact, able to adjust status under section 209 without regard to their relationship to the principal alien.

Ability of the Applicant to Adjust Status Where the Principal Alien Does Not Adjust Status

The finding that the derivative alien must maintain the relationship with the principal alien only addresses part of the issue, as the case raises another issue relating to the applicant's ability to adjust status under section 209, that is, whether a spouse or child of the principal alien may adjust status when the principal has failed to adjust status under section 209.⁸ See *Decision of the District Director*, dated July 15, 2002, at p. 4. The district director found that the existing legal opinions had determined that a spouse or child of an asylee could not adjust prior to the principal's adjustment. *Id.* The district director, however, took issue with the opinion it believed counsel had expressed questioning why an alien derivative granted asylum could not adjust status independently from the principal simply by virtue of also being an asylee. *Id.* at pp.4-5. In support of his conclusion, the district director noted that the Miami District office had raised its view about the existence of a conflict between sections 208 and 209 to Headquarters, which had responded with an electronic mail response dated February 19, 2002, which stated in part,

Section 208 provides that an asylee's spouse and/or child may also be granted if accompanying or following to join...an applicant filing for adjustment under section 209 does not have to establish that a "principal" spouse or parent has also adjusted in order to qualify."

Decision of the District Director, dated July 15, 2002, at p. 4.

⁸ This could occur either, as is the case here, where the principal adjusted status under a different provision of the law, or where the principal failed to adjust status at all.

A review of the record does not disclose the referenced message, or the inquiry that prompted the Headquarters response. In any event, it does not appear that the district director relied upon the Headquarters message in rendering his decision. Even if he had, an electronic mail message is not the type of evidence that the AAO would consider authoritative as it does not constitute formal agency guidance or an agency determination. As this decision has previously rejected the district director's determination that a conflict exists between section 208 and section 209, it is necessary to consider whether, in fact, the failure of the principal to adjust status adversely affects the applicant's ability to adjust under section 209 as the child of a refugee.

The district director found that the office of General Counsel had concluded that the spouse or child of an asylee could not adjust status prior to the adjustment of status of the principal alien. *Decision of the District Director*, dated July 15, 2002, at p. 4. The district director's finding appears to be that a derivative asylee under section 209 is required to adjust status in a coordinated manner with the principal, meaning that both parties must adjust status under section 209 and the adjustment must be coordinated temporally as well such that the derivative asylee would be unable to adjust status ahead of the principal alien. The district director interpreted the legal counsel opinions as mandating this result. Even though the district director felt that such would be the opinion of counsel, he proceeded to resolve the issue by concluding that there existed an independent ability of the derivative to adjust status, thus freeing the principal from any connection at all to the principal, including the relationship to the principal, the timing of the adjustment vis a vis the principal's as well as the provision of law under which each adjusted status.

The applicant's ability to adjust turns on whether, assuming that the applicant maintains the qualifying relationship with the principal, the statute limits the ability of the applicant to adjust status under section 209 to situations where the principal alien has first adjusted under section 209.

The district director's conclusion resulted from his interpretation of the two opinions issued by counsel, i.e., 89-55, dated July 27, 1999, and the January 11, 1994 opinion. The two opinions set forth the treatment of derivative asylees and derivative refugees in section 209, where the relationship with the principal no longer existed. The 1999 opinion found that where the relationship to the principal no longer existed due to a divorce or due to the child aging out, a derivative asylee could not adjust. In contrast, a derivative refugee, not facing the same requirement to maintain the relationship to the principal, could adjust in the situation where the relationship to the principal no longer existed due to the principal's death. The opinions do not make any mention of the timing of the adjustment of the principal versus the adjustment of the derivative alien. Thus, the district director's assumption that a derivative could not adjust in advance of the principal is not compelled by the legal opinions.

Similarly, the AAO does not find any limitation in the statutory or regulatory language that requires that the derivative asylee adjust under the same provisions as the principal. Several factors support an interpretation that authorizes derivative asylees to adjust status separate from the principal. First, a review of the statutory and regulatory language discloses no requirement that the principal adjust status prior to the derivatives. The statute in section 209 is very specific as to the requirements that asylees must meet to be eligible to adjust status. In summary, they must 1) apply; 2) have been physically present for a one year period of the grant of asylum; 3) continue to be a refugee or the spouse or child of such a refugee; 4) not be firmly resettled in a foreign country; and 5) be admissible. No conditions regarding the timing of the adjustment applications of

asylees are made other than the condition that the applicant has been physically present for one year. No link is made between the applications for adjustment of status of principals and derivatives, nor is a requirement for simultaneous filings imposed. The only point at which the statute mentions the principal and the derivative together is in the requirement that the derivative continue to be the spouse or child of the principal.

