INTERIM MEMO FOR COMMENT
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This memo is in effect until further notice.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

June 6, 2014 **PM-602-0097**

Policy Memorandum

SUBJECT: Guidance on Evaluating Claims of "Extraordinary Circumstances" for Late Filings When the Applicant Must Have Sought to Acquire Lawful Permanent Residence Within One Year of Visa Availability Pursuant to the Child Status Protection Act

Purpose

In *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012), the Board of Immigration Appeals (the "Board") confirmed previous U.S. Citizenship and Immigration Services (USCIS) guidance that filing an application for adjustment of status or an immigrant visa meets the requirement that a beneficiary "sought to acquire" lawful permanent residence within one year of visa availability in order to benefit from the age-out protection provided by the Child Status Protection Act (CSPA). The Board further indicated certain "extraordinary circumstances" that prevented the filing of an application could excuse the one year filing requirement. This policy memorandum (PM) provides guidance on properly evaluating evidence and appropriately exercising discretion when individuals claim extraordinary circumstances prevented them from seeking to acquire lawful permanent residence in a timely manner.

This PM revises Chapter 21.2(e) of the Adjudicator's Field Manual (AFM); AFM Update AD14-01.

Scope

Unless specifically exempted herein, this PM applies to and is binding on all USCIS employees. This policy supplements previous guidance on the application of the CSPA.

Authority

Sections 203(h)(1) of the Immigration and Nationality Act (the "Act"); 8 U.S.C. §§ 1153 (h)(1), as amended by Public Law 107-208; *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012)

Background

The CSPA was enacted on August 6, 2002, and provides continuing eligibility for immigration benefits to the principal and/or derivative beneficiaries of certain benefit requests when the beneficiary has aged-out by turning 21. Specifically, the CSPA addresses certain age-out

consequences in those instances where aging out of eligibility for classification as a child is caused by a delay in the adjudication of the petition or application. The CSPA has wide applicability, covering family and employment-based beneficiaries, diversity visa immigrants, refugees, and asylees when delays in processing visa petitions or applications would cause a beneficiary to lose eligibility for classification as a child solely due to reaching 21 years of age. This PM specifically addresses circumstances in which a family-based preference principal or derivative beneficiary or an employment-based derivative beneficiary may be deemed to retain the CSPA's age-out protection when they fail to seek to acquire lawful permanent residence within one year of visa availability due to exceptional circumstances.

Section 203(h)(1)(A) of the Act states that a "CSPA age" under 21, as calculated pursuant to section 203(h)(1)(A) and (B), will be used for purposes of classifying an alien as a child, "*but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of visa availability* [emphasis added]…"[1] Previous USCIS policy on whether an application met the "sought to acquire" requirement did not allow officers to use discretion in considering late filings. *Matter of O. Vasquez*, allows for discretion in these determinations. This PM outlines the appropriate exercise of this discretion.

Policy

Under USCIS policy, there are three ways to meet the "sought to acquire" requirement:

- Filing Form I-485, Application to Register Permanent Residence or Adjust Status;
- Submitting Form DS-230, Application for Immigrant Visa and Alien Registration;[2] or
- Having Form I-824, Application for Action on an Approved Application or Petition, filed on the alien's behalf.

These actions meet the "sought to acquire" requirement because they are affirmative and verifiable actions that can ultimately lead to adjustment of status or admission to lawful permanent residence. In *Matter of O. Vasquez*, the Board found that extraordinary circumstances *may* warrant the exercise of discretion in excusing a late filing for purposes of meeting the "sought to acquire" requirement. Specifically, the Board found that the requirement

[1] "Sought to acquire" has become a term of art as shorthand for the much longer and more cumbersome, "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of visa availability," and is used in this way throughout this memorandum with minor variation to allow for contextual appropriateness (e.g., tense agreement).

[2] The procedures for submitting a DS-230 to Department of State (DOS) are substantively different from those for filing Form I-485 with USCIS. DOS notifies beneficiaries or their designated agents at each step in the process of documents to be submitted. Prior to the visa becoming available, DOS notifies the beneficiary of impending visa availability and requests submission of fees, an Affidavit of Support, and initiates processing in advance of accepting the actual application. As such, applicants for immigrant visas can meet the sought to acquire requirement in advance of the actual filing of the DS-230.

could be met if the applicant could show with persuasive evidence that his/her application was rejected for a technical or procedural reason, or he or she filed late due to extraordinary circumstances *beyond his or her control*.

In its decision, the Board also recognized that maintaining the integrity of the law as written requires substantive and timely action, stating:

> actions that do not approximate the filing of an application or extraordinary circumstances, such as contacting an attorney about initiating the process for obtaining a visa that has become available, are insufficient to meet the requirements of section 203(h)(1)(A) of the Act. The alternative suggested by the respondent, that the deadline could be satisfied by simply contacting an organization or an attorney for legal advice, is impractical and leaves open many questions…

The Board's decision, however, does not provide specific criteria for establishing extraordinary circumstances for failure to meet the "sought to acquire" requirement. This guidance draws from the existing statutory and regulatory framework to assist officers in the sound exercise of discretion when an alien claims that extraordinary circumstances warrant excusing the failure to satisfy the "sought to acquire" requirement.

