

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
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**U.S. Citizenship
and Immigration
Services**

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AFM Update AD07-04

Memorandum

TO: Field Leadership

FROM: Donald Neufeld /s/
Acting Associate Director, Domestic Operations

SUBJECT: Revised Guidance for the Child Status Protection Act (CSPA)

AFM Update: Chapter 21.2(e) The Child Status Protection Act of 2002 (CSPA)
(AD07-04)

1. Purpose

This guidance significantly modifies a prior interpretation of certain provisions of the CSPA. In particular, it changes how the agency interprets the statute to apply to aliens who aged out prior to the enactment date of the CSPA. It also permits those individuals who were ineligible under the prior policy to file a new application for permanent residence. Under certain circumstances, this guidance also permits those individuals who were previously denied for CSPA to file motions to reopen or reconsider without filing fee. It also explains what steps certain aliens who do not automatically benefit from the CSPA can take to protect their status as a child.

This guidance contained in the AFM update below replaces the following two memoranda:

- The Child Status Protection Act, issued September 20, 2002; and
- The Child Status Protection Act – Memorandum Number 2, issued February 14, 2003

This guidance does NOT affect:

- Form I-539 adjudications for V status; or
- The memorandum, Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under the Child Status Protection Act Section 6 and Form I-539 Adjudications for V Status, issued June 14, 2006

2. Field Guidance and AFM Update

Accordingly, AFM chapter 21.2(e) is revised in its entirety to read as follows:

(e) The Child Status Protection Act of 2002 (CSPA)

The CSPA amended the Immigration and Nationality Act (Act) to permit an applicant for certain immigration benefits to retain classification as a child under the Act, even if he or she has reached the age of 21. The CSPA added section 201(f) for applicants seeking to qualify as Immediate Relatives and section 203(h) for applicants seeking to benefit under a preference category, including derivative beneficiaries.

(1) CSPA Coverage

- (i) Adjustment as an Immediate Relative (IR). The CSPA amended section 201(f) of the Act to fix the age of an alien beneficiary on the occurrence of a specific event (e.g. filing a petition). If the alien beneficiary is under the age of 21 on the date of that event, the alien will not age out and continue to be eligible for permanent residence as an IR. It does not matter whether the alien reaches the age of 21 before or after the enactment date of the CSPA, when the petition was filed, or how long the alien took after petition approval to apply for permanent residence provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence based on the immigrant visa petition upon which the alien claims to be a child.
- (A) Petition Initially Filed as Immediate Relative (IR) Child. If an alien is seeking to adjust status on the basis of being the beneficiary of an approved petition for classification as an IR (or IR self-petitioner under VAWA) and the petition was initially filed for classification as an IR, then the alien's age for CSPA purposes is the age of the alien on the date on which the petition for classification as an IR (or IR self-petitioner under VAWA) was filed. If the alien was under the age of 21 at the time a petition was filed on his or her behalf for classification as an IR (or IR self-petitioner under VAWA), the alien will not age out.

For an IR self-petitioner under VAWA, officers are to follow the guidance (except footnote 1 and 2 relating to the retroactivity of the CSPA) issued August 17, 2004 entitled Age-Out Protections Afforded Battered Children Pursuant to the Child Status Protection Act and the Victims of Trafficking and Violence Protection Act.

- (B) Petition Initially Filed as Child of a Lawful Permanent Resident (LPR). If an alien is seeking to adjust status on the basis of being an immediate relative child, and the petition serving as the basis for the adjustment was first filed for classification as a family-sponsored immigrant based on the parent being a lawful permanent resident and the petition was later converted, due to the naturalization of the parent, to a petition to classify the alien as an IR, then the age of the alien on the date of the parent's naturalization is the alien's age for CSPA purposes. If the alien was under the age of 21 on the date of the petitioning parent's naturalization, the alien will not age out.
 - (C) Petition Initially Filed as Married Son or Daughter of a U.S. Citizen (USC). If an alien is seeking to adjust as an immediate relative child, and the petition serving as the basis for such adjustment was first filed for classification as a married son or daughter of a U.S. citizen, but the petition was later converted, due to the legal termination of the alien's marriage, to a petition to classify the alien as an immediate relative, then the age of the alien on the date of the termination of the marriage is the alien's age for CSPA purposes. If the alien was under the age of 21 on the date of the termination of the marriage, the alien will not age out.
- (ii) Adjustment Under a Preference Category. The beneficiary's CSPA age is determined using the formula below. If the petition is approved and the priority date becomes current before the alien's CSPA age reaches 21, then a one-year period begins during which the alien must apply for permanent residence in order for CSPA coverage to continue.

