



# LEGAL ACTION CENTER

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AMERICAN IMMIGRATION COUNCIL

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## **PRACTICE ADVISORY<sup>1</sup>**

**September 9, 2009**

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## **THE CHILD STATUS PROTECTION ACT<sup>2</sup>**

By Mary Kenney

The Child Status Protection Act (CSPA), Pub. L. No. 107-208 (Aug. 6, 2002), provides relief to children who “age-out” as a result of delays by the U.S. Citizenship and Immigration Services (USCIS) in processing visa petitions and asylum and refugee applications. A child “ages-out” when he or she turns 21 and loses the preferential immigration treatment provided to children. The Immigration and Nationality Act (INA) defines a “child” as an unmarried individual less than 21 years of age. 8 U.S.C. § 1101(b)(1). The CSPA does not change this definition, but instead establishes a formula for determining “age” that is not based solely on chronological age.<sup>3</sup>

Prior to the CSPA, a child who turned 21 before the relevant application for immigration benefits was adjudicated would age-out. As the result of agency backlogs and delays, many children aged out before their cases were complete. For cases to which it pertains,

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<sup>2</sup> This practice advisory updates and replaces three earlier advisories: “2006 Update on the Child Status Protection Act: New Administrative Interpretations” (Sept. 26, 2006); “Aging Out: Recent Developments Related to the Child Status Protection Act and Other Provisions” (Feb. 24, 2005); and Updated Practice Advisory on the Child Status Protection Act (Mar. 8, 2004).

<sup>3</sup> To be considered a “child,” the individual also must be unmarried at the relevant time. 8 U.S.C. § 1101(b)(1); *see also* 8 U.S.C. § 1101(a)(39). The CSPA did not change this requirement.

the CSPA now freezes the age of the child at an earlier date in the process, and in this way preserves the status of “child” for many individuals who otherwise would age out.

The CSPA’s method of calculating a person’s age varies depending on the type of immigration benefit that is sought. The CSPA applies to:

- Derivative beneficiaries of asylum and refugee applications;
- Children of U.S. citizens;
- Children of lawful permanent residents (LPR); and
- Derivative beneficiaries of family-based, employment-based and diversity visas.

According to USCIS, the CSPA does not apply to the Nicaraguan Adjustment and Central American Relief Act; Haitian Refugee Immigration Fairness Act; Family Unity; Special Immigrant Juvenile status; Cuban Adjustment Act; or nonimmigrant visas. *See* “Revised Guidance for the CSPA” (April 30, 2008), [http://www.uscis.gov/files/nativedocuments/CSPA\\_30Apr08.pdf](http://www.uscis.gov/files/nativedocuments/CSPA_30Apr08.pdf); *see also* *Midi v. Holder*, 566 F.3d 132 (4th Cir. 2009) (CSPA does not apply to HRIFA cases). While, USCIS states that the CSPA does not apply to K visas because these are non-immigrant visas, USCIS also has outlined limited circumstances where it finds that the CSPA will cover K2 and K4 beneficiaries. *See* “Revised Guidance for the CSPA” (April 30, 2008), *supra*.<sup>4</sup>

This practice advisory provides an overview of the CSPA, its effective date, and its interpretation and implementation by USCIS, the Department of State (DOS), the Board of Immigration Appeals (BIA) and the courts. Practitioners should be aware that the CSPA is complex and there are a number of unresolved issues. Although the CSPA has been law for seven years, there still are no regulations implementing it. Instead, both USCIS and DOS are relying on interpretative memoranda and cables.<sup>5</sup> Moreover, some of these interpretations construe the CSPA narrowly, even where an expansive interpretation is more consistent with the statute’s purpose and language.

