AMERICAN IMMIGRATION LAW FOUNDATION

"AGING OUT": RECENT DEVELOPMENTS RELATED TO THE CHILD STATUS PROTECTION ACT AND OTHER PROVISIONS

Practice Advisory[1]

By: Mary A. Kenney
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This Practice Advisory will discuss recent developments in the interpretation and implementation of the Child Status Protection Act (CSPA), Pub. L. 107-208 (Aug. 6, 2002) by the United States Citizenship and Immigration Services (USCIS), the Department of State (DOS) and the Board of Immigration Appeals. There are no regulations yet implementing the Act. The agencies have continued to interpret the Act through policy memoranda and an unpublished BIA decision, however, as described below. Additionally, following an opinion by a federal court, USCIS has decided to lift the "age-out" restrictions from the regulations applicable to V visa beneficiaries.

This Practice Advisory is intended as a supplement to AILF's "Updated Practice Advisory on the Child Status Protection Act," March 8, 2004 (http://www.ailf.org/lac/lac_pa_010504.asp), which contains a more comprehensive discussion of the CSPA. The information in this advisory is accurate and authoritative, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

1. Children of Asylees and Refugees

USCIS has issued two memoranda explaining in detail how the CSPA will be applied to the children of asylees and refugees. These memorandums are "Processing Derivative Refugees and Asylees under the Child Status Protection Act," July 23, 2003

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(http://uscis.gov/graphics/lawsregs/handbook/refcspa072303.pdf) and "The Child Status Protection Act – Children of Asylees and Refugees," August 17, 2004 (http://uscis.gov/graphics/lawsregs/handbook/CSPA081704.pdf).[2]

Significantly, USCIS is interpreting the CSPA as allowing a derivative applicant who is eligible to retain classification as a child under the CSPA to also be considered a child for all related eligibility determinations. That is, children who turn 21 on or after August 6, 2002 (the effective date of the CSPA), and who are eligible for continued consideration as a child under the CSPA will benefit from the CSPA with respect to an asylum application (Form I-589), adjustment as an asylee or a refugee under INA § 209 (Form I-485), admission to the United States as a refugee (Form I-590), and an application to accompany or follow to join a parent (Form I-730). *See* "The Child Status Protection Act – Children of Asylees and Refugees," August 17, 2004 (http://uscis.gov/graphics/lawsregs/handbook/CSPA081704.pdf).

Because USCIS has interpreted the CSPA as not applying retroactively, the analysis is more complicated when the child turned 21 prior to August 6, 2002. In this situation, USCIS interprets the statute as allowing continued classification as a child *only if* an application for a covered benefit was pending on August 6, 2002.[3] Covered benefits would include an asylum or refugee application, an adjustment application, or an application to accompany or follow to join the child's parent. *Id.* Forms I-590 (for classification as a refugee) and I-730 (Refugee/Asylum Relative Petition) are considered to have been still pending on August 6, 2002 even if they were approved, as long as the beneficiaries had not been issued travel documentation as of that date. "Processing Derivative Refugees and Asylees under the Child Status Protection Act," July 23, 2003 (http://uscis.gov/graphics/lawsregs/handbook/refcspa072303.pdf).

To confuse matters more, in a footnote to the August 17, 2004 memo, USCIS makes a distinction between the adjudication of an I-730 and an I-485. In the case of an I-730, USCIS states that it is determining whether the derivative is entitled to be classified as a child. As such, USCIS takes the position that if the derivative ages out before the effective date of the statue, the I-730 application must actually be pending on the effective date for the CSPA to apply. In contrast, USCIS indicates that when an I-485 is being adjudicated, the applicant is already an asylee based upon classification as a child. Thus, USCIS concludes that the applicant remains eligible to retain the classification of

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[2] USCIS issued a preliminary memorandum dated August 7, 2002, that discussed the CSPA and asylum cases in general terms. *See* "HR 1209 – Child Status Protection Act" (INS Asylum Division) (Aug. 7, 2002) (*posted at AILA InfoNet at Doc. No. 02090531); see also* AILF's "Updated Practice Advisory on the Child Status Protection Act," March 8, 2004 (http://www.ailf.org/lac/lac_pa_010504.asp).

[3] There is a question as to whether this interpretation is correct. There may be an argument based on the effective date provision, CSPA § 8, that as long as the child was listed on the parent's asylum application (I-589) before the child aged out, the child remains covered by the CSPA even where an I-730 or I-485 was not filed until after the statute's effective date.

child – apparently even where the child aged out prior to August 6, 2002 – for an I-485 application filed on or *after* this date (emphasis in the original). Thus, it appears that USCIS may be willing to apply the CSPA in the case of a child found to be an asylee based upon the parent's application, who ages out prior to the statute's effective date but who does not file an adjustment application until after this date.[4] These issues may need to be resolved with the agency or through litigation.

The memoranda contain a chart and a number of examples explaining how these provisions are to be implemented.