It does not matter if the alien aged out before or after the enactment date of the CSPA, so long as the petition is filed before the child reaches the age of 21 provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence based on the immigrant visa petition upon which the alien claims to be a child.

- (A) CSPA Age Formula. Determine the age of the alien on the date that a visa number becomes available. The date that a visa becomes available is the later of (a) the first day of the month of the Department of State (DOS) Visa Bulletin, which indicates availability of a visa for that preference category or (b) the petition approval date if a visa

number is already available on the approval date. Subtract the number of days the petition was pending as described in paragraphs (B), (C) and (D) below. This is the alien beneficiary's CSPA age. If the alien beneficiary's CSPA age is under 21, he or she remains a child for purposes of the application for permanent residence provided the beneficiary properly applies for permanent residence, based on the subject petition, within one year of visa availability and notwithstanding the alien's CSPA age on the date of adjudication of such application.

- (B) Direct Beneficiaries. The number of days that a petition is pending is the number of days between the date that it is properly filed (receipt date) and the date an approval is issued on the petition, including any period of administrative review.

In the case of a petition where adjustment is sought as the child of an LPR (F2A) and it is determined that the age of the beneficiary is over the age of 21 for CSPA purposes, if the petitioner naturalizes then the petition is to be automatically converted to the appropriate first or third family preference category for that petitioner and beneficiary (so long as marriage occurred after the naturalization of the petitioner). The beneficiary will retain the priority date in this case.

- (C) Derivative Beneficiaries – Family and Employment-Based. The number of days that a petition is pending is the number of days between the date that the petition is properly filed (Form I-140 is considered properly filed on the receipt date and not priority date) and the date an approval is issued on the petition, including any period of administrative review. If the petition was approved and the priority date becomes current before the child's CSPA age reaches 21, the alien must, within one year of the visa availability date, apply for adjustment of status, an immigrant visa, or be the beneficiary of an I-824 in order for the CSPA coverage to continue.

Note: An alien may benefit from the CSPA if the alien "sought to acquire" the status of an LPR within one year of visa number availability. USCIS has determined that an alien has "sought to acquire" permanent residence if he or she files an application for adjustment of status or an immigrant visa, or is the beneficiary of an I-824 within one year of the immigration petition approval date (or visa becoming available subsequent to petition approval date, whichever is later). Adjudicators are reminded that an I-824 can be concurrently filed with Form I-485 Application To Register Permanent Residence or Adjust Status. A previously filed I-824 that was denied because the principal alien's adjustment of status application had not yet been approved can serve as evidence of having "sought to acquire" LPR

status. USCIS has made this determination because the CSPA language requires the alien to have “sought to acquire” LPR status subsequent to visa availability, which is a product of visa petition approval. Consequently, neither a labor certification nor a visa petition will satisfy the “sought to acquire” LPR status requirement because these actions are an integral part of the visa petition approval process and will necessarily precede visa availability.

- (D) Derivative Diversity Visa (DV) Applicants. For the purpose of determining the period during which the “petition is pending,” officers should use the period between the first day of the DV mail-in application period for the program year in which the principal alien has qualified and the date on the letter notifying the principal alien that his/her application has been selected (the congratulatory letter). That period should then be subtracted from the derivative alien’s age on the date the visa became available to the principal alien.

(2) CSPA Coverage for Specific Aliens Not Covered Under Previous Guidance

- (i) Limited CSPA Coverage for K4 Aliens. The CSPA does not apply to aliens obtaining K2 or K4 nonimmigrant visas or extensions.

An alien in K4 status may utilize the CSPA upon seeking adjustment of status because a K4 alien seeks to adjust as an IR on the basis of an approved Form I-130, which is filed under section 204 of the Act. This is because the USC petitioner who filed the nonimmigrant visa petition on behalf of the K3 parent must file a Form I-130 on behalf of the K4 alien before the K4 seeks to adjust status pursuant to 8 CFR 245.1(i). This necessarily requires the existence of a parent-child relationship between the USC and the K4 alien. Accordingly, the CSPA should be applied to K4 applicants as described in paragraph 21.2(e)(1)(i).

