The Child Status Protection Act (CSPA) & Derivative Beneficiaries
Recapturing Priority Dates after *Scialabba*
Practice Advisory

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Background

Under Section 203(h)(1)(A) of the Immigration and Nationality Act (INA), The Child Status Protection Act (CSPA) protects derivative children of family-based I-130 petitions from "aging-out" in two ways. First, for those who are still under 21 when the priority date of the parent's I-130 petition becomes current (meaning that an immigrant visa has become available to them), the CSPA will allow them to continue to be considered under 21 through the adjudication of their application for permanent residence, *so long as they* "seek to acquire" that status within one year of when the priority date became current. Second, when a derivative child has already turned 21 at the time her parent's priority date becomes current, the CSPA provides a calculator that will yield a "CSPA age" by subtracting the amount of time the I-130 petition was pending from the *actual* age of the child on the date when the parent's priority date became current. That CSPA age is then also valid for only one year. Therefore, the derivative beneficiary child must "seek to acquire" lawful permanent resident status within one year of when her parent's priority date became current.

Therefore, the question remains: what happens when a derivative child in a family-based petition is not protected by the CSPA in either of the two manners described above? In other words, what happens when that child "ages-out"?

According to INA § 203(h)(3), regarding the retention of priority dates,

> *"If the age of an alien is determined* [by the CSPA calculator] *to be 21 years of age or older for the purposes of* [retaining status as a derivative beneficiary in the preference categories]*, 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."*

Under the Supreme Court's recent case *Scialabba v. Cuellar de Osorio*, this protection is now only available to the children of beneficiaries of second preference category petitions 2A – for the spouses and children of Lawful Permanent Residents.

Discussion

When a derivative child in a family-based immigrant visa petition turns 21 and "ages out," that child is no longer able to immigrate as a derivative beneficiary on her parent's I-130 petition. Therefore, a new petition must be filed on her behalf, with the former derivative child now as the principal beneficiary.

> **Example 1:** Lucas is immigrating through an I-130 family visa petition filed by his Lawful Permanent Resident (LPR) wife, Antonia. Therefore, he is immigrating under the second preference category 2A for the spouses and children of LPR's. Included in that petition was his daughter Monica, who unfortunately aged-out and can no longer immigrate through that petition. Therefore, a new petition must be filed for Monica by the original petitioner, her mother Antonia, under the second preference category 2B, for the adult, unmarried sons and daughters of LPR's.

Example 2: Let's say that Lucas is immigrating instead through an I-130 family visa petition filed, not by his wife Antonia, but by his U.S. Citizen (USC) sister Emma. Therefore, he is immigrating under the fourth preference category (F4) for the siblings of USC's. Included in that petition was his daughter Monica, who unfortunately aged-out and can no longer immigrate through that petition. Therefore, a new petition must be filed for Monica. However, she does not qualify to immigrate as the *niece* of a USC; therefore, Emma cannot file a petition for her. Instead her father Lucas will have to file a petition for her under preference category 2B, for the adult, unmarried sons and daughters or LPR's.

In the examples above, Monica's ability to immigrate will be severely delayed unless she is able to retain the priority date of the parent's original I-130 petition. In other words, for adult children who have aged out, this process of filing a new petition and obtaining a new priority date will delay their ability to immigrate and obtain lawful permanent residence for many years. In the case of beneficiaries from Mexico or the Philippines, the delay could be for more than 10 or even 20 years, according to current processing times.

Therefore, in recent years, the Board of Immigration Appeals (BIA) and the appellate courts have grappled with the question of whether or not INA § 203(h)(3) would allow a beneficiary of a family-based petition such as Monica to retain the priority date of her parent's original I-130 family visa petition. Unfortunately, the Supreme Court disappointed many immigrant families and their advocates this past June when, in its decision in the case of *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), the Court affirmed the BIA's prior decision in *Matter of Wang*, 25 I. & N. Dec. 28 (B.I.A. 2009), narrowly interpreting the INA's provision for retention of priority dates in these cases.

The Court read INA 203(h)(3) to allow only the derivative children of beneficiaries under the second preference category 2A – for the spouses and children of LPR's – to retain the priority date of their parent's original petition. Derivative beneficiaries under any other preference category may not retain the priority date of the petition where their parents were principal beneficiaries. These other derivative beneficiaries include the children of unmarried sons and daughters of USC's (first preference category, F1); the children of unmarried sons and daughters of LPR's (second preference category 2B); the children of married sons and daughters of USC's (third preference category, F3); and the children of siblings of USC's (fourth preference category, F4). None of those derivative beneficiaries may retain the priority date of their parents' original I-130 petition. Returning to the examples above, under **Example 1,** Monica would be able to recapture the priority date of her father's visa petition because she was a derivative of a 2A beneficiary; while under **Example 2**, she would not because she was a derivative of a beneficiary under F4.

Therefore, the *Scialabba* decision has caused many derivative beneficiaries of family-based visa petitions to lose their ability to immigrate once the priority date on their parents' petitions become current. They must now wait to have a new I-130 filed on their behalf, which will have a new (and much later) priority date.