



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

October 26, 2023

Ur Jaddou
Director
United States Citizenship and Immigration Services
5900 Capital Gateway Dr.
Camp Springs, MD 20588-0009

Submitted via: policyfeedback@uscis.dhs.gov.

Re: USCIS Policy Manual, Volume 7: Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act – Comment

Dear Director Jaddou:

On behalf of the American Immigration Lawyers Association (AILA), we submit the following comments relating to the recently updated USCIS policy guidance on the “sought to acquire” requirement under the Child Status Protection Act (CSPA) found in Volume 7: Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act (“Policy Manual”) as announced in a [Policy Alert](#) dated August 24, 2023 (“Policy Alert”).

AILA is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

We appreciate the opportunity to provide comments to USCIS relating to its recent update to Volume 7, Part A, Chapter 7 of the USCIS Policy Manual pertaining to the Child Status Protection Act. We believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Background

In an effort to resolve inconsistency created by the establishment of two separate immigrant visa availability charts, one listing Dates for Filing and another listing Final Action Dates, the relevant section of the Policy Manual was updated in February of 2023 to indicate that, “USCIS

AILA National Office

1331 G Street NW, Suite 300, Washington, DC 20005

Phone: 202.507.7600 | Fax: 202.783.7853 | www.aila.org

... now considers a visa available to calculate CSPA age at the same time USCIS considers a visa immediately available for accepting and processing the adjustment of status application.”

The Policy Manual update was published with the goal of resolving any contradiction between different dates in the visa bulletin and the statutory text regarding when a visa is “available.” Specifically, the February 2023 Policy Manual update states that:

- When USCIS determines there are more immigrant visas available for a fiscal year than there are known applicants for such visas, and USCIS announces that prospective applicants may use the Dates for Filing chart when filing adjustment of status applications, then USCIS also uses the Dates for Filing chart when calculating the applicant’s CSPA age.
- When USCIS announces that a prospective applicant must use the Final Action Dates chart when filing the adjustment of status application, then USCIS uses the Final Action Dates chart when calculating the applicant’s CSPA age.

Subsequent to the issuance of the February 2023 Policy Manual update, USCIS determined that foreign nationals who may benefit from the new methodology for determining when a visa became “available” may in fact no longer be eligible to apply for adjustment of status either because they had not “sought to acquire” an immigrant visa either because they did not qualify based on the prior procedure or would have been ineligible because their CSPA age would have been calculated to be over 21 under the prior procedure. To address this issue, USCIS issued updated Policy Manual guidance on August 14, 2023 to “clarify that USCIS considers the February 14, 2023, policy change to be an extraordinary circumstance that may excuse an applicant’s failure to meet the ‘sought to acquire’ requirement provided that the delay in filing the adjustment of status application is reasonable under the circumstances.”

CSPA and USCIS Use of Dates for Filing Chart

While this Policy Manual update provided welcome flexibility, specific questions remain. For example:

- Can a foreign national only use the Dates for Filing chart to lock in a child’s age if USCIS *allows* Dates for Filing chart filings for that month?

An example can best illustrate this issue. In October 2020, USCIS designates the Dates for Filing chart of the DOS Visa Bulletin for use to apply for adjustment of status in the employment-based preference categories. Even though visas are available to a principal applicant and a derivative child based on their priority date and country of chargeability in both October and November, the derivative child is unable to apply for adjustment of status in October or November, although the principal does apply. For instance, a derivative child may be away from home for school or studying abroad and may be unavailable to complete the requirements of the I-485 in a timely

manner. Then, in December 2020, USCIS designates the Final Action Dates chart for use by prospective applicants in the employment-based preference categories. The derivative child does not have an available visa based on the Final Action Dates chart in December 2020 and cannot apply during that month. One year later, in December 2021, a visa once again becomes available to the derivative child based on the Dates for Filing chart, which USCIS has designated for use in that month, and the derivative child files an application for adjustment of status on December 1, 2021. At that point, USCIS would calculate CSPA age based on the derivative's age on December 1, 2021, not in October 2020. As the example above illustrates, derivative children who did not apply in October or November 2020 with their parents, and then could not subsequently file until December 2021, when a visa once again became available, would now have their age recalculated over a year later and may therefore have "aged out."

Although the agency has provided needed flexibility with respect to the extraordinary circumstances exception to the one year "sought to acquire" requirement, a significant issue remains in that derivatives in this situation are going to have their age recalculated as older than if they had filed for adjustment of status back in 2020, which they would have likely done if the policy announced on February 14, 2023 was in effect, and, in a significant number of cases, their CSPA age will now be over 21. The fact that the one year "sought to acquire" rule is now more flexible does not affect this calculation. Because of this policy interpretation by USCIS, the foreign national in the example highlighted above is not considered to have locked-in their age in 2020, but rather their age is recalculated at the much later date of December 2021. In order to more fully implement the positive aspects of the February 14th and August 14th Policy Manual updates, we believe further clarification¹ is needed to indicate that applicants who would have had their CSPA age "locked in" based on the additional flexibility provided by the recent updates but who did not do so because they were ineligible under the prior policy are now eligible to apply for an immigrant visa.

