Child Status Protection Act

(CSPA)

U.S. Citizenship
and Immigration
Services

AILA InfoNet Doc. No. 11062968. (Posted 07/26/11)

Introduction

- Due to the definition of “child,” an applicant was precluded from adjustment of status if the applicant reached the age of 21 years.
- This previous definition required the expedited processing of age out dependents.
- However, the amendments made to the Immigration and Nationality Act (INA) by the Child Status Protection Act (CSPA) have changed the way we determine whether the alien qualifies a “child” under INA 203(d).

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Child Status Protection Act (CSPA)

- On August 6, 2002, President Bush signed legislation that addressed the problem of minor children losing their eligibility for certain immigration benefits as a result of administrative delays.

- Public Law 107-208 amended the INA and created sections 201(f) and section 203(h) of the INA. It provided a new set of rules for determining if certain principal and derivative beneficiaries satisfy the age requirement as children under 101(b)(1) of the INA.

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Purpose

The CSPA allows a beneficiary to retain a visa classification as a "child" after the beneficiary reaches the age of 21, if certain requirements are met .

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Eligible Applicants

- Immediate relatives
- Direct beneficiaries of family based preference petitions
- Derivative beneficiaries of family and employment-based preference petitions
- Diversity Visa applicants
- Asylee and Refugee derivatives

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Is the CSPA Retroactive?

- **NO,** CSPA became effective on August 6, 2002, the date of enactment.

- The child must have been under **21** years of age on the date the petition was filed and not have had a final decision on permanent residence prior to the date of enactment.

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Immediate Relatives
Child Under 21 of a USC

- If an IR-2 petition for the child of a USC was filed **prior** to the child turning **21** years of age, the child remains eligible as an immediate relative.

- Also applies to Orphan and Hague Convention Adoptee cases, and the derivatives of a *widow(er)'s* I-360, since they are also "immediate relatives.

- For CSPA purposes, the alien's age is his/her age on the **date the petition was properly filed**.

- In all of these cases, the child must remain unmarried.

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Immediate Relatives

F22 Filing, Petitioner Naturalizes

- If a Lawful Permanent Resident files an F2-A petition for an unmarried child and **naturalizes** prior to the child turning **21** years of age, the petition automatically converts to an immediate relative.

- For CSPA purposes, the alien's age is his/her age on the **date the lawful permanent resident parent becomes a naturalized U.S. citizen**.

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Immediate Relatives

F31 Filing, Child's Marriage Terminated

- If a USC files an F3 petition for a **married** son or daughter and the marriage is legally **terminated prior** to the son or daughter turning **21** years of age, the petition will automatically convert to an immediate relative.

- For CSPA purposes, the alien's age is his/her age on the **date the marriage terminated**.

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Asylum-base Eligibility Overview

Refugee and Asylee Protections

- CSPA provides age-out protections for named derivatives on Forms I-589 and I-590, as well as beneficiaries of Form I-730. The child must remain unmarried to benefit from CSPA protection.

- The child's age is "frozen" at the time the parent's Form I-589, Application for Asylum and Withholding of Removal, Form I-590, Registration for Classification as a Refugee, or Form I-730, Refugee/Asylee Relative Petition was filed. As long as the child was unmarried and under 21 at the time one of these forms was filed, and the child was listed (for Forms I-589 and I-590) and no final determination was made regarding lawful permanent residence prior to enactment , the child will remain a "child" regardless of age and can continue adjustment of status or consular processing on that basis.

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CSPA Age Formula

- Determine the age of the alien on the date that a visa number becomes available.
- Subtract the number of days the petition was pending from the alien's age at the time of visa availability.
- This is the alien beneficiary's CSPA age. If the child is under 21 using this formula, he or she may benefit from CSPA age-out protection.

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Preference Categories

- If the preference petition is approved and the priority date becomes current before the alien's CSPA age reaches 21, then a one-year period begins during which the alien must seek to acquire permanent residence for CSPA coverage to continue.

- It does not matter if the child aged out before or after the enactment date of CSPA, so long as the petition is filed before the child reaches 21 and seeks to acquire permanent residence within one year of visa availability.

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Requirements

The alien must seek to acquire lawful permanent resident status within **one** year of the visa availability by one of the following methods:

- filing Form I-485, or
- submitting Form DS-230, or
- the principal filing Form I-824 on the derivative's behalf.

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Visa Availability

The date the visa became available is defined as the first day of the first month the priority date is current in Department of State's visa bulletin or the date the petition was approved, whichever is later.

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Visa Regression

- When an individual files for adjustment of status and the visa subsequently regresses, they've locked in their "CSPA" age. We hold the I-485 until the visa becomes available again and then adjudicate it.

- When a visa becomes available and the beneficiary fails to seek to acquire within one year, and the visa regresses after that one year has lapsed, they are ineligible for CSPA age-out relief, since the regression did not affect their ability to meet the seek to acquire requirement.