USCIS is guided by those "extraordinary circumstances" previously articulated by regulation and BIA precedent in the context of the one-year filing deadline for asylum applications, as factors which may similarly excuse a late filing in CSPA's sought to acquire context. 8 CFR 208.4(a)(5) articulates thresholds for consideration of extraordinary circumstances and examples of circumstances that may warrant the exercise of discretion in accepting a late filing. Determining whether an alien demonstrates that extraordinary circumstances prevented meeting the "sought to acquire" requirement must be made on a case by case basis and officers must consider the totality of the circumstances. Specific factors to be considered are provided in the accompanying AFM update.

Implementation

☞ 1. AFM chapter 21.2(e) is revised as follows:

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(1) CSPA Coverage

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(ii) Adjustment Under a Preference Category

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(C) Derivative Beneficiaries – Family and Employment-Based

[Text box removed.]

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(E) Sought to Acquire

Section 203(h)(1)(A) states that to determine whether an alien satisfies the age requirement for classification as a child, the calculation is "the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available to the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of visa availability…"

"Sought to acquire" has become a term of art as shorthand for the much longer, and more cumbersome, "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of visa availability," and is used in this way in policy and in this manual with minor variation to allow for contextual appropriateness (e.g. tense agreement).

(I) General requirements. An alien seeking classification as a child under sections 203(a)(2)(A) or 203(d), or as a derivative beneficiary under 203(a) or 203(b), who has a "CSPA age" under 21, must have sought to acquire lawful permanent residence within one year of the visa becoming available.

- The date of visa availability is the first day of the month in which the priority cut-off date or visa is identified as *current* pursuant to the Department of State's Visa Bulletin or the date the petition was approved, whichever is later.

- If the visa regresses before the alien has had a full and continuous year in which to *seek to acquire*, the full one year clock will start again when the visa once again becomes available and the age will be calculated from the more recent date on which the visa became available (Note: if the alien seeks to acquire within one calendar year of the actual first date on which the visa became available, despite a regression, use the earlier date for purposes of the age calculation).

- An alien may satisfy the sought to acquire requirement by: (a) filing Form I-485; (b) submitting Form DS-230 to Department of State (Note: the consular process is different and "sought to acquire" may be satisfied with payment of the visa application fees rather than submission of the actual form); or, (c) having a Form I-824 filed on the alien's behalf.

(II) Extraordinary Circumstances for Late Filing. In *Matter of O. Vasquez,* 25 I&N Dec. 817 (BIA 2012), the Board of Immigration Appeals ruled that extraordinary circumstances could warrant the exercise of discretion to excuse an alien who failed to timely satisfy the "sought to acquire" requirement. The guidance below draws from asylum regulations which also require extraordinary circumstances to excuse a late filing (see 8 CFR 208.4(a)(5)).

In order to establish extraordinary circumstances, the alien must demonstrate that:

(1) The circumstances were not created by the alien through his own action or inaction;

(2) Those circumstances were directly related to the alien's failure to file the application within the one year period; and

(3) The delay was reasonable under the circumstances.

Examples of extraordinary circumstances that *may* warrant a favorable exercise of discretion include, but are not limited to:

- Serious illness or mental or physical disability during the one year period;
- Legal disability, such as instances where the applicant is suffering from a mental impairment, during the one year period;
- Ineffective assistance of counsel, when the following requirements are met, the:

  (1) Alien filed an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

  (2) Counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him and been given an opportunity to respond, or that a good faith effort to do so is demonstrated; and

  (3) Alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities and, if not, why;
- A timely application was rejected by USCIS as improperly filed and was returned to the applicant for corrections where the deficiency was corrected and the application re-filed within a reasonable period thereafter; and
- Death or serious illness or incapacity of the alien's legal representative or a member of the alien's immediate family.

When considering a claim of extraordinary circumstances, the officer should weigh the totality of the circumstances and the nexus of the circumstances presented to the failure to meet the "sought to acquire" requirement, as well as the reasonableness of the delay. In order to warrant a favorable exercise of discretion, the circumstances must truly be extraordinary and beyond the alien's control. Commonplace circumstances such as financial difficulty, minor medical conditions, and circumstances within the alien's control such as when to seek counsel or begin preparing the application package are not considered extraordinary. Further, the fact of being or having been a child is common to all applicants seeking protection under the CSPA and does not constitute an affirmative defense for failure to timely seek to acquire.

Procedurally, when an alien seeks to acquire after one year of visa availability and does not provide an explanation and/or evidence of extraordinary circumstances, the officer will issue a notice of intent to deny to allow the applicant the opportunity to rebut the presumptive ineligibility.

(III) Motions to Reopen

Unfavorable decisions on the basis of failure to *seek to acquire* issued prior to the decision in *Matter of O. Vasquez* were proper based upon the law in effect at the time of the decision. However, untimely motions to reopen for denials based solely on failure to *seek to acquire* issued after the *Matter of O. Vasquez* precedent may be filed with proper fee with a claim that the holding in *Matter of O. Vasquez* constitutes changed circumstances justifying reopening of the application. Officers will consider new evidence of extraordinary circumstances pursuant to the policy in this chapter.

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☞ 2. The AFM **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD14-01 6/6/2014	**Chapter 21.2(e)**	Provides guidance on properly evaluating evidence and appropriately exercising discretion when individuals claim extraordinary circumstances prevented them from seeking to acquire lawful permanent residence in a timely manner.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or

benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Chief Counsel and Office of Policy and Strategy.