CHILD LEFT BEHIND

By Michael Phulwani, Esq. and David Nachman, Esq.

There have been many cases where the parents got the immigrant visa, but the children became over 21, and therefore, the immigrant visa was denied to them. Some children were lucky and got the immigrant visa with their parents, even after they aged-out, for the reason that they qualified under the Child Status Protection Act (CSPA).

If the left out child did not qualify under the CSPA, the parents, after immigrating to the U.S., can file I-130 immigrant visa petition on behalf of the child who aged-out. In such cases, a new priority date is given by the U.S. Citizenship & Immigration Services (USCIS), under family-based 2B preference category due to heavy backlog, under which the child has to wait for several years for the visa number to become available and must remain unmarried until the visa is issued or the green card holder parent who filed the petition becomes a U.S. citizen, in which case, the petition can be upgraded to family-based 1st preference category, which is also backlogged.

Other options for the left out child are to obtain the immigrant visa under other Family or Employment categories, for which visa number is immediately available or the waiting time is less.

There have been several court cases where the courts have held that when the new petition is filed for such child, USCIS should give them the old priority date of the parents. USCIS has not made policy decision to implement the court decisions, as of today.

Recently, in the matter of DeOsorio v. Napolitano, U.S. Court of Appeals for the 9th Circuit has held that under the CSPA, the child should be given the old priority date of the petition which was filed on behalf of the parent, under which the unmarried child was also eligible, but was not granted the visa since he aged-out.

We hope that the Obama Administration may follow the Court decisions and make policy decision administratively. However, if that does not happen, the matter goes before the Supreme Court, it may affirm the DeOsorio v. Napolitano decision, which would be applied nationwide. In such case, thousands of left out children who are waiting in line for several years, may get the old priority date of the parent's case, resulting in processing of their applicant visa speedily.

On September 26, 2012, an en banc panel of the U.S. Court of Appeals for the 9th Circuit ruled, in DeOsorio v. Napolitano, that the "automatic conversion" clause of the CSPA gives credit to sons and daughters of permanent residents who have "aged-out" for the time that they stood in line with their parents under the family-based

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third and fourth preference categories. Consequently, as long as they remain unmarried, they are permitted to retain their original priority dates and automatically convert to the family-based 2B category.

We find it interesting, even astonishing, that the government continues to argue that Congress, in drafting the CSPA, intended that sons and daughters of permanent residents be given no credit for the years that they stood in line with their parents waiting for their priority dates to become current. Instead, the government insists that, no matter how long they already waited in line, these sons and daughters must go to the back of the 2B line, even though this means a 115-year wait for Mexicans and a 28-year wait for Filipinos. Thus, as a practical matter, the great majority of these sons and daughters will never be reunited with their parents in the U.S.

Is this really what Congress meant when it passed the CSPA?

If existing immigration laws and regulations are relevant, the answer is a resounding no.

When one examines the pre-existing regulatory scheme cited by the Board of Immigration Appeals (BIA) in Matter of Wang, it becomes clear that beneficiaries of visa petitions have always been given credit for the time that they stood in line, even when the line in which they spent years waiting was not the same line in which they ultimately received their green cards.

Consider the regulations which allow persons to change from one family-based category to another. Let's say that a permanent resident parent submits a visa petition for an unmarried adult daughter under the 2B preference category. Later, when the parent naturalizes, the daughter automatically converts to the 1st preference category. She does not have to go to the back of the line. She retains her original 2B priority date under the 1st preference category. If she later marries, she converts to the 3rd preference category, and she retains her original priority date as do her husband and any children that they may have together. Under the government's logic, isn't she jumping ahead of others? And certainly, her husband and children who never waited a single day in the 2B or 1st preference line are cutting in ahead of others in the 3rd preference line. However, under this regulation, the unity of her family trumps the interests of others who may have been waiting far longer in the 3rd preference line.

The same is true under another regulation which allows a permanent resident to petition her spouse and children under the 2A category. If a child ages-out, he converts to the 2B category. Must he go to the end of the line in order not to displace others who have been waiting in the 2B line far longer than he has? The answer is no. The regulation allows him full credit for the time that he spent waiting in the 2A line together with his parent.

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Furthermore, it is instructive to look at another section of the CSPA to see what Congress intended regarding the retention of priority dates. In Section 6, the "opt-out" provision, persons who have converted from the 2B to the 1st preference category are allowed to return to the 2B category even though their petitioning parent has already naturalized. Are they required to go to the back of the line in order not to displace others in the 2B category? Not at all. They are given full credit for the time that they have waited in line, even if it was in another line.

Given this overwhelming evidence based on both CSPA as well as other immigration statutes and regulations, why does the government ignore all of this and insist that only in the case of section 203(h)(3) are sons and daughters compelled to go to the back of the line? Certainly, if the government believes that their view is the correct one, one has to wonder why they failed to seek Supreme Court review when the U.S. Court of Appeals for the 5th Circuit, in interpreting section 203(h)(3), rejected their arguments in Khalid v. Holder over a year before DeOsorio.

Clearly, the decision by the Court in DeOsorio v. Napolitano, merits its implementation by the government without requiring review by the Supreme Court.

We wish to advise our readers that Attorneys Michael Phulwani and David Nachman will be visiting India and available for meetings in January/February 2013.

For more information, please feel free to contact the Immigration and Nationality Lawyers at the NPZ Law Group at 201-670-0006 or by e-mailing us at info@visaserve.com.

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