- When a visa becomes available, but regresses before one year has lapsed, we currently restart the one year clock the next time it becomes available. The caveat is that we do the age calculation based on the new visa availability date, so it is in a beneficiary's best interest to seek to acquire as soon as possible when it comes to CSPA age-out. The same can occur multiple times, as long as the visa was never available for a full year.

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Ineligible Applicants

The CSPA does not apply to the following applicants and/or derivatives:

- Nonimmigrant visa applicants
- NACARA/HRIFA applicants
- Family Unity applicants
- Special Immigrant Juveniles

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Who Determines Eligibility?

- USCIS makes preliminary determination of possible eligibility at the time of the Immigrant Petition adjudication.
- The final determination is made at the time of adjustment of status or immigrant visa issuance.

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Family-Based Case Scenario

- DOB: February 3, 1983
- LPR I-130 filed: May 12, 1999
- Approved: January 6, 2003
- Visa first available: August 2, 2005
- I-485 filed: September 29, 2006

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Family-Based Scenario Questions

1. Is the CSPA age under 21?

2. Is this individual eligible to adjust status as a child?

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Answer to Question 1

Age at time visa was available - 22y 5m 29d

minus time I-130 is pending - 3y 7m 24d

= CSPA age 18y 10m 5d

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Answer to Question 2

No. Because the visa was available for more than one year, before the applicant filed for adjustment.

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Employment-Based Case Scenario

- A Form I-140 visa petition and concurrent Form I-485 were filed on Eun Joo's mother's behalf on October 26, 2010.
- The E21 petition was approved by USCIS on March 25, 2011 at which time a visa was immediately available.
- Eun Joo was born on January 21, 1990 and turned 21 on January 21, 2011.

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Scenario Explanation

Her age at time visa was available (date of I-140 approval) was 21 years and 2 months

Minus

Time I-140 is pending was 5 months

Age for CSPA purposes would be:

<u>20 years and 9 months</u>

- As Eun Joo's Form I-485 was filed concurrently with her mother's Form I-140, she is considered to have filed within one year of visa availability. Accordingly, she is eligible for CSPA protection.

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Asylum Case Scenario

- Adam was listed as a derivative child on his parent's Form I-589, filed November 15, 2007.
- The I-589 was approved on March 1, 2008.
- Adam filed an I-485 for adjustment as an asylee on March 1, 2009.
- Adam turned 21 on January 1, 2009.
- Is Adam eligible to adjust as an AS8?

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Explanation

Yes, Adam's age was "frozen" on the date the Form I-589 on which he was listed on was filed.

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Adjustment of Status under 245(i) and Grandfathering

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Adjustment of Status

Family and employment-based immigrants have 2 avenues to apply for adjustment of status:

- 245(a) – The general adjustment of status provision which requires continual maintenance of status since arrival;
- 245(i) – This provision allows an adjustment of status application to be filed by a "grandfathered" alien;
- 245(k) – Preserves eligibility under 245(a) for employment-based immigrants with certain status violations that might otherwise bar adjustment.

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Immediate Relatives

- An immediate relative who did not maintain status or worked without authorization is eligible to adjust under Section 245(a) if he/she was inspected and admitted or paroled.

- An immediate relative who was not inspected and admitted or paroled may apply for adjustment under Section 245(i), if grandfathered.

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Adjustment under 245 (i)

- First enacted in 1994, **section 245(i)** of the Act allows certain aliens to adjust status in the U.S. despite entering without inspection or being otherwise barred from adjustment under section 245(c).

- On December 21, 2000, the LIFE Act Amendments temporarily restored eligibility under Section 245(i) by replacing the previous cut-off date of January 14, 1998, with a new date, April 30, 2001. Accordingly, a beneficiary of a **immigrant visa petition or labor certification application**, filed on or before April 30, 2001, preserves an individual's eligibility to adjust status under Section 245(i) if certain conditions are met.

- The LIFE Act added a significant requirement to Section 245(i). If the qualifying petition or labor certification was filed after the previous cut-off date of January 14, 1998, the individual must have been physically present in the United States on the date of enactment (December 21, 2000) in order to qualify for Section 245(i) benefits under LIFE.

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245(i): Eligibility Requirements

- The individual must be a beneficiary of an immigrant petition (Forms I-130, I-140, I-360 or I-526) or application for labor certification (Form ETA 750) filed on or before April 30, 2001;
  - Petitions must have been approvable when filed. See 8 CFR 245.10(a)(3).
  - Labor certification applications must have been properly filed according to the applicable DOL regulations.
- A petition that was previously used to serve as the basis of an adjustment of status or an immigrant visa cannot serve as the basis for 245(i) benefits.

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Filing the I-485 for Adjustment under 245(i)

- The filing of an I-485 for adjustment under 245(i) requires that the applicant pay the applicable filing fees for the I-485 application as well as the fee required for Supplement A.

- If the applicant is under 17 years of age, then the Supplement A is required but they DO NOT have to pay the additional fee.

- If the applicant is the spouse or unmarried child less than 21 years of age of a legalized alien and the spouse or child qualifies for and has properly filed Form I-817 for Family Unity, no fee is required for the Supplement A.