## **1. DERIVATIVE BENEFICIARIES OF ASYLEES AND REFUGEES**

The child of an individual granted asylee or refugee status may be granted the same status if accompanying or following-to-join the parent. 8 U.S.C. §§ 1157(c)(2) and 1158(b)(3). The CSPA amends the asylum and refugee provisions by freezing the age of a child on the date that the parent files the asylum or refugee application, regardless of how old the child is when the asylum or refugee application is finally approved. CSPA §§ 4 and 5

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<sup>4</sup> For information on nonimmigrant V visas and aging-out, *see* “Adjudication of Form I-539 for V-2 and V-3 extension” (January 10, 2005), <http://www.uscis.gov/files/pressrelease/V2V3extn011005.pdf>.

<sup>5</sup> These and other resources are collected on the CSPA Featured Topic page of AILA InfoNet, <http://www.aila.org/issues/issue.aspx?docid=21697>. For a comprehensive discussion of the CSPA, *see* Charles Wheeler, “AILA’s Focus on the Child Status Protection Act,” <http://www.ailapubs.org/cspa.html>.

(codified at 8 U.S.C. §§ 1157(c)(2)(B) and 1158(b)(3)(B)). Thus, a child who is 20 when the parent files for asylum will retain the status of a child even if he or she is 22 when the asylum application is approved.

USCIS has issued several memoranda explaining how the CSPA is applied to the children of asylees and refugees. These memoranda are “HR 1209 – Child Status Protection Act” (August 7, 2002), [http://www.uscis.gov/files/pressrelease/cspa\\_memo\\_pub.pdf](http://www.uscis.gov/files/pressrelease/cspa_memo_pub.pdf); “Processing Derivative Refugees and Asylees under the Child Status Protection Act” (July 23, 2003), <http://www.uscis.gov/files/pressrelease/refcspa072303.pdf>; and “The Child Status Protection Act – Children of Asylees and Refugees” (August 17, 2004), <http://www.uscis.gov/files/pressrelease/CSPA081704.pdf>.

USCIS is interpreting the CSPA as allowing a derivative applicant who is eligible for CSPA coverage to retain the status of “child” for all eligibility determinations related to the asylum or refugee status, including the application for asylum (Form I-589); adjustment as an asylee or a refugee under INA §209 (Form I-485); admission to the United States as a refugee (Form I-590); and an application to accompany or follow to join a parent (Form I-730). See “The Child Status Protection Act – Children of Asylees and Refugees” (August 17, 2004), *supra*.

There are two ways for a child to obtain derivative asylee or refugee status. First, the child can be included in the parent’s asylum or refugee application. In these circumstances, the CSPA will apply if (1) the child was under 21 when the asylum or refugee application was filed; and (2) the parent adds the child’s name to the application before it is adjudicated. See “HR 1209—Child Status Protection Act” (Aug. 7, 2002), *supra*. For example, the CSPA will apply if an asylum applicant adds a 22 year-old child who is present in the United States to a pending asylum application, provided the child was under 21 when the asylum application was filed. Note that for refugee cases, USCIS interprets the date that a refugee application is “filed” as being the date that the refugee is interviewed by a Department of Homeland Security officer. See “Processing Derivative Refugees and Asylees under the Child Status Protection Act” (July 23, 2003), *supra*.

Second, a child not included in the asylum or refugee application (or in asylum cases, who is not present in the United States), may obtain derivative asylee or refugee status if the parent files a Form I-730, Refugee/Asylee Relative Petition, within two years of being granted asylum or admitted to the United States as a refugee. The CSPA also applies to children who obtain derivative asylum benefits through an I-730. As in all asylum and refugee cases, however, the child must have been under 21 at the time that the asylum application was filed. Moreover, the USCIS memos cited above indicate that, in asylum cases, for the CSPA to apply to an I-730 petition, the child’s name must have been added to the asylum application before it was granted. This interpretation appears inconsistent with the statute, which applies without limit to children who are following-to-join their asylee parents.