- (ii) Limited CSPA Coverage Option for K2 Aliens. An alien in K2 status does not have a visa petition filed on his or her behalf under section 204. Consequently, a K2 alien cannot utilize the CSPA when seeking to adjust status. Although not required, USCIS may accept a Form I-130 filed by the USC petitioner based on a parent-child relationship between the USC petitioner and the K2 alien (e.g. where the USC petitioner has married the K1 and K2 is not yet 18 years old). This will allow an alien who once was a K2 to adjust on the basis of a petition filed under section 204 of the Act and will allow him/her to utilize the CSPA when seeking to adjust status in some cases.

Exercising this option requires: (1) an existing parent-child relationship between the USC petitioner and the K2 alien, and (2) paying the requisite

- fees associated with Forms I-130 and I-485, Application To Register Permanent Residence or Adjust Status. This guidance does not create a petitionable relationship for K2s or K4s where none exists.
- (iii) CSPA coverage for preference aliens who did not have an application for permanent residence pending on August 6, 2002 and who subsequently filed an application for permanent residence that was denied solely because he or she aged out. An alien on behalf of whom a visa petition had been approved prior to August 6, 2002 and who filed an application for adjustment of status after August 6, 2002 may file a motion to reopen or reconsider without filing fee if: (a) the alien would have been considered under the age of 21 under applicable CSPA rules; (b) the alien applied for permanent residence within one year of visa availability; and (c) the alien received a denial solely because he or she aged out.
- (iv) CSPA coverage for preference aliens who did not have an application for permanent residence pending on August 6, 2002 and did not subsequently apply for permanent residence. An alien whose visa became available (as defined in paragraph 21.2(e)(1)(ii)(A)) on or after August 7, 2001 who did not apply for permanent residence within one year of the petition approval and visa availability, but would have qualified for CSPA coverage had he or she applied but for prior policy guidance concerning the CSPA effective date, may apply for permanent residence.
- (3) CSPA Section 6 Opting-Out Provisions. Beneficiaries of 2nd preference I-130 petitions that were automatically converted to family first preference upon the petitioning parent's naturalization may exercise the "opt-out" provision of section 6 even if the petition in question was originally filed in the F2A category but has now converted to F2B. Aliens seeking to utilize this opt-out provision should file a request in writing with the District Office having jurisdiction over the beneficiary's residence. Adjudicators do not need to determine the age of the alien when a section 6 opt-out request is received. [<link to section 6, 6-14-06>](#)
- (4) Visa Availability Date Regression. If a visa availability date regresses, and an alien has already filed a Form I-485 based on an approved Form I-130 or Form I-140, the officer should retain the Form I-485 and note the date a visa number first became available. Once the visa number again becomes available for that preference category, determine whether the beneficiary is a "child" under paragraph 21.2(e)(1)(ii) using the visa availability date marked on the Form I-485, as long as the I-485 was filed within one year of that visa availability date.

If, however, an alien did not file a Form I-485 prior to the visa availability date regressing, and then files a Form I-485 within one year of when the visa

availability date again becomes current, the alien's CSPA age is determined using the subsequent visa availability date.

(5) Inapplicability of the CSPA. The CSPA applies only to those immigrant visas expressly specified in the statute. Nothing in the CSPA provides protection for nonimmigrant visas (e.g. K or V), NACARA, HRIFA, Family Unity, Cuban Adjustment Act, and Special Immigrant Juvenile applicants and/or derivatives not specifically provided in the CSPA. This list is not exhaustive.

3. Contact Information

Questions regarding the guidance contained in this memorandum should be directed to Fred Ongcapin, Domestic Operations Directorate and Andrew Perry, Office of Policy and Strategy through the appropriate supervisory channels.

4. Use

This memorandum is intended solely for the guidance of USCIS personnel in performing their duties relative to adjudications of applications. 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 by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Appendix

The following examples reflect how the guidance would be applied to some specific scenarios.