  ✸ Note: There are no restrictions on how often an individual may file an application for 245(i)adjustment prior to adjusting his or her status, but each time will require both the fee for the I-485 and the Supplement A fee.

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Section 245(i): What does it do?

Section 245(i) of the INA allows individuals who would otherwise be ineligible to apply for permanent residence while in the United States when they normally would be ineligible due to :

- Entry without inspection;
- Failure to maintain a lawful immigration status;
- Employment without authorization; and
- Additional bars to adjustment contained in section 245(c).

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Section 245(i): What does it not do?

245(i) does not:

- Waive other conditions required to apply for permanent residence.
- Waive any ground of inadmissibility.
- Provide any lawful immigration status or work authorization.
- Protect the individual from deportation.

  ✸Note: Inadmissibility under 212(a)(6)(A) does not apply in section 245(i) cases; however, all other grounds of inadmissibility do apply.

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Section 245(i) Grandfathering

While section 245(i) was a temporary provision that terminated on April 30, 2001, those who met the eligibility requirements of 245(i) on or before April 30, 2001 are considered grandfathered and remain grandfathered until they become permanent residents.

As such, a grandfathered individual is eligible to apply for adjustment of status even after April 30, 2001.

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Spouses and Children

- 245(i) defines the term “beneficiary” to include the principal alien’s spouse and children accompanying or following to join per INA 203(d).

- Following to join spouses and children are grandfathered and may adjust under 245(i) either with the principal, or independently, if they have another basis for immigrating.

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Eligibility Requirements for Derivative Spouses and Children

The spouse or child relationship must have existed when the qualifying petition or labor certification application was filed – on or before April 30, 2001.

If the qualifying relationship was created after April 30, 2001, the derivative may still be able to adjust status under 245(i) if that relationship exists at the time the principal alien adjusts status and continues to exist when the derivative adjusts status.

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Derivative Spouses and Children and Physical Presence

- If the qualifying visa petition or labor cert was filed after 1/14/98, the *principal* applicant must have been physically present in the U.S. on 12/21/00.
  - The accompanying/following to join spouse and children are not required to meet the physical presence requirement.
  - The derivative can adjust together with the principal or separately.

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245(i): Change in Circumstances (Family Based)

Derivative spouses or children who are considered grandfathered in their own right (e.g., derivative beneficiaries on the original qualifying petition or labor certification application) remain grandfathered for 245(i) benefits despite any termination of the relationship due to:

- death;
- divorce;
- and, in the case of children, age out or marriage (Note, CSPA may also offer benefits to some individuals).

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245(i): Change in Circumstances (Employment Based)

In the case of a beneficiary of a labor certification or an employment based immigrant petition, he or she may remain grandfathered despite such circumstances as:

- The petitioning company goes out of business or;
- The petitioning company withdraws the labor certification application

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Diversity Lottery Winners

- An alien who meets the grandfathering requirements may apply for adjustment under INA 245(i) based on another approved petition or under another provision of law.

- A DV lottery application does not grandfather the alien, because it was filed with DOS, but a DV lottery winner may adjust under 245(i), if he/she is grandfathered.

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Example

An individual (or alien) had a labor certification filed on his/her behalf prior to April 30, 2001. The company that filed the labor certification later goes out of business. The individual wins the diversity lottery. Because the individual is grandfathered, he/she is eligible to apply for adjustment of status based on the diversity lottery.

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In Conclusion

- The applicant for adjustment of status who is grandfathered under 245(i) must still meet all other applicable requirements for adjustment of status.
- As always, the burden of proof is upon the applicant to establish that he or she is eligible for benefits under 245(i)

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Questions

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Meeting Invitation

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Service Center Operations
Monthly Stakeholder Teleconference

The USCIS Service Center Operations Directorate invites interested stakeholders to participate in the next Monthly Stakeholder Teleconference scheduled for **Tuesday, July 26, 2011 from 2:00pm to 3:30pm Eastern Time**. These engagements present an opportunity for stakeholders to receive current information from service center officials on particular topics of interest. The Vermont Service Center will host the July teleconference with assistance from the California Service Center.

The topic for the July 2011 teleconference will be **The Child Status Protection Act and the Grandfather Clause** as related to preserving priority dates**.**

Please note the change in topic for the call scheduled for July. The tentative schedule for upcoming teleconferences and topics is now as follows:

Engagement Date	Topic
July 26, 2011	Child Status Protection Act & Grandfathering
August 23, 2011	Form I-140
September 27, 2011	Form I-130

Agenda Items: Please submit items for the July agenda to the Vermont Service Center Community Engagement Officer Donna Kane at donna.kane@dhs.gov by **COB Friday, July 8, 2011.**

RSVP: If you would like to participate in the July teleconference, please provide your full name and the organization you represent to Donna Kane at donna.kane@dhs.gov by **COB Friday, July 15th** and reference "**July 26 Teleconference**" in the subject line.

For additional information, please contact Donna Kane by email.

We look forward to engaging with you!

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