USCIS has interpreted the effective date provision of the CSPA (CSPA § 8) as allowing CSPA coverage in asylum and refugee cases in any of the following situations:

- The parent's application for refugee/asylum status was pending on or filed after August 6, 2002, and the derivative was under the age of 21 at the time of filing;
- The Form I-730 from which the derivative is benefiting was pending on August 6, 2002, and the derivative was under the age of 21 at the time the I-730 was filed;
- The parent's application for refugee/asylum status or the I-730 was filed prior to August 6, 2002, and the derivative turned 21 years of age on or after August 6.

*See* “Processing Derivative Refugees and Asylees under the Child Status Protection Act” (July 23, 2003), *supra*.

Forms I-590 (for classification as a refugee) and I-730 (Refugee/Asylum Relative Petition) are considered to have been pending on August 6, 2002, even if they were approved, as long as the beneficiaries had not been issued travel documentation as of that date. *Id.*

Finally, with respect to asylum adjustment cases under INA § 209, USCIS indicates that when the adjustment application is being adjudicated, the applicant is already an asylee based on classification as a child. *See* “The Child Status Protection Act – Children of Asylees and Refugees” (August 17, 2004), *supra* at n. 2. Thus, USCIS concludes that the applicant remains eligible to retain the classification of asylee for an I-485 application filed on or *after* this date. (Emphasis in the original).

## **2. IMMEDIATE RELATIVE—CHILD OF A U.S. CITIZEN**

As a general rule, the CSPA freezes the age of a child of a United States citizen (USC) on the date that the USC parent files an I-130 visa petition for the child (or the date on which an immediate relative files a self-petition under VAWA). CSPA §2; 8 U.S.C. §§ 1151(f)(1) and (4); *see also* “Revised Guidance for the CSPA” (April 30, 2008), *supra*. Thus, if a U.S. citizen father files an I-130 for his unmarried daughter when the daughter is 20, the daughter will retain the status of a “child” even if the visa petition or adjustment of status application is not adjudicated until the daughter is 22 years old.

The CSPA includes two statutory modifications to this general rule, both of which involve conversions of a petition from a preference category to the immediate relative category. First, when an LPR petitions for a child under the 2A preference category, and the LPR naturalizes while the petition is pending, the age of the child will freeze on the date of the parent’s naturalization. If the child is under 21 on that date, the petition will be converted to an immediate relative petition. 8 U.S.C. § 1151(f)(2); *see also* “Revised Guidance for the CSPA” (April 30, 2008), *supra*.

Second, when a USC parent files a visa petition for a married son or daughter under the third preference, and the son or daughter legally terminates the marriage while the

petition is pending, the son or daughter's age will freeze on the date that the marriage is legally terminated. If this age is under 21, the petition will be converted to an immediate relative petition. 8 U.S.C. § 1153(f)(3); *see also* "Revised Guidance for the CSPA" (April 30, 2008), *supra*.

Additionally, although not in the statute, DOS has stated that it will allow certain beneficiaries who initially fell within the immediate relative category but who aged out and were converted to the family 1st preference category and who, under the CSPA, are again eligible for immediate relative status, to opt out of such a conversion. *See* "Child Status Protection Act: ALDAC 2" (January 17, 2003), [http://travel.state.gov/visa/laws/telegrams/telegrams\\_1369.html](http://travel.state.gov/visa/laws/telegrams/telegrams_1369.html). DOS explains that beneficiaries with children may want to remain in the 1st preference category in order to have their children included as derivatives—an option that is not open to immediate relatives. This opt-out from CSPA coverage will be allowed if the beneficiary requests this and if the priority date falls within the first preference cut-off date. It is not clear from the DOS cable, however, whether this option is limited to those whose cases initially began in the immediate relative category.

### **3. CHILD OF LPR OR DERIVATIVE CHILD OF FAMILY-BASED, EMPLOYMENT-BASED, OR DIVERSITY VISA**

The process for determining the age of the child beneficiary – either direct or derivative – of a family-sponsored, employment-based, or diversity visa under the CSPA is more complicated. The statutory formula for these cases is that the child's age will freeze as of the date that a visa number becomes available for the petition in question reduced by the number of days that the petition was pending, but only if the child seeks to acquire the status of an LPR within one year of the date the visa became available. CSPA §3; \* U.S.C. §§ 1153(h)(1) and (2). This CSPA benefit also applies to self-petitioners and to derivatives of self-petitioners. 8 U.S.C. § 1153(h)(4).