CSPA and Concurrent Filing

We believe the CSPA policy manual should expressly confirm that a concurrent Form I-485 filing will establish the derivative's age for CSPA purposes and also satisfy the 'seeking to acquire' requirement under the CSPA, even though at the time of concurrent filing there has not yet been a CSPA age determination under current USCIS policy.² Because the date on which the

¹ A proposed clarification could indicate, "To more fully implement the August 14, 2023 policy change amending the "sought to acquire" requirement, derivative visa applicants who would have been eligible to file for adjustment of status and who would have their CSPA age calculated based on the Date for Filing chart but who did not do so because the policy in effect on that date determined their CSPA age based on the Final Action dates chart, may establish their CSPA age using the date a visa first became available to them based on the Dates for Filing chart and file for adjustment of status if their CSPA age would permit them to be considered a derivative applicant."

² As a reference, the Policy Manual expressly provides, "[t]he CSPA age associated with the petition does not change after the filing of the adjustment of status application and is frozen through the final adjudication, regardless

visa number became available for the concurrent application would necessarily include the date of Form I-485 filing, the beneficiary's age should be locked-in for CSPA purposes as long as the underlying visa petition is ultimately approved.

We believe an appropriate reading of the statute would freeze the child's age at the time of the Form I-485 filing. The language of Section 245(a) of the INA requires that, in order to file an application for adjustment of status to permanent residence, "an immigrant visa [must be] immediately available to him at the time his application is filed." Similarly, the CSPA freezes the age of a child "on the date on which an immigrant visa number becomes available for such alien." Because the language of the two sections is, as a practical matter, identical, and as the application for adjustment of status is properly filed based upon immediate visa number availability, the requirement of the CSPA is also satisfied and the child's age should be frozen at the age at the time of filing. When the immigrant visa petition is approved and the CSPA age is determined to be under 21 based on the date of filing, the child who has concurrently filed the Form I-485 will also be deemed to have satisfied the 'seeking to acquire' requirement without any further action, thereby locking in the CSPA age at the date of filing even if there is subsequent retrogression.

We further believe that the Policy Manual should confirm that the CSPA age will be locked in even if the visa availability retrogresses subsequent to the concurrent filing. If, for example, the child who is age 20 at the time of the concurrent filing is subsequently age 21 at the time of the Form I-140 approval, the child should still be eligible to adjust status, once the priority date is again current, even if visa availability had retrogressed and was unavailable to the beneficiary at the time USCIS approved the Form I-140

CSPA and the Determination of When a Visa Becomes Available

This example also raises a separate and critical issue with respect to the agency's position on recalculating the CSPA age when a derivative child is unable to file for adjustment of status before cut-off date retrogresses. USCIS policy in this regard appears inconsistent with the statutory language, which indicates:

203(h)(1) In General. For purposes of subsections (a)(2)(A) and (d), a determination of whether an [foreign national] satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using –

- A. The age of the [foreign national] on the date on which an immigrant visa number becomes available for such [foreign national] (or, in the case of subsection (d), the date on which an immigrant visa number became available for the [foreign national]'s parent), but only if the [foreign national] has sought to acquire the status of [a foreign

of when a visa is authorized for issuance based on the Final Action Dates chart. Volume 7: Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act, Section F.5

national] lawfully admitted for permanent residence within one year of such availability; reduced by

- B. The number of days in the period during which the applicable petition described in paragraph (2) was pending.

The statutory language indicates that the CSPA age is calculated when the “**visa number becomes available**” to the person’s parent, that is, when it first becomes available, not when it subsequently becomes available after a visa cutoff date retrogression. The only part of the statute that requires a foreign national to file for adjustment of status relates to the one year “sought to acquire” provision. The plain meaning of the statutory language is that the CSPA age is established at the age of first availability, with only a subsequent requirement to seek to acquire the immigrant visa within one year of availability. Accordingly, adding an additional condition on eligibility that requires a subsequent recalculation after a period of retrogression is *ultra vires* and we request amendment of the relevant Policy Manual section³ to comport with the plain statutory language and provide that the CSPA age is established when an immigrant visa first becomes available to the foreign national.

Conclusion

We thank you for this opportunity to provide comments on the policy guidance contained in Volume 7, Part A, Chapter 7 of the USCIS Policy Manual regarding the Child Status Protection Act. We look forward to a continuing dialogue on this and related matters.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

³ 7 USCIS-PM 7.F(6).