Child Status Protection Act – Part II

by

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President Bush signed into law the Child Status Protection Act (CSPA) on August 6, 2002 which permits certain aliens to retain classification as a "child", even if the child has reached the age of 21.

In part I of the article, we discussed about various steps in making determinations as to whether CSPA applies to the child, (1) when the child's age is frozen under CSPA, (2) age of child when the priority date becomes available minus the period of times taken by the U.S. Citizenship & Immigration Services (USCIS) in approving the petition, (3) whether the application for the immigrant visa, Form DS-230, was filed or the fee was paid for the child within one year, from the date when the visa became available. In cases where the principal applicant (parent) adjusted status as a permanent resident, the parent should have filed Form I-824 within one year from the date the visa became available.

We now continue to discuss about CSPA applicability for Asylee/Refugee applicants and detailed information about calculating CSPA applicability and eligibility under Family and Employment preference categories.

Asylum/Refugee Applicants

Asylum / Refugee applications pending on or after August 6, 2002 will benefit from CSPA. USCIS memorandum of August 17, 2004 provides further guidance concerning the effect of CSPA on petitions for children following to join an asylee or refugee and for purposes of adjustment of status.

For asylees, an unmarried alien who seeks to accompany, or follow to join, a parent granted asylum, and who was under 21 years of age on the date on which such parent applied for asylum, will continue to be classified as "a child" even after he or she attained 21 years of age after such application was filed but while it was pending. The child must be under the age of 21 years on the date that his or her parent applied for political asylum. There is no requirement that the child should have been included as a dependent on a Political Asylum application at the time of filing, only that the child be included prior to the adjudication.

For refugees, a child who is under 32 on the date the parent files the Form I-590, is first interviewed by USCIS, will continue to be classified as a "child" even after he or she attained 21 years of age after such application was filed. In order to be eligible for continued classification as a child, the parent must have listed the child on the Form I-590 prior to adjudication of the application.

Benefits under Patriot Act

An alien who is the beneficiary of a visa petition or application filed on or before September 11, 2001, can deduct an additional 45 days under step two above, to determine his/her age for the purposes of CSPA. The Patriot Act grants such aliens 45 days extra in addition to the number of days that the petition was pending, and allows them to deduct this number from the age of the child for the purposes of CSPA.

Other Important Considerations

Assuming CSPA applies, based upon the abovementioned explanation, the determination of age of the child is made under various family- and employment-based categories as follows:

Family Preferences

Immediate Relatives (*Children of U.S. citizens):*

- The age of the child will freeze on the date of filing of Form I-130 and the child will permanently qualify as a child under Immediate Relative (IR) category as long as he/she does not marry.

- Naturalization of a parent who filed a family-sponsored second immigrant visa petition (as a lawful permanent resident alien) for an unmarried child under the age of 21 would result in the child's classification as an Immediate Relative even if he/she thereafter crosses the age of 21 years, provided the parent's naturalization occurred while the age was below 21 years of age. As indicated above, CSPA provides for the automatic transfer of preference categories when the parent of an unmarried son or daughter naturalizes, but also provides the unmarried son or daughter the ability to request that such transfer not occur. If an unmarried son or daughter does not want such automatic transfer of preference categories to occur upon his or her parent's naturalization, the Immigration Service (USCIS) shall accept such request in the form of a letter signed by the beneficiary. If the beneficiary does make this written request to the Immigration Service (USCIS), then the beneficiary's eligibility for family-based immigration will be determined as if his or her parent had never naturalized.

Preference Categories

F2A category – Unmarried Sons & Daughters under the age of 21 of permanent residents:

If CSPA applies, the age of the child should be calculated by taking the age of the child on the date that a visa first became available and subtract the time taken by USCIS to adjudicate the petition. This has been discussed at length in the opening paragraphs above.

Derivatives in Other Family & Employment Preference Categories, DV and Asylee cases:

If CSPA applies then the age of the derivative child should be determined on the basis of guidelines provided above.

To Be Continued…