This formula can be broken down into three steps:

- First, determine the child's age at the time a visa number becomes available;
- Second, subtract from this age the number of days that the visa petition was pending; and
- Third, determine whether the beneficiary sought LPR status within one year of the visa availability date.

The first two steps will determine the child's age. This age will only be frozen, however, if the third step is met. Each of these steps is discussed briefly below. Both the INS memoranda and DOS cables cited in this practice advisory contain examples illustrating how this formula applies in a variety of case situations. DOS also provides a worksheet to calculate age. *See* "Child Status Protection Act: ALDAC 2" (January 17, 2003), *supra*.

When calculating the child's age, remember that the U.S. Patriot Act provides extended "child" status to those who turned 21 during or after September 2001. USA PATRIOT

Act, Pub.L. No. 107-56, 115 Stat. 272 (2001). Beneficiaries who turned 21 during September 2001 are entitled to a 90-day extension of their child status. This means that these beneficiaries can subtract 90 days from their biological age before calculating their CSPA age. Beneficiaries who turn 21 after September 2001 are entitled to a 45-day extension of their child status, which means they can subtract 45 days from their biological age.

**a. How do I determine when a visa number has become available?**

The first step is to determine the child's age at the time that a visa number became available for the petition in question. Both USCIS and DOS state that a visa number becomes available on the first day of the month that the DOS Visa Bulletin says that the priority date has been reached.

If the visa number is already available when the petition is approved, however, the agencies interpret the "visa availability" date for the CSPA as the date that the petition is approved. "Revised Guidance for the CSPA" (April 30, 2008), *supra*; "Child Status Protection Act: ALDAC 1" (August 26, 2002), [http://travel.state.gov/visa/laws/telegrams/telegrams\\_1429.html](http://travel.state.gov/visa/laws/telegrams/telegrams_1429.html). DOS rejected an alternate interpretation advanced by AILA that a *visa number* is distinguishable from a visa, and that a *visa number* becomes available when the priority date becomes current, even if the visa itself is not available yet. See "DOS Answers to AILA Questions" (*published on AILA InfoNet at Doc. 03040340 (posted Apr. 3, 2003)*).

If a visa availability date retrogresses after the individual has filed an application for adjustment of status (Form I-485) based upon an *approved* visa petition, USCIS states that it will retain the I-485 and note on it the visa availability date at the time that the I-485 was filed. When a visa number again becomes available, USCIS is to calculate the beneficiary's age under the CSPA formula by using the earlier visa availability date marked on the I-485. See "Revised Guidance for the CSPA" (April 30, 2008), *supra*. USCIS says that it will not follow this practice if the I-485 was not filed at the time that the visa availability date retrogressed. Instead, if the I-485 is filed after the visa date retrogresses but before one year of when the visa availability date again becomes current, the beneficiary's age is calculated using the second visa availability date. *Id.*

**b. How do I determine how long a visa petition has been pending?**

A child's age will be determined by subtracting the number of days that the visa petition was pending from the child's age at the time a visa number became available. Generally, a petition is pending between the date that the petition is properly filed (receipt date) and the date that an approval is issued. In family-sponsored cases, the receipt date is also the priority date. For employment-based cases, however, the date to be used in CSPA calculations is the date the I-140 is filed (the receipt date) and not the priority date. "Revised Guidance for the CSPA" (April 30, 2008), *supra*.

Both USCIS and DOS state that for a derivative of a diversity visa, a petition is considered pending between the first day of the DV mail-in application period for the program year in which the principal has qualified and the date on the letter notifying the principal applicant that the application was selected. *See id.*; “Child Status Protection Act: ALDAC 1” (August 26, 2002), *supra*.

