Lost In A Maze Of USCIS Policy On Child Immigration Status

By **Jeffrey Galkin and Anna Stepanova** (October 30, 2023)

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Yogi Berra once quipped: "I really didn't say everything I said." This inherently contradictory statement perfectly describes a recent series of seemingly inconsistent actions by U.S. Citizenship and Immigration Services surrounding the Child Status Protection Act, a critical law that protects children from aging out of a parent's immigrant petition.[1]

A succession of USCIS policy updates, erroneous denials and conflicting messages has left some practitioners confused and with limited ability to help clients benefit from the CSPA.

The Child Status Protection Act

The CSPA protects certain children of intending immigrants from aging out of a parent's immigrant petition, so they can become lawful permanent residents as a derivative child of the primary applicant. In general, a child can benefit from an immigrant petition filed on behalf of a parent until they are 21 years old.

If a child turns 21 before an immigrant visa is available — i.e., before the parent's priority date becomes current — the child ages out and can no longer benefit from the parent's petition. To alleviate this issue, Congress enacted the CSPA in August 2002, which created a formula for calculating a child's "CSPA age."

The formula locks in a child's actual age when a visa number becomes available for the child, and deducts the length of time the parent's petition was pending from the child's age. The difference results in the child's CSPA age and, if the CSPA age is below 21 years, the child can apply for lawful permanent resident status based on the parent's petition — so long as the child seeks to acquire an immigrant visa or applies for adjustment of status within one year of the immigrant visa becoming available.

The U.S. Department of State Visa Bulletin has two separate charts indicating visa availability for both family-based and employment-based immigrant categories: the final action date chart, or Chart A, and the dates for filing chart, or Chart B.[2] An intending immigrant's priority date must be current in order to apply for adjustment of status or for an immigrant visa.

With regard to applying for adjustment of status, each month, USCIS specifies which chart will be used to determine whether an individual's priority date is available to apply. Historically, regardless of which chart could be used for filing an application for adjustment of status, the derivative children would only be protected by the CSPA with regard to its age calculation formula if their parent's priority date was current per Chart A, and not Chart B.

However, this policy posed a challenge for derivative children who filed for adjustment of status pursuant to the USCIS' announcement designating Chart B for filing, when their parent's priority date was still not current based on Chart A. In such a scenario, the child could still age out if Chart A did not advance sufficiently before the child reaches a certain

age.

USCIS Starts Using Chart B for CSPA Age Calculations

On Feb. 14, USCIS pleasantly surprised the immigration community with an update to its CSPA policy guidance stating that Chart B would determine the date of visa availability for purposes of the CSPA age calculation in months when USCIS designates Chart B for filing eligibility.[3]

This policy change significantly expanded the CSPA's protection as it applied to an additional group of derivative children at risk of aging out by allowing the CSPA age calculation to occur at an earlier age, in some cases.

To illustrate the new policy's impact, suppose a child is 18 years old when an employer files an immigrant petition for a parent. The petition remains pending for 12 months before it is approved. When the child is 21 years and 10 months old, the parent's priority date becomes current on Chart B, but not yet on Chart A, and the child files for adjustment of status in a month USCIS designates Chart B for filing.

Under the new policy, the child's CSPA age is locked-in at 20 years and 10 months and the child is protected from aging out. Under the old policy however, the child would still be at risk of aging out if Chart A does not become current before the child's actual age of 22 years old — and CSPA age of under 21, based on this scenario.

While the policy change alone was a reason to celebrate going forward, USCIS went the extra mile and said that the policy could be retroactively applied to children who previously filed based on Chart B, but aged out of a parent's petition under the old CSPA policy because of unavailability of the visa based on Chart A. For these children to take advantage of the updated policy, the USCIS policy alert instructed:

[N]oncitizens may file a motion to reopen their previously denied adjustment of status application with USCIS using a Notice of Appeal or Motion (Form I-290B). Noncitizens must generally file motions to reopen within 30 days of the decision. For a motion filed more than 30 days after the denial, if the noncitizen demonstrates that the delay was reasonable and was beyond their control, USCIS may in its discretion excuse the untimely filing of the motion.

This instruction, which remains on the USCIS CSPA webpage, plainly invites children who previously had their applications for adjustment of status denied in this scenario to file a late motion to reopen a denied application to register permanent residence or adjust status, also known as a I-485.[4] It certainly appears that the lateness of filing should be excused as reasonable if the Feb. 14 policy update was not in place at the time of the initial filing.

Naturally, practitioners rushed to help clients take advantage of this retroactive policy. However, the plain language of USCIS' own guidance is contradicted sometimes by the agency's actions.