In contrast to the absence of an express temporal link in the statute between the adjustment of the principal and the derivatives, the statutory language in sections 207 and 208 and 203(d) contains such a link for the admission of derivatives of refugees and asylees and family-sponsored immigrant visas. Those statutes afford the derivatives admission in the same status as the principal “if accompanying, or following to join” such alien. The issue of whether that language prohibits the derivative family members from entering the United States in advance of the principal alien has been addressed in a legal opinion construing the provisions of section 207(c)(2) as to refugee derivatives. That opinion concluded that the statutory language requires that the principal accompany or precede the derivative family members in coming to the United States. See *GENCO Opinion 97-14* dated September 17, 1997. In the context of the derivatives of family-based preference immigrants, it has been found that the accompanying, or following to join language likewise requires that the principal must precede the derivative family members in being admitted to the United States in immigrant status. See *Matter of Naulu*, 19 I&N Dec. 351 (BIA 1986); *Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975). Because such language is absent from the section 209 adjustment provisions, there appear to be no similar limitations on the ability of a derivative asylee or refugee to adjust status in advance of the principal.

The conclusion that derivatives under section 209 are not prohibited from adjusting separately from the principal alien is further supported by the instructions accompanying the Form I-485 (Application to Register Permanent Residence or Adjust Status). While the instructions do not expressly address the issue of coordinated adjustment applications between principals and derivatives under section 209, a comparison of the instructions for two categories of derivative applicants suggests that the spouses and children of asylees are not subject to the same constraints that exist for other adjustment categories. The first column on the first page of the instructions sets forth categories of individuals who may file the Form I-485. At least two categories appear to encompass derivative applicants for adjustment of status. The first category identifies as eligible, those individuals who qualify as the spouse or child of a principal applicant for permanent residence in an immigrant category that provides for derivative status. The instructions for that category of applicants who reside in the United States specifically provide that:

the individual derivatives may file their Form I-485 adjustment of status applications concurrently with the Form I-485 for the principal beneficiary, or file the Form I-485 at anytime after the principal is approved, if a visa number is available.⁹

The second category identifies individuals filing based on asylum status. The instructions for that category simply state that an applicant:

⁹ For those derivative applicants residing abroad, the instructions provide that the person adjusting status should file the Form I-824 Application for Action on an Approved Application or Petition, *concurrently*, with the principal’s adjustment of status application.

may apply to adjust status if you have been granted asylum in the U.S. after being physically present in the U.S. for one year after the grant of asylum, if you still qualify as an asylee or as the spouse or child of a refugee.

Consequently, the I-485 instructions themselves make a distinction between the ability of different classes of derivatives to adjust status in relation to the principal.

A review of the legislative history and preamble language pertaining to the statutory provisions and regulations has not disclosed any discussion of why a difference exists between asylee and refuge adjustments under section 209 and regular adjustments under section 245. One possibility is that while both provisions afford benefits to derivative family members to further family unity objectives, the primary objective in affording benefits to asylees differs in a material respect. The benefits available to family members of preference immigrants derive solely from the relationship to the principal, and the desire to preserve the family unit, and not due to any other considerations. These considerations appear to have resulted in tying the adjustment of the derivative family members to the adjustment of the principal alien. There is no need or public policy purpose served by authorizing the family members of the principal to remain where the principal's failure to adjust status indicates that the principal may not intend to remain in the United States.

In contrast, although the asylum status of the derivatives of an asylee also results from their relationship to the principal, and the corresponding objective of keeping the family unit intact, additional considerations also exist. Those considerations have to do with the circumstances which led the principal to obtain asylum, and the possibility that harm may come to the derivative family members based upon their relationship to the principal family member. It appears that because of the unique protections and public policy considerations surrounding asylees, it was deemed sufficient to condition adjustment of the derivative family members upon the maintenance of the relationship at the time of adjustment, and not upon the adjustment of the principal in advance, or in conjunction with that of the derivative family members.