- a. Form I-129F was approved and the K1 entered the country with a K2 who was then 17. The marriage between the K1 and USC petitioner occurred within 90 days and before the child's 18th birthday. The USC petitioner then files an I-130 on behalf of the K2 when the K2 is 20 years old. Consequently the K2 would be treated as if he or she is an immediate relative for CSPA purposes and his or her eligibility for permanent residence would be 20, the beneficiary's age on the date the form I-130 was filed on his or her behalf. See Chapter 21.2(e)(1)(i).
- b. An immigrant visa petition was filed when the beneficiary was under the age of 21 and approved before August 6, 2002. After August 6, 2002, the beneficiary filed Form I-485 within one year of visa availability. USCIS determined that the CSPA did not apply because no petition or application was pending on the August 6, 2002, and the alien received a denial solely because he or she aged out. Based on this new CSPA guidance, the applicant may be eligible for CSPA benefits. The alien may file a new application for adjustment of status today. USCIS will adjudicate the current Form I-485 as if it had been filed within one year of visa availability. See Chapter 21.2(e)(2)(iii).
- c. An immigrant visa petition was filed when the beneficiary was under the age of 21 and subsequently approved. The beneficiary did not file Form I-485 within one year of visa availability because previous USCIS guidance indicated that they would not benefit from the CSPA. Based on this new CSPA guidance, the applicant may be eligible for CSPA benefits. The alien may file a Form I-485, and USCIS will adjudicate the Form I-485 as if it had been filed within one year of visa availability. See Chapter 21.2(e)(2)(iii), and (iv).
- d. An immigrant visa petition (either a Form I-130 or a Form I-140) was filed in 2000 when the derivative beneficiary was 20. When the petition was filed, the priority date for the principal's classification was current. The visa petition was not approved until 2007, and a Form I-485 was filed one month after approval. The derivative beneficiary's "age" for CSPA purposes would be 20 (the beneficiary was 27 when the I-485 was filed, but the visa petition was pending for 7 years). This derivative beneficiary can benefit from the CSPA since he or she applied for permanent residence within one year of visa number availability. The visa availability date in this example is the immigration petition approval date. Thus, this derivative beneficiary would be able to retain classification as a child. See Chapter 21.2(e)(1)(ii)(A) and (C).

- e. An immigrant visa petition (either a Form I-130 or a Form I-140) was filed in 2000 when the derivative beneficiary was 20. The visa petition is approved exactly one year later in 2001. A visa becomes available exactly 5 years later in 2005 and the principal files an I-485 immediately. The application is approved in 2007 and the beneficiary applies for adjustment of status one month after approval of the principal's application. The derivative beneficiary's "age" for CSPA purposes would be 24 (the beneficiary is 25 in 2005 when the visa became available, but the visa petition was pending for 1 year). Not only would this derivative beneficiary be considered over the age of 21, this beneficiary could not benefit from the provisions of the CSPA because he or she did not file a Form I-485 within one year of the principal's visa becoming available. Thus, this derivative beneficiary would be unable to retain classification as a child. See Chapter 21.2(e)(1)(ii)(A) and (C).
- f. An immigrant visa petition (either Form I-130 or Form I-140) was filed and denied in 2000 when the derivative beneficiary was 20. The petitioner filed a timely appeal with the AAO/BIA which, in 2006, sustained the appeal, remanded the matter, and directed the petition approved (on grounds other than the new availability of the CSPA). On the date of approval, visas are available for the principal's classification. The principal and derivative beneficiaries each file a Form I-485 six months later. The derivative beneficiary's "age" for CSPA purposes would be 20 (the beneficiary is 27 in 2007, but the Form I-140 was pending for 7 years). Thus this beneficiary would be eligible to retain classification as a child. See Chapter 21.2(e)(1)(ii)(A) and (C).
- g. An immigrant visa petition (either Form I-130 or a Form I-140) was filed and denied in 2000 when the beneficiary was 20. The petitioner filed a timely motion to reopen, and, in 2007, the motion to reopen is granted (on grounds other than the new availability of the CSPA). The petition is then approved and a visa is available to the beneficiary on the date of approval, and the alien files a Form I-485 nine months later. The beneficiary's "age" for CSPA purposes would be 20 (the beneficiary is 27 today, but the Form I-130 was pending for 7 years). Thus, this beneficiary would be eligible to retain classification as a child. See Chapter 21.2(e)(1)(ii)(A) and (B).

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