2. Unpublished BIA decision interprets CSPA expansively as it applies to a derivative child.

Section 3 of the CSPA provides a formula for determining the age of a principal or derivative child beneficiary of a family-sponsored, employment-based or diversity visa petition. This formula provides that the beneficiary's age will "lock in" on the date that the priority date of the visa petition becomes current, less the number of days that the visa petition is pending, *but only if the beneficiary has sought to acquire the status of an LPR within one year of the date that the visa became available.* CSPA § 3 (emphasis added). USCIS has interpreted the phrase "sought to acquire LPR status" narrowly. In the context of a beneficiary who is adjusting status within the United States, USCIS interprets "sought to acquire" as being limited to filing an I-485 application for adjustment.

In an unpublished decision dated December 20, 2004, the BIA rejected USCIS's narrow interpretation of this phrase. *See In re Kim*, http://www.aila.org/Content/default.aspx?docid=12026.[5] The Board considered the exact statutory language as well as Congress's intent to promote family unification, and held that the phrase "sought to acquire" was broader than the word "filed" and thus could not be limited to this one discrete step. In the case before it, the Board found that the CSPA was applicable even though the adjustment application was not filed until 17 months after the visa petition was approved. The Board held that, despite this, the beneficiary sought to acquire LPR status within one year of visa approval because her parents hired an attorney to start preparing the adjustment application within one year of the approval of the visa petition, the adjustment application was filed within a reasonable time thereafter, and the child was still under the age of 21 when the application was filed.

The Board's interpretation of the statute adds important flexibility to the formula for determining whether a child beneficiary of a family-sponsored, employment-based or

[4] There are no examples in the memo to illustrate this situation; in the only adjustment example in which the child ages out *prior* to the effective date of the statute, the I-485 is already filed and still pending on the effective date.

[5] The Attorney who successfully represented the respondent in this appeal is AILA member Kenneth J. Robinson.

diversity visa retains the status of child. Unfortunately, the *Kim* decision is unpublished and thus is not a precedential decision. *See* 8 CFR §1003.1(g). However, practitioners may nevertheless make the same arguments in their cases – before USCIS, in immigration court, and before the Board – and may submit the *Kim* decision in support. *See, e.g., Davila-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994) (an agency cannot adopt conflicting policies in different case decisions). Moreover, practitioners may note *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004), in which the court found that the CSPA must be interpreted expansively. In fact, the Board in *Kim* relied upon *Padash* to support its expansive interpretation of the statute.

Thus, this is an issue in which a challenge to USCIS' restrictive interpretation through advocacy or litigation could be successful. *See, e.g., Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004) (successful challenge to the Board's restrictive interpretation of the CSPA phrase "final determination").

3. Naturalization of an LPR parent petitioning for a son or daughter: what happens to the petition and what options does the beneficiary have?

The CSPA provides generally that when an LPR with a pending visa application for an unmarried son or daughter naturalizes, the visa petition will automatically convert from a 2B preference category (INA § 203(a)(2)(B)) to a 1st preference category (INA § 203(a)(1)).

An exception to this general rule is included in the statute. The son or daughter may elect in writing not to have the conversion occur, or if it has already occurred, to have it revoked. *See* 8 USC § 1154(k)(2). When a son or daughter makes this election, the CSPA provides that the petition is to be adjudicated as if the naturalization had not taken place. *Id.* Moreover, the CSPA also provides that, whether a conversion takes place, if an unmarried son or daughter was assigned a priority date on the visa petition prior to the naturalization, he or she may maintain that priority date. 8 USC § 1154(k)(3).

In a memorandum dated March 23, 2004, USCIS discussed its initial implementation of this provision. *See* "Section 6 of the Child Status Protection Act," March 23, 2004 (http://uscis.gov/graphics/lawsregs/handbook/CSPA_sec6_32304.pdf). This memorandum states that that it will only entertain elections to opt out of the automatic conversion from beneficiaries from the Philippines, since at the time of the memo, the Philippines was the only country in which visa availability was more current in the second preference category than in the first preference category. The memo also advised, however, that if future visa availability dates change so that other countries have more advantageous second preference category dates than first preference category dates, the memo's guidance regarding the opt-out procedure will be applied to those countries.

The memo also states that the procedure to opt out of the automatic conversion upon a petitioner's naturalization is for the son or daughter to file a written request to the Officer in Charge, Manila. The Officer in charge will then make a decision and notify the beneficiary on official letterhead.

This guidance both conflicts with the CSPA and is incomplete. First, the CSPA makes clear that it is the beneficiary's choice whether to opt out of the conversion. If the beneficiary does opt out in writing, the petition "shall" be decided as if the parent's naturalization had not occurred – that is, it shall continue to be treated as a 2B preference petition. The CSPA does not give USCIS any authority to deny the beneficiary's election to opt out of the conversion. In violation of this statutory language, USCIS' interpretation shifts the authority for making the opt-out decision from the beneficiary to USCIS. It treats the beneficiary's election as if it were a request which the USCIS can reject. Should the USCIS deny an election that is properly filed by your client, you can challenge this decision as *ultra vires*. If this happens in one of your cases, please contact Mary Kenney at mkenney@ailf.org.