Having determined that the applicant may adjust status without the need to coordinate the timing of the adjustment with that of the principal, the AAO turns next to the related issue of whether there is any limitation on the derivative alien's ability to adjust status in the situation where the principal has adjusted under a different provision of law. The AAO finds that the principal may adjust under a different provision of law. The determination that the derivative asylee has the ability to apply for adjustment of status without needing to coordinate the timing of the adjustment to the principal's adjustment under the same statute carries some force in the case of a principal adjusting under a different provision of law. Moreover, there is no limitation in the law linking the ability of the derivative to adjust status to those situations where the principal has adjusted under the same provision. Furthermore, a review of GENCO opinions reveals that CIS has sought to encourage the ability of individuals to seek adjustment under whatever provisions of law benefit them. *See* GENCO Opinion 89-38, dated April 6, 1989 (concluding that where Congress had not limited the ability of a legalized alien to obtain lawful permanent resident status under alternate means, the agency could not do so by regulation); GENCO Opinion 89-90 (finding that an alien's acquisition of lawful status under legalization does not terminate a validly approved visa petition filed on the alien's behalf prior to the legalization). It would, therefore, be incongruous for CIS to take a position that would have the effect of discouraging a principal from pursuing available avenues of adjustment, if the principal's pursuit of alternative means of

adjustment means that he or she does so at the risk of causing a disadvantage to a derivative beneficiary.¹⁰ Consequently, for all of the reasons discussed, the AAO finds that neither the timing of the principal's adjustment nor his adjustment under a provision of law other than section 209 limits the ability of the derivative alien to adjust status under section 209.

The District Director's Conclusion that the Applicant Remained Eligible for Adjustment of Status Notwithstanding His Age and/or Marriage

Having rejected the district director's conclusion that the applicant was eligible to adjust independent of any relationship with the principal, the AAO turns next to the issue of whether the applicant was ineligible to adjust status due to having married and/or attained the age of majority, and was thus no longer considered a child under the Act at the time of the adjudication of the application on July 15, 2002.

The term "child" is defined in section 101(b)(1) of the Act as an "unmarried person under twenty-one years of age" who meets one of the conditions set forth in subsections (A), (B), (C), (D), or (E). The conditions set forth in the subsections are not at issue in these cases. The issue is whether the applicant was no longer qualified to adjust status as the child of the principal alien due to having lost his status as a child based on a marriage and/or due to having aged out by having attained the age of twenty-one.

The AAO will first address the issue of the applicant's marital status. The record reflects that at the time of his adjustment of status interview held on March 21, 2002, the applicant indicated that he had married. Consequently, on the basis of his marriage, the applicant no longer satisfies the definition of a child for purposes of his ability to adjust status under section 209. The AAO finds that the adjustment of status application may be denied on this basis alone, and bases its decision primarily on this finding.

However, the AAO's decision will also address the issue of the applicant's age. While not critical to a determination of the applicant's eligibility to adjust status due to his apparent marriage, the AAO finds it necessary to correct the analysis of this issue in the district director's decision, as the district director considered the applicant's age to be irrelevant to the adjudication of the adjustment application. The record reflects that the applicant turned twenty-one on February 1, 1996, and was over the age of twenty-one at the time that the district director entered his decision on July 22, 2002. The applicant did not appear to meet the definition of child under the Act at the time of the adjudication of the adjustment application although the district director did not consider either the applicant's age, or his marriage to be facts that disqualified him from eligibility for adjustment of status. However, within a few weeks after the district director issued his decision, and while the case was on certification to the AAO, new legislation, in the form of the Child Status Protection Act (CSPA), Public Law 107—208, 116 Stat. 927, was enacted. The law's effective date was the

¹⁰ This conclusion is reached notwithstanding the fact that the only opinion located addressing the Cuban Adjustment Act and derivatives concluded that a derivative spouse could not adjust status under the Cuban Adjustment Act once the principal had naturalized. That finding does not affect our conclusion in the issues raised here as that situation involved a derivative that was deemed ineligible to adjust based upon a strict reading of the statutory language. The derivative's ability to adjust was conditioned on being the spouse or the child of an "alien described in" section 1 of the Act. The opinion concluded that because the principal had acquired naturalization, the principal was no longer an alien, and thus the derivative no longer had an alien through which he or she could qualify. See GENCO Opinion 93-13, dated April 17, 1992. In contrast, the language of section 209 does not condition the derivative's ability to adjust through a relationship to "an alien" but to a refugee.

date of enactment, August 6, 2002. Because the applicant's case remains pending, it will be examined in light of the law's provisions.