Despite the instructions provided by the Feb. 14 policy alert, in our practice we have seen USCIS refusing to excuse the lateness of a filing as unreasonable or beyond the control of the applicant, resulting in an outright dismissal of a late motion — a devastating outcome for the family that left the attorneys utterly perplexed.

What is even more surprising, the Office of the Citizenship and Immigration Services

Ombudsman tends to agree with the USCIS' assertions that the policy update was not meant to have any retroactive effect.

USCIS Expands CSPA Extraordinary Circumstances Exception

The plot thickened on Aug. 24, when USCIS issued yet a new policy update for the CSPA.[5] The new policy expanded the extraordinary circumstances exception for the sought-to-acquire requirement under the CSPA in light of the Feb. 14 policy update.

To benefit from the CSPA's protection, a child must have sought to acquire lawful permanent resident status within one year of the parent's priority date becoming current. A child who fails to satisfy this requirement generally cannot benefit from the CSPA's protection. However, if a child's failure to meet the sought-to-acquire requirement was directly caused by extraordinary circumstances beyond the child's control, USCIS may excuse a child's late application.

Such extraordinary circumstances can include a serious illness or disability of the child or the death or incapacity of an individual critical to helping the child file an application, among other situations.

Under the old CSPA policy, many children who filed their applications under Chart B and subsequently aged out, had their applications promptly denied by USCIS. However, some others were discouraged from filing adjustment of status applications based on Chart B due to the likelihood that they would age out and their applications would be denied.

Following the most current CSPA age calculation update, a child who previously aged out of a parent's immigrant petition under the old policy might now be determined to have not aged out under the new policy and therefore be eligible to seek lawful permanent resident status.

However, such a child's priority date may have become current more than a year before the Feb. 14 CSPA age calculation update, in which case the child cannot meet the one year sought-to-acquire requirement. The Aug. 24 policy update remedies this issue by considering the Feb. 14 CSPA age calculation update as an extraordinary circumstance sufficient to excuse a child's failure to meet the sought-to-acquire requirement.

The Aug. 24 policy update introduced a new twist to the CSPA retroactive policy saga. After USCIS repeatedly denied that the updated CSPA age calculation policy was retroactive, it appears that the policy is, in fact, retroactive, albeit applicable to a slightly different scenario.

It appears that the Aug. 24 policy update was meant to fix the misinterpretation by USCIS of its own policy issued on Feb. 14 by allowing those children who ended up not making the filing when given the opportunity to file under Chart B, to fulfill their sought-to-acquire requirement by filing their applications outside the one-year window of the priority date becoming current.

While practitioners should celebrate another expansion of the CSPA's protection, the conflicting messages from USCIS dampen the celebratory spirit. Naturally, the first thought of a practitioner who witnessed the aftermath of the Feb. 14 update is whether USCIS will actually honor this new policy.

However, in our practice, we recently saw a glimmer of hope after a recently filed case

matching the Aug. 24 scenario was approved. Despite this success, the Aug. 24 policy leaves a trail of unanswered questions. USCIS has yet to indicate whether the August policy update is a narrow policy change or a tacit acknowledgment that the Feb. 14 update is generally retroactive.

Moreover, if the Feb. 14 policy update is indeed generally retroactive, it is not clear if USCIS now intends to honor the initial allowance for a child to file a late motion to reopen on a previously denied adjustment of status application.

Additionally, the Aug. 24 policy update does not specify whether it only applies to children who never filed for adjustment of status or if it also includes children who previously filed and were denied. If the latter group is included, it can negate the need to file a late motion to reopen on a previously denied application.

Finally, how do all the policy updates affect the consular processing of immigrant visas, if at all? The answers to these and many other questions are still unclear. Given USCIS has never promulgated any regulations implementing the CSPA, immigration practitioners and their clients are left to rely on USCIS' multiple memoranda which are, in large part, contradictory and inconsistent.

Conclusion

The CSPA was intended to protect children from aging out and to prevent families from splitting apart. Recent conflicting actions and policies from USCIS have confused practitioners and have compromised the CSPA's ability to fulfill its purpose. A practitioner who is lost in the CSPA policy maze and uncertain about how to proceed may need to follow the advice of a different Yogi-ism: "When you come to a fork in the road, take it."

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[1] https://www.govinfo.gov/content/pkg/PLAW-107publ208/pdf/PLAW-107publ208.pdf.

[2] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html.

[3] https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230214-CSPA.pdf.

[4] https://www.uscis.gov/green-card/green-card-processes-and-procedures/child-status-protection-act-cspa.

[5] https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230824-CSPA.pdf.