**c. How do I determine whether the beneficiary sought LPR status within one year of visa availability?**

The child’s age—determined by the first two steps above—will freeze only if the beneficiary sought to acquire the status of an LPR within one year of the visa availability. For a child beneficiary who is adjusting status, USCIS interprets the phrase “sought to acquire” LPR status narrowly. USCIS limits this phrase to filing an I-485 application for adjustment. *See* “Revised Guidance for the CSPA” (April 30, 2008), *supra*.

DOS indicates that in consular processing cases, the date that a child seeks to acquire LPR status is the date Form DS 230, Part I is submitted by the child, or by the child’s parent on the child’s behalf. DOS stresses that in derivative cases, it must be Part I of an application filed specifically on behalf of the derivative child; it is not enough for the principal to seek LPR status within the one-year time frame. *See* “Child Status Protection Act: ALDAC 2” (January 17, 2003), *supra*. In cases in which no record of Part I of the visa packet for a derivative child exists at the post, DOS places the burden on the derivative to demonstrate sufficient alternate proof. *Id.*

In cases in which the principal beneficiary adjusted status in the United States and the derivative is applying for a visa abroad, the derivative will be considered to have sought LPR status on the date that the principal filed Form I-824 to initiate the child’s follow-to-join application. Because Form I-824 is not the only way to initiate this process, DOS instructed posts to seek an advisory opinion in cases in which some other “concrete” step was taken. *Id.* What constitutes a “concrete” step has not been delineated.

In a 2004 unpublished decision involving adjustment of status, the BIA rejected USCIS’s narrow interpretation of the phrase “sought to acquire.” *See In re Kim*, 2004 WL 3187209 (BIA Dec. 20, 2004). The Board considered the exact statutory language as well as Congress’s intent to promote family unification, and held that the phrase “sought to acquire” was broader than the word “filed” and thus could not be limited to the one discrete step of filing an adjustment of status application. The BIA held that the CSPA was applicable in Kim’s case even though the adjustment application was not filed until 17 months after the visa petition was approved. Despite this time period, the BIA found that the beneficiary sought to acquire LPR status within one year of visa approval because her parents hired an attorney to start preparing the adjustment application within the one year period, the adjustment application was filed within a reasonable time thereafter, and the child was still under the age of 21 when the application was filed.

More recently, in *In re Castillo-Bonilla*, 2008 WL 4146759 (BIA Aug. 20, 2008) (unpublished), the BIA held that a respondent in proceedings had “sought to acquire”

permanent residence within the one year period when, during this time, he informed both the immigration judge and the BIA that he wished to file an adjustment application, even though he never actually filed this application.

*In re Kim* and *In re Castillo-Bonilla* are unpublished and thus not precedential. However, practitioners may make the same arguments in their cases – before USCIS, in immigration court, and before the Board – and may submit the decisions in support.

#### **4. AUTOMATIC CONVERSION AND RETENTION OF PRIORITY DATE FOR AGED-OUT BENEFICIARIES**

The CSPA does not protect all beneficiaries from “aging out.” Some individuals will be found to be over 21 when the CSPA formula for determining the age of the beneficiary is applied. However, CSPA § 3 provides other benefits for certain of these aged-out individuals. 8 U.S.C. § 1153(h)(3).

If after applying the CSPA formula the age of a beneficiary is determined to be 21 years or older for purposes of 8 U.S.C. §§ 1153(a)(2) (petitions filed by LPRs) or 1153(d) (derivative beneficiaries of family, employment and diversity visa petitions), § 1153(h)(3) states that “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.”

In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA narrowly interpreted § 1153(h)(3) by holding that its priority date retention and automatic conversion provisions do not apply to a derivative beneficiary of a 4th preference family-based visa petition. Instead, the BIA found that these provisions only apply to visa petitions filed by an LPR parent for a child as either a direct or derivative beneficiary (i.e., in the family 2A category). Thus, the BIA found that Wang’s aged-out daughter – who had been named as a derivative beneficiary in the 4th preference visa petition filed for Wang by his brother – could not retain the priority date of this 4th preference visa petition.

