



USCIS UPDATES POLICY GUIDANCE ON CSPA 'Sought to Acquire' REQUIREMENT AFTER USING FILING DATE TO PROTECT THE AGE OF THE CHILD

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By Cyrus D. Mehta and Kaitlyn Box*

As detailed in a [prior blog](#), USCIS issued updated [guidance](#) on February 14, 2023 on when an immigrant visa number “becomes available” for the purpose of calculating a noncitizen’s age under the Child Status Protection Act (CSPA). Prior to February 2023, USCIS had taken the position that only the Final Action Date (FAD) protects a child’s age, not the Date for Filing (DFF). This position resulted in children aging out before the FAD became current, and their I-485 applications getting denied, although they had been permitted to apply for adjustment of status using the DFF. In numerous previous blogs (see [here](#), [here](#), and [here](#)), Cyrus Mehta advocated for a change in USCIS policy to allow the DFF to protect children’s ages under CSPA rather than the FAD. In its February 2023 guidance, USCIS finally adopted this recommendation, acknowledging that “the same applicant for adjustment of status could have a visa ‘immediately available’ for purposes of filing the application but not have a visa “become available” for purposes of CSPA calculation”, and stating that “USCIS has updated its policies, and 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”.

Regardless of whether the FAD or DFF is used for CSPA purposes, however, INA § 203(h)(1)(A) makes clear that a child’s age is locked “only if the has sought to acquire the status of an alien lawfully admitted for permanent residency within one year of such availability”. In updated [guidance](#) issued on August 24, 2023, USCIS clarified that it considers “applicants to have met the sought to acquire requirement if their application to adjust their status was pending on Feb. 14

and they applied to adjust their status within 1 year of a visa becoming available based on the Final Action Dates chart under the policy guidance that was in effect when they applied". The updated guidance:

- Explains that USCIS considers the February 14 policy change to be an extraordinary circumstance that may excuse an applicant's failure to meet the "sought to acquire" requirement;
- Clarifies that the agency may excuse an applicant's failure to meet the requirement if they did not apply to adjust status because they could not calculate their CSPA age under the prior policy or their CSPA age would have been calculated as over 21, but they are now eligible for CSPA age-out protection under the new policy; and
- Clarifies that the agency considers applicants to have met the requirement if their application to adjust their status was pending on February 14 and they applied to adjust status within one year of a visa becoming available based on the Final Action Dates chart under the policy guidance that was in effect when they applied.

USCIS further explains that under the policy guidance in effect before February 14, 2023, some noncitizens may not have applied to adjust status because a visa was not available to calculate their CSPA age under the prior policy or their CSPA age would have been calculated to be over 21 years old. If these noncitizens apply to adjust their status under the new policy issued on February 14, USCIS said, they may not be able to meet the one-year "sought to acquire" requirement. "However, noncitizens who do not meet this requirement may still benefit from the CSPA if they can establish that their failure to meet the requirement was the result of extraordinary circumstances," USCIS noted.

Although it is clear that individuals who were unable to apply for adjustment of status within one year of the DFF becoming current can now claim an exception if the delay in filing was the result of extraordinary circumstances, this updated guidance still leaves some questions unanswered.

USCIS's policy of using the DFF to protect a child's age seems only to pertain to individuals who apply for adjustment of status within the United States. The Department of State (DOS) has yet to issue any corresponding guidance or

update the Foreign Affairs Manual (FAM) in accordance with USCIS's new policy. The [FAM](#) still states that an applicant's "CSPA age" is determined on the date that the visa, or in the case of derivative beneficiaries, the principal applicant's visa became available (i.e., the date on which the priority date became current in the Application **Final Action Dates** and the petition was approved, whichever came later) (emphasis added)". Thus, an applicant outside the U.S. who pays an immigrant visa (IV) fee may satisfy the "sought to acquire" requirement, but only based on the FAD becoming current. This uneven policy makes little sense, and the DOS should promulgate its own guidance in accordance with USCIS's policy to ensure that the DFF can also be used to protect the age of a child who processes for a visa overseas.

Additionally, some derivative children may not have applied for adjustment of status with their parent while the previous policy was in effect because only the DFF was current and it would not have protected their age. Are these children now able to assert that the policy change constitutes extraordinary circumstances and apply for adjustment of status although more than a year has passed since the visa became available (and the DFF has retrogressed, and the USCIS's [stated policy guidance on retrogression](#) is at odds with this update)? Based on the new policy, one can argue that the child was eligible to apply for adjustment of status when the DFF became current, and is now eligible to file a late, sought-to-acquire I-485 under the extraordinary circumstances exception. The same logic should also apply to children whose I-485s were denied based on the prior policy because they aged out before the parent's priority date became current under the FAD and they can file a late motion to reopen.

Finally, the DFF only protects the age under the CSPA if the USCIS has indicated that the DFF can be used to file I-485 applications. For instance, the USCIS for the September 2023 Visa Bulletin has only permitted filing of employment-based I-485 applications under the FAD and not the DFF. Thus, the DFF will not be able to protect the age of the child under the CSPA even if an I-140 is approved and the DFF is current for that I-140 under the relevant employment-based preference.

While it is salutary that the DFF can be used to protect the age of the child under the CSPA, USCIS needs to provide more clarification and harmonize the application of the DFF with the FAD to protect the child's age under the CSPA.

*Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners PLLC.