Child Status Protection Act – Part III
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This is the third and concluding part of the series of articles with regard to the applicability of the Child Status Protection Act (CSPA) and the formula, based upon which the child who aged out may qualify to obtain immigrant visa, and other relevant information.

We now discuss how and in what type of cases, the priority date can be retained and various decisions rendered by the Board of Immigration Appeals (BIA) and Circuit Courts in certain parts of the country on this issue.

Retention of Priority Date:
A petition filed on behalf of a child of a green card holder under F2A preference category is automatically converted to F2B preference category if the child ages out and does not qualify under CSPA. When a derivative child of an F2A petition ages out, and is not eligible under CSPA, the green card holder parent has to file a new separate I-130 petition under F2B category on behalf of the aged-out child. The child is able to retain the original priority date of the first petition for the new petition under F2B category.

However, derivative children who age out under F1, F3, & F4 preference categories and who are also not eligible for CSPA, will have to wait until their parent becomes a green card holder and that parent files a new I-130 petition on their behalf under F2B preference category, and is accorded a new priority date, for which the current waiting period is over 9 years. Recently, there have been some court decisions wherein the courts have held that, in such cases, children should be accorded the same priority date as of the petition filed on behalf of the parent. Detailed information with regard to the decisions of the Board of Immigration Appeals (BIA) and courts is provided in this concluding part of the article.

The Immigration & Nationality Act (INA) as amended by the CSPA provisions provides: *Retention of Priority Date – If the age of an alien is determined… to be 21 years of age or older…, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.*

It was not clear to the U.S. Citizenship & Immigration Services (USCIS) as to whether the new petition can be assigned the priority date of the original petition that was filed on behalf of the child's parent. USCIS has interpreted the CSPA provisions narrowly. USCIS has taken the position that these aged-out children may not retain the original priority date.

In the matter of *Garcia,* BIA held on June 16, 2006 that CSPA allows for priority date retention when the green card holder parent files a new I-130 petition for the aged-out child. In this case, the alien Maria was the derivative beneficiary of an I-130 petition filed on behalf of her mother by her aunt in 1983. When the visa numbers became current in June 1996, Maria had aged out and was unable to obtain a green card. Her mother, upon becoming a green card holder, filed a new I-130 petition on behalf of Maria under F2B category. In this case, the BIA determined that

as per the CSPA provision stated above, Maria automatically converted to the F2B preference category as she was still the unmarried daughter of a green card holder. Further, it also held that Maria was eligible to retain the 1983 priority date of the petition filed by her aunt on behalf of her mother, thus making her current in the F2B category. Unfortunately, the USCIS decided not to follow the Garcia decision and continued to give new priority date for the petitions filed by green card holder parents for the children left behind.

Subsequent to the Garcia decision, BIA rendered another decision in the Matter of Wang in 2009, stating that CSPA does not apply to a now adult noncitizen (meaning that foreign national child who aged out) who was previously listed as a derivative on a visa petition filed on behalf of the child's parent. In other words, Wang decision reversed the Garcia decision mentioned above and held that the child cannot be granted the old priority date.

This matter was again brought up in the matter of Mohammad Abubakar Khalid v. U.S. Attorney General before the U.S. Court of Appeals which rendered the decision, holding that the plain language of the CSPA was unambiguous and that the interpretation of the matter of Wang, contravenes the plain language of the CSPA, and the Court declined to follow the Matter of Wang. In its 19-page decision rendered on September 8, 2011, the U.S. District Court of Appeals for the Fifth Circuit stated that the Congress plainly made automatic conversion and priority date retention available to all the petitions for derivative beneficiaries of all the family-based petitions, including the 4th preference petitions.

Recently, the Ninth Circuit Court of Appeals, held in the Matter of De Osorio, stating that children who are under the age of 21, when they are listed as "derivative" on a permanent residence application, should be able to retain their space in line, even if they turn 21 before the immigrant visa is issued. Once again, the Circuit Court of Appeals stated that in the Matter of Wang, parents were forced to leave their children behind or to live with vulnerability because of the quota or processing delays.

There have been some other court decisions rendered similar to the abovementioned decisions. However, as of today, USCIS has made no decision to follow the court decisions. We hope that this matter can be resolved soon by USCIS, changing its policy as per the court decisions or compelling USCIS by taking individual cases or by class action to the court. It is also possible that ultimately, the matter is taken by the U.S. Supreme Court, which may render a decision in favor of retention of old priority date. We need to wait and watch. In the meantime, it is a good idea that when the principal applicant files the I-130 petition for the child left behind, he/she should submit the request with a legal brief to the USCIS to accord the old priority date based upon various court decisions.