The CSPA amends the Act to permit certain aliens to retain classification as a "child" even if they have reached the age of 21. The relevant provisions of the CSPA are section 4, which modifies section 208(b)(3) of the Act which, as previously discussed, deals with the treatment of the spouse and children of aliens granted asylum, and section 8, which sets forth the effective date of the CSPA. Section 4 divides section 208(b)(3) into two sections and defines the conditions under which a child may retain status as a child. Section 4 of the CSPA reads as follows:

Sec. 4. USE OF AGE ON PARENT'S APPLICATION FILING DATE IN DETERMINING ELIGIBILITY FOR ASYLUM

Section 208(b)(3) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(3)) is amended to read as follows:

(3) TREATMENT OF SPOUSE AND CHILDREN—

(A) IN GENERAL.—A spouse or child (as defined in section 101(b)(1)(A), (B), (C), (D), or (E)) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying or following to join, such alien.

(B) CONTINUED CLASSIFICATION OF CERTAIN ALIENS AS CHILDREN.—An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 209(b)(3), if the alien attained 21 years of age after such application was filed but while it was pending.

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. 1154) pending on or after such date; or

- (3) an application pending before the Department of Justice or the Department of State on or after such date.

The former Immigration and Naturalization Service (INS), and the current Citizenship and Immigration Services (CIS), issued guidance memoranda explaining the CSPA amendments, three of which address, among other issues, the effect of the legislation upon children of asylees and refugees, including their applications for adjustment of status under section 209 of the Act. *See Memorandum entitled, H.R. 1209-Child Status Protection Act*, dated August 7, 2002; *Memorandum entitled, Processing Derivative Refugees and Asylees Under the Child Status Protection Act*, dated July 23, 2003; and *Memorandum entitled, The Child Status Protection Act—Children of Asylees and Refugees*, dated August 17, 2004.

The guidance can be summarized as follows:

A child of a principal asylee may benefit from the Child Status Protection Act (CSPA) even though such child may "age out" prior to filing his or her application for adjustment of status under section 209 of the INA. In general, a derivative child of a principal asylee is eligible for continued classification as a "child" if the derivative remains unmarried and one of the following conditions is met:

1. The parent's application for asylum (Form I-589) was pending on or filed after August 6, 2002, and the derivative child was under the age of 21 at the time of filing.
OR
2. The Form I-730 from which the derivative is benefiting was pending on August 6, 2002, and the derivative was under the age of 21 at the time the I-730 was filed.
OR
3. The parent's Form I-589 or the I-730 was filed prior to August 6, 2002, and the derivative child turned 21 years of age on or after August 6, 2002.
OR
4. The derivative child's application for adjustment of status under section 209 (Form I-485) was pending on August 6, 2002, and the derivative was under 21 years of age at the time the application for adjustment of status under section 209 (Form I-485) was filed.

Before considering the applicability of the CSPA to the applicant's case, it is useful to consider the following summary of the pertinent events relevant to the applicant's case.

Case of [REDACTED]

DOB: February 1, 1975

Initial Asylum Grant for Principal: March 7, 1994

I-730 Asylee Relative Petition Approved: November 30, 1994

I-485 Filing Date: May 21, 1997

Adjustment or Naturalization of Principal: Unknown

Date of Marriage: Memo to File Related to Adjustment Interview Conducted on March 21, 2002, States that the Alien Married

Date of District Director's Decision: July 15, 2002

Applying the rules from the guidance memoranda, the applicant fails to satisfy the first requirement, i.e., that he has remained unmarried. Therefore, it appears that nothing in the CSPA alters the ineligibility of a derivative alien to adjust status under section 209 in those cases where the derivative alien has married. If, however, the applicant were not married at the time of the adjudication, the applicant's case would be examined under each of the four possible scenarios under which the applicant might qualify for treatment as a child under the CSPA. Such an examination would have found that the applicant would not have benefitted under any of the four scenarios. While the application for adjustment of status under section 209 (Form I-485), was pending on August 6, 2002, the applicant was not under 21 years of age at the time the application for adjustment was filed on May 21, 1997, and therefore he still would not have been eligible for continued treatment as a child under the CSPA. Consequently, the applicant is not eligible to adjust status as a derivative asylee pursuant to section 209 of the Act.

ORDER: The decision of the acting district director is withdrawn and the application is denied.