**Child Status Protection Act – Part I**
***by***
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When President Bush signed into law The Child Status Protection Act (CSPA) on August 6, 2002, it was evident that the Act sought to avoid penalizing children for U.S. Citizenship & Immigration Services (USCIS) [formerly known as INS] delays. The CSPA amends the Immigration & Nationality Act (INA) by permitting certain aliens to retain classification as a "child" under the Act, even if he or she has reached the age of 21. However, the CSPA provisions were so ambiguous that USCIS officials and American consular officers had difficulties in interpreting its language and sense. The Department of State (DOS), which interprets matter of law for American consular officers, then provided guidelines and clarifications though several cables to consular officers to enable the proper applicability of CSPA. USCIS also issued instructions to its field officers through several memorandums clarifying the applicability and implementation of CSPA.

From the time CSPA was enacted until today, we have been continuously researching and reviewing the extent and nature of the implications, taking into account the DOS and USCIS cables and memorandums as well as the decisions of the Board of Immigration Appeals (BIA) and decisions rendered by the courts. We are now happy to provide our following analysis.

## Does CSPA apply?

### *Step One*

The first step is to make the determination as to whether CSPA applies as stated above.

The initial interpretation and memorandums with regard to the applications of CSPA, provided that CSPA applies only to the petitions approved before August 6, 2002 and in limited number of cases to the petitions approved between August 6, 2001 and August 5, 2002. Later, this rule was changed and presently, CSPA applies to the petitions approved any time before or after August 6, 2002.

### *Step Two*

If CSPA applies under the abovementioned guidelines, the next step would determine whether a child, who would have previously lost benefits due to aging-out, is able to receive benefits. The first part of the analysis is determining the date on which the child's age is "frozen."

Firstly, ascertain when immigrant visa numbers became available. The date that a visa number becomes available is the first day of the month that the Department of State (DOS) Visa Bulletin says that the priority date has been reached. If upon approval of the Form I-130 petition, a visa number is already available according to the DOS Visa Bulletin, the date that a visa number becomes available is the approval date of the Form I-130.

When the visa number becomes available, we can commence the exercise to freeze the child's age by deducting the time taken by USCIS for approval of the visa petition from the age of the child. The time deducted from the age of the child is the difference between the priority date and the date on which petition was approved. If under this formula, the child's age is under 21, it will be frozen at that point. The child's aging out after that "frozen" date will not affect eligibility to obtain immigration benefits.

With regard to the children under the preference categories, their age for CSPA purpose is calculated by taking the age of the child on the date the visa became available and subtracting the time taken by the USCIS to adjudicate the petition.

***Step Three***

The child's age – determined by the first two steps described above – will remain frozen only if the beneficiary has sought to acquire the status of an alien admitted for permanent residence within one year of the visa availability. For a child beneficiary who is obtaining his visa at a U.S. Consulate abroad, this requirement will be satisfied by the submission of a completed Form DS-230 Part I to the consular office where the visa application would be processed or the National Visa Center (NVC). In the cases in which the principal adjusted status in the U.S. and the derivative is applying for a visa abroad, the third step is satisfied by the filing of Form I-824 by the principal applicant. For a child beneficiary who is adjusting his/her status in the U.S., the filing of Form I-485 satisfies the third step. However, it is important that the third step has to be completed within one year of the visa availability.

The BIA decision in December 2004, has provided a broader interpretation of the phrase "sought to acquire" Lawful Permanent Resident (LPR) status to include actions other than simply filing Forms DS-230 Part I, I-824 or I-485. The BIA found that seeking the assistance of an attorney within the one-year window to prepare the application for adjustment of status satisfied the requirement. The BIA found that the statutory language "sought to acquire" is broader than "filed" and includes acts that "try to acquire or gain" or "make an attempt to get or obtain." However, this decision was not implemented by the concerned authorities and CSPA requests were denied in most of the cases for noncompliance of the one-year rule. The good news is that based upon representations made to the DOS, DOS has rendered Advisory opinions in certain cases where the visa fee for the child, was paid to the NVC within one year from the date when the visa number became available for the first time and, in some other situations, for reasons warranting such decision. It should be noted that the DOS has not rendered any memorandum or policy decision on this subject to the consular officers. Therefore, in such cases, we have to approach the DOS for an Advisory opinion.

**Child of Adjustee in the United States**

The alien child applying for his/her visa abroad as a derivative on the basis of the parent's adjustment of status is also required to show that he/she sought to acquire permanent resident status within one year of visa availability. Filing of Form I-824 by the parent

within one year of visa availability would suffice for the purpose of satisfying this requirement.

In Part II of this article, we will discuss about seeking the old priority date (of the parent's petition) for the children who aged out and did not qualify under CSPA. In recent court decisions, it has been held that when the green card holder parent files the Form I-130 petition on behalf of such child, he or she should be given the old priority date of the petition under which the parent was granted immigrant visa.

***…to be continued***