Second, the USCIS interpretation also conflicts with the statute by limiting the election to individuals in countries in which visa availability is more current in the second preference than in the first. In the vast majority of cases, this will not matter, for the beneficiaries who most often will want to opt out will be those in countries in which visa availability in the second preference is more current than in the first preference. However, there may be unusual circumstances involving derivative children in which an election after the fact to remain in the 2B category would allow the derivative children to continue to be considered children for CSPA purposes.

Imagine, for example, a case other than from the Philippines in which a derivative child of the principal beneficiary did not "seek to acquire" LPR status within one year of the petitioner's naturalization. If the priority date for 1st preference was current as of the petitioner's naturalization date, then the visa availability date arguably would be considered the date of naturalization. The derivative's failure to "seek to acquire" LPR status within one year of that date would make him or her ineligible for CSPA benefits.[6] However, were the beneficiary (the derivative's parent) to opt out of the automatic conversion to 1st preference (or revoke this conversion if it already happened), the case would continue under the 2B classification. As such, the priority date would not yet be reached. As a result, the derivative would not be disqualified from CSPA coverage for not having already sought LPR status.[7]

Third, USCIS' restriction of the opt-out procedure to cases initially filed in the 2B category is inconsistent with the statute. USCIS indicates that it will not allow a beneficiary to exercise the opt-out election if the petition was filed originally as a 2A

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[6] There is a greater chance of this happening under USCIS' narrow interpretation of the phrase "sought to acquire" LPR status. *See* section 2 above.

[7] Opting out of the automatic conversion in this situation would delay the case for the entire family. The statute specifies that it is the "son or daughter" who may make the election to opt out, which appears to preclude the derivative from making an independent election from that of the principal beneficiary. Thus, this additional delay in the case would have to be weighed against the potential ineligibility of a derivative child.

petition for the child of an LPR and then converted to a 2B petition because the child aged-out. USCIS bases its interpretation on the CSPA reference to a "petition … initially filed" under the 2B classification. *See* CSPA § 6 *amending* 8 U.S.C. § 1154(k)(1). However, this term is found in the statute's sub-section discussing the *automatic conversion* of a case from a 2B to a 1st preference based upon the petitioner's naturalization, not in the sub-section relating to the opt-out election. Thus, it is inconsistent for USCIS to automatically convert a 2B petition in this situation to a 1st preference petition but then not allow the individual to opt-out of the conversion.

Fourth, the guidance is also incomplete because it does not set forth a procedure by which a beneficiary in the United States who wishes to adjust status can opt out of the automatic conversion. The statute, however, does require a *written* election. Thus, in this situation, the beneficiary could file the election to opt out of the conversion with the local office and simultaneously, file the adjustment application based upon the 2B rather than the first preference category.

4. New protections against aging out for beneficiaries of V visas.

The CSPA does not apply to beneficiaries of non-immigrant V visas. However, following a decision from the Ninth Circuit Court of Appeals, USCIS has decided to eliminate the "age-out" restrictions in the regulations applicable to V visa beneficiaries.

8 CFR § 214.15(g) concerns the period of admission for certain spouses and children of lawful permanent residents who are eligible for a V visa. The regulation includes an "age-out" restriction: it limits the period of admission for a child under a V visa – or any extension of this period – so that it will expire on the day prior to the child's 21st birthday. In *Akhtar v. Burzynski*, 384 F.3d 1193 (9th Cir. 2004), the 9th Circuit invalidated these "age-out" provisions as being in conflict with the statute and Congress' intent. USCIS has decided to apply *Akhtar* on a nation-wide basis. *See* "Adjudication of Form I-539 for V-2 and V-3 extension," (USCIS) (Jan. 10, 2005) (*posted on AILA InfoNet at Doc. No. 05020460*).

As a result, according to the USCIS' own announcement, the age out provisions of 8 CFR § 214.15 are no longer effective.[8] An application for an extension of a V visa for a child cannot be denied solely on the basis that the child has turned 21. Moreover, USCIS has also instructed that an individual who was previously accorded V-2 or V-3 status as a child, and whose application for an extension was denied solely due to having turned 21, may now file a new application for an extension. *See* "Adjudication of Form I-539 for V-2 and V-3 extension," (USCIS) (Jan. 10, 2005) (*posted on AILA InfoNet at Doc. No.*

[8] Of course, *Akhtar* is only binding in the 9th Circuit. Until USCIS actually withdraws the age-out provisions of the V regulations, it could again change its position and decide to continue applying these regulations outside of the 9th Circuit. Were this to happen, a challenge to the existing regulations could be brought in federal court, just as it was in *Akhtar.*

05020460). USCIS indicates that it will amend the regulations to reflect this new policy although there is no indication how quickly new regulations will be issued.