Under the BIA’s interpretation in *Matter of Wang*, § 1153(h)(3) only would apply to direct or derivative beneficiaries of the family 2A preference category. This interpretation ignores the plain language of § 1153(h)(3), which by referencing § 1153(d) covers all derivative beneficiaries, including those in other family-based petitions and in employment-based and diversity petitions.<sup>6</sup>

Even before *Matter of Wang*, USCIS was interpreting § 1153(h)(3) in the same restrictive manner. A national class action challenging DHS’ narrow interpretation of § 1153(h)(3) is pending in the District Court for the Central District of California. *Costelo v. Chertoff*,

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<sup>6</sup> An earlier unpublished BIA decision had interpreted this provision more liberally, in accord with precise language of the statute. *See Matter of Garcia*, 2006 WL 2183654 (BIA June 16, 2006).



No. 08-688 (C.D. Cal. *filed* June 20, 2008). The district court has certified a class consisting of LPR parents:

- Who gained their LPR status through 3d and 4th preference family-based visa petitions;
- Whose children had been named as derivative beneficiaries on the original 3d and 4th preference visa petitions;
- Who subsequently filed 2d preference visa petitions for their now adult, unmarried children; and
- Whose 2d preference visa petitions have not been accorded the benefits of § 1153(h)(3) (automatic conversion and retention of priority date) by USCIS.

See <http://www.aifl.org/lac/chdocs/costello-classcert.pdf>.<sup>7</sup> Updates on this case will be posted on AILF's website. See [http://www.aifl.org/lac/lac\\_index.shtml](http://www.aifl.org/lac/lac_index.shtml).

## **5. CONVERSION FROM 2d PREFERENCE TO 1ST PREFERENCE; OPT OUT PROVISION**

CSPA § 6 addresses what happens to a visa petition for an unmarried son or daughter of an LPR when the parent naturalizes. 8 U.S.C. § 1154(k). It provides that a family-based visa petition filed by an LPR on behalf of an unmarried son or daughter (who is over 21) will automatically convert to a 1st preference petition if the LPR naturalizes while the petition is still pending. If the beneficiary was assigned a priority date prior to the conversion of the petition, he or she will maintain that priority date after the conversion.

Section 1154(k) also allows the beneficiary to elect not to have the petition converted to 1st preference, or if already converted, to have the conversion revoked. When the beneficiary makes this election, the case will continue as if the parent had not naturalized – that is, as a 2B preference petition. See “Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under The Child Status Protection Act Section 6 And Form I-539 Adjudications for V Status” (June 14, 2006), <http://www.uscis.gov/files/pressrelease/CSPA6andV061406.pdf>. This option will primarily benefit Mexicans and Filipinos because the backlog for the first preference category for these countries is greater than the backlog for the 2B preference category. See, e.g., DOS Visa Bulletin (September 2009), [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_4558.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_4558.html).

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<sup>7</sup> The court's class definition reads as follows:  
Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § [1153(h)(3)].

UCIS will allow a beneficiary to “opt out” regardless of whether the original petition was initially filed in the 2B preference category or was first filed in the 2A preference category and later converted to the 2B category because the child aged out. *See* “Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under The Child Status Protection Act Section 6 And Form I-539 Adjudications for V Status” (June 14, 2006), *supra*. UCIS reads the statutory language “initially filed” to mean that the petition was *initially filed* for a beneficiary who is *now* in the 2B unmarried son or daughter classification, regardless of whether the petition was originally filed in the 2A category.<sup>8</sup>

## 6. DOES THE CSPA APPLY RETROACTIVELY?

The CSPA was effective on August 6, 2002. It applies to all children who turn 21 after this effective date, provided all other requirements of the CSPA are met.<sup>9</sup> The statute has an effective date provision (CSPA § 8) which governs how the statute is to be applied to cases in which some relevant event occurred prior to August 6, 2002, the date that the CSPA was adopted. USCIS has interpreted this provision as applying the CSPA to three sets of cases:

- Cases in which the visa petition was approved prior to August 6, 2002, but a final determination has not been made on a beneficiary’s application for an immigrant visa or adjustment of status pursuant to the approved petition;
- Cases in which the visa petition is pending on or after August 6, 2002; and
- Cases in which the application for an immigrant visa or adjustment of status is pending on or after August 6, 2002.

USCIS had interpreted the statutory term “final determination” (as used in CSPA § 8(1)) to mean *agency* approval or denial issued by USCIS or EOIR.<sup>10</sup> In contrast, the Ninth

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<sup>8</sup> Previously, CIS interpreted the statutory phrase “initially filed” as limiting the opt-out election to beneficiaries of petitions that *originally* were filed in the 2B preference category. Thus, in earlier guidance on this issue, CIS stated that it would not allow a beneficiary to exercise the opt-out election if the petition was filed originally as a 2A petition for the child of an LPR and then converted to a 2B petition because the child aged-out prior to the parent’s naturalization.

<sup>9</sup> Both USCIS and DOS agree that the statute applies to a child who ages out after August 6, 2002, the statute’s effective date. In determining whether a child aged out after this date, it is important to remember the 45-day extension contained in the USA PATRIOT Act. Under this provision, the child beneficiary of a petition filed prior to September 11, 2001, will remain eligible for child status for 45 days if they turn 21 after September 11, 2001. Children who turn 21 during September 2001, will remain eligible for child status for an additional 90 days. USA PATRIOT Act of 2001, Pub.L. No. 107-56, 115 Stat. 272.

<sup>10</sup> It is not clear whether this remains the agency’s interpretation, since the memo in which this interpretation appeared has since been replaced. *See* “Revised Guidance for the CSPA” (April 30, 2008), *supra*, replacing “The Child Status Protection Act --

Circuit in *Padash v. INS*, rejected the interpretation of a “final determination” as limited to an agency determination, and instead found that there was no final determination of an adjustment application when an appeal of the agency’s denial of the application was pending in federal court. *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004).

The BIA also has resolved an issue relating to CSPA § (8)(1). In *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007), the BIA held that the CSPA applied where a visa petition for an immediate relative was approved prior to August 6, 2002 and an adjustment application was not pending on that date but was subsequently filed. In so holding, the BIA rejected DHS’ argument that, for this effective date provision to be triggered, an adjustment application must have been pending on August 6, 2002.

Over a year later, USCIS issued a new memorandum that, *inter alia*, implements the holding of *Matter of Avila-Perez*. “Revised Guidance for the CSPA” (April 30, 2008), *supra*. This memo reverses USCIS’ earlier position that had required an application for permanent residence to be pending on August 6, 2002. It also attempts to remedy the situation for those wrongly denied or discouraged from filing under the old policy.

First, it allows a beneficiary of a visa petition approved prior to August 6, 2002 to file a motion to reopen his or her adjustment application where that application had been denied under the prior policy because it was filed after August 6, 2002, provided the beneficiary meets all other requirements for CSPA coverage.

Second, the memorandum also provides for those who did not apply for adjustment of status but who would have been eligible but for the erroneous agency policy. It allows a beneficiary whose visa became available on or after August 7, 2001 (one year prior to the statute’s adoption date) to apply for adjustment now, even though this adjustment application would not be filed within one year of the visa availability date.

On June 15, 2009, USCIS issued guidance on this memorandum. This fact sheet does not offer any new interpretation but instead attempts to explain the April 30, 2008 memorandum. “Questions and Answers, USCIS Guidance on the Applicability of the Child Status Protection Act” (June 15, 2009), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=10409fed09eb9110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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Memorandum Number 2” (February 14, 2003), [http://www.uscis.gov/files/pressrelease/CSPA2\\_pub.pdf](http://www.uscis.gov/files/pressrelease/CSPA2_pub.pdf).