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SAVE THE CHILDREN

Posted on April 19, 2010 by Cyrus Mehta

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When Congress enacted the Child Status Protection Act, it wanted above all else to soften the harsh blows of long delays by the USCIS in the adjudication of "green card" cases. How? Congress did so by extending this generous benefit to protect vulnerable children who would otherwise be cavalierly abandoned to the tender mercies of an indifferent jurisprudence when their parents immigrated. The dread of watching their children "age out" and thereby lose their derivative status haunted the imagination of parents everywhere who felt helpless against Father Time. At last, Congress would save them, or so they thought. The Board of Immigration Appeals, in *In re Avila-Perez*, 24 I&N Dec. 78 at 83-84 (BIA 2007), faithfully captured this humane spirit:

The CSPA was created to remedy the problem of minor children of United States citizens losing their immediate relative status and being demoted to the family first-preference category as a result of the INS's backlog in adjudicating visa petitions and applications for adjustment of status…To prevent these individuals from "aging out" because of INS processing delays, Congress decided that a child's age should be determined by the date his visa petition was filed, not as of the date the INS reviewed his applications, as it would have been under the old law.

There was no way that Congress could have possibly anticipated the implosion of the EB-3 or EB-2 in the China and India categories. While the architects of the CSPA strove mightily to promote family unity, the restrictive formula they came up with reflects their wholly understandable failure to account for the entirely unanticipated possibility of visa retrogression greatly exceeding government processing delays. It is no exaggeration to conclude or contend that this adverse effect on "aging out" children ran directly contrary to what Congress thought it was doing. Given an EB-3 backlog of almost 7-8 years worldwide and

over 30 years for India, you would have to start a labor certification now for someone who has a child turning 12 because that child's age will only be frozen when the immigrant visa is available, many years later. For India, even if the labor certification is started around the time of the child's birth, such strategic foresight may not suffice! If you get a quick labor certification followed by prompt USCIS approval of the I-140 petition, the child you think you are helping might not be so lucky down the road. When you have visa retrogression like we have right now, the CSPA formula is useless to protect children no matter how you interpret the CSPA formula. To the EB-3 preference child, especially if the parents are born in India, the promise of the CSPA has become a cruel joke.

Under INA § 203(h)(1)(A) & § 203(h)(1)(B), the age of a child is frozen at the point that a visa becomes available, based on the first day of the month of the relevant visa bulletin and the approval of the visa petition, provided the child sought to acquire permanent residency within one year of visa availability. The child can also subtract from his or her age (if over 21 years at the time of visa availability) the time the visa petition of the parent took to get approved from the time of filing. Based on this formula, the visa is likely to become available after many years, and in the case of an India EB-3, probably long after the child has turned 21.

What to do? There is an answer. Sua sponte, the USCIS could save the children by redefining the concept of visa availability in a provisional sense to include the derivative beneficiaries of approved I-130 or I-140 petitions even without the absence of a current priority date as we have proposed in our article Tyranny of Priority Dates, http://scr.bi/i0Lqkz. This would restore the relevance of the CSPA and honor the original intent of Congress by allowing a revised formula to freeze the child's age despite visa backlogs! The child could not have his or her adjustment of status approved absent a current priority date but allowing them to remain children while waiting for this to happen also permitted them to remain in the queue. While we acknowledge that such an approach is, to say the least, openly unorthodox, we are warmed by the well-settled truth that a generous interpretation of any statute should be adopted where its "remedial purposes are most evident." Sedima v. Imrex Co., 473 U.S. 479, 491, n. 10 (1985).

Moreover, USCIS has, in the past, expanded the meaning of visa availability. During the July 2007 Visa Bulletin period, when the dates for the EB-2 and EB-3 were made current, eligible applicants filed concurrent I-140 petitions and I-485

applications. The I-140 petitions were not approved at the time of visa availability, and after August 17, 2007, there was again retrogression. To the credit of the USCIS, the child's age was still frozen at the time of filing the unadjudicated I-140 petitions and I-485 applications, even if the I-140 petitions were approved after August 17, 2007 and when there was no longer any visa availability. In this case, the government informally expanded the interpretation of visa availability to a point of time when the visa was available by virtue of the July 2007 Visa Bulletin, but the I-140 petition had not been approved even though the USCIS had insisted in insisted that there had to be an approved I-140 petition at the time of visa availability to freeze the age of the child, even if the priority date subsequent to this event regresses. *See* Johnny Williams, Office of Field Operations of Legacy INS, The Child Status Protection Act, Memo # 2, Feb. 14, 2003, AILA InfoNet Doc. No. 03031040.

There is, of course, a second part to the CSPA age formula, namely that the child must have "sought to acquire" the status of a lawful permanent resident within one year of visa availability. Now, as our colleague Quynh Nguyen so incisively reminds us, "sought to acquire" is a singularly novel term. The authors do not think it is used anywhere else in the INA. We do not seek to re-write the CSPA age formula; just the opposite. We seek to interpret it in a broadly humane way to achieve what Congress thought it was prescribing, a formula for the protection of children and the advancement of family unit. Our suggestion is advanced in furtherance of this intent by allowing a provisional submission to count as "sought to acquire." Remember, dear friends, the CSPA language speaks of "sought to acquire" a "green card" within the one year period after the Visa Bulletin indicates availability. Ms. Nguyen correctly points out that nothing precludes the USCIS from interpreting this to mