

Child Status Protection Act

In January 2011 the CIS Ombudsman's Office hosted a public teleconference on the Child Status Protection Act (CSPA) to share information from USCIS regarding the logistics of priority date retention and “aging out.”

History: The CSPA was enacted on August 6, 2002, to help applicants who would have otherwise turned 21 and “aged out,” thereby losing the possibility of gaining immigration benefits reserved for children under 21. The CSPA addresses problems with USCIS processing delays which inevitably caused beneficiaries to lose their status as they turned 21. The law has different formulas for how the CSPA age should be calculated depending on whether the person is the child of a U.S. citizen, the child of a green card holder, a derivative in the family- or employment-based categories, an asylee/refugee derivative, or a derivative based on the Violence Against Women Act (VAWA). Although it does not protect all applicants, the CSPA ensures that certain family members who turn 21 will not be penalized due to USCIS processing delays which are beyond their control.

Immediate Relative Children of US Citizens: Immediate-relative children who were unmarried and under 21 at the time their U.S. citizen parent filed a Form I-130 Petition for Alien Relative on their behalf are allowed to preserve their immediate relative status upon turning 21. In effect they will never age out. Under the prior law, they would have automatically moved into the first-preference category upon turning 21.

Children who were married and under 21 at the time their U.S. citizen parent filed an I-130 on their behalf and who subsequently divorced before turning 21 convert to the immediate-relative category. The CSPA preserves their immediate-relative status when they turn 21.

Children who were unmarried and under 21 at the time their legal permanent resident (LPR) parent filed an I-130 on their behalf, and *whose parent subsequently naturalized before the child turned 21*, convert to the immediate-relative category. The CSPA preserves their immediate relative status when they turn 21.

Children of Green Card Holders (LPRS): Children (under the age of 21) of green card holders (LPRs) are classified in the second-preference 2A category. For citizens of most countries, the difference between being in the 2A category versus the 2B one is huge--it means waiting approximately five years for the visa to become current versus waiting almost nine years otherwise (for citizens of Mexico and the Philippines, the additional wait time in the 2B category is even longer). There is therefore a strong incentive to remain in the 2A category.

Children in the second-preference 2A category will preserve their 2A status upon turning 21 if they are under 21 using their “adjusted age” (see below) on the date the 2A category visa becomes available for their priority date.

The adjusted age is determined by subtracting the number of days the I-130 petition was pending before USCIS approval from the child’s biological age:

Adjusted Age:

Current Age – (the number of days in between the I-130 adjudication date and the filing date) = CSPA Age

Under current law, these children have one year from the date they became current to seek adjustment of status or an immigrant visa.

Family-Based Derivatives: Derivative children in the family-based categories will retain their derivative status upon turning 21 if they are under 21 using their adjusted age on the date the principal beneficiary's visa becomes available.

The adjusted age is determined by subtracting the number of days the I-130 was pending before being approved from the child's biological age:

Adjusted Age:

Current Age – (the number of days the I-130 was pending before being approved by USCIS) = CSPA Age

Derivative children in family-based categories who age out should automatically convert to the 2B category and retain the original priority date when their parent, after acquiring LPR status, files a new I-130 petition on their behalf. One interpretation is that the conversion is automatic and the LPR parent does not need to file a new I-130 on their child's behalf. USCIS' current position is that only derivative children in the 2A category automatically convert to the 2B category upon aging out and only they can retain the original priority date upon the petitioner's filing a new I-130 petition on their behalf. USCIS' interpretation is that the automatic conversion and retention of the priority date does not apply to derivatives in other family-based categories.

Employment-Based Derivative Children: Derivative children in employment-based categories will retain their derivative status upon turning 21 if they are under 21 using their "adjusted age" on the date their principal beneficiary's category becomes current. The adjusted age is determined by subtracting the number of days the I-140, Immigrant Petition for Alien Worker, was pending before approval from the child's biological age:

Adjusted Age:

Current Age – (the number of days the I-140 was pending before being approved by USCIS) = CSPA Age

Derivative children in employment-based categories have one year from the date they become current to seek adjustment of status or an immigrant visa. Right now derivative children in employment-based cases who age out do not automatically convert to the family-based 2B category.

Asylee/Refugee Derivative Children: Children who are over 21 at the time their Form I-589, Application for Asylum and Withholding of Removal, is approved will receive derivative asylum status if:

- They were under 21 years of age at the time their parent filed Form I-589;
- They were named in that application; and
- They are residing in the United States.

Children who meet the first two requirements but are residing outside of the United States may be eligible to receive derivative asylum status under certain circumstances. Children of refugees who filed an application for refugee status have similar protection from aging out under the CSPA. The CSPA coverage also extends to age-out situations under VAWA.

One Year Filing Requirement

To preserve 2A status, the child of an LPR must “seek to acquire” LPR status within one year of the visa becoming available. If the child fails to do so, the CSPA protections will be void and the child’s biological age will determine visa eligibility. USCIS has defined the term “sought to acquire” as filing for adjustment of status, filing for an immigrant visa, or filing a Form I-824, Application for Action on an Approved Application or Petition. As long as the child files a Form I-485, Application to Register Permanent Residence or Adjust Status, with USCIS within one year of the visa becoming available (the first day of the month when the Visa Bulletin indicates that the priority date is current), he or she has satisfied this requirement.

The U.S. Department of State (DOS) concurs with this interpretation. DOS has also defined the term “sought to acquire” for those who are applying for a visa from outside of the U.S. through a U.S. consulate. Submitting a completed Form DS-230 Part 1, Application for Immigrant Visa and Alien Registration, within one year of the visa becoming available satisfies that requirement. For consular processing, a derivative child will satisfy the one-year filing requirement by submitting a separate Form DS-230 Part 1. It is not enough that the principal beneficiary submitted one application covering the principal.

Visa Retrogression and CSPA Beneficiaries

Children under 21 who filed for adjustment of status when they were current in the 2A category may find themselves ineligible to adjust due to visa retrogression. The National Benefits Center (NBC) follows a policy of holding onto the adjustment applications in those cases and adjudicating the case or rescheduling the adjustment interviews once the 2A visa category becomes current again. ***If the applicant attempts to file when the visa has retrogressed and is no longer available, the NBC will reject the application.*** The National Visa Center (NVC) will not schedule the visa interview until the visa is available and will suspend processing if the visa has retrogressed and is no longer current. Visa retrogression affects both the adjusted age calculation and the one year filing requirement.

Applicants affected by visa retrogression that may be interested in seeking CSPA coverage:

- Applicant has waited more than one year to seek LPR status after the visa became available, and then the visa retrogresses. That child may not take advantage of the CSPA and visa retrogression is essentially irrelevant.
- Applicant is under 21 using his or her adjusted age and then filed for adjustment of status during the one-year window before visa retrogression. The subsequent visa retrogression will not affect that child; his or her 2A status is locked in. It does not matter when the visa becomes available again or how long it takes to complete the adjustment process. The same outcome should occur if the visa retrogressed before the child filed for adjustment, but then became available again during that initial one-year window and the child filed for adjustment before the end of that one year.
- Applicant is under 21 using the adjusted age and delays filing for adjustment of status. The visa date retrogresses, preventing the child from filing before the one year period has passed. In that case, USCIS calculates the applicant's age using CSPA principles on the date the visa becomes available the second time. If the child is under 21 on that date, he or she has one year from that date to seek LPR status (file for adjustment of status, an immigrant visa, or an I-824 under the agencies' current interpretations). Thus, a second one year window opens up on the date the priority date becomes current again, but the applicant's CSPA age is calculated on that date, not on the date the 2A category first became current.

Impact of LPR Naturalization on Unmarried Children: Under current law, an LPR parent's I-130 petition filed on behalf of an unmarried son or daughter over 21 will automatically convert from second-preference 2B to first preference when the LPR parent naturalizes. The same is true if the child was under 21 at the time the I-130 was filed but later turned 21 before the LPR naturalized. In some cases the first preference category may be backlogged further than the second preference 2B category—in such cases beneficiaries may decide whether they want to convert to first preference automatically or opt out and stay in the 2B category to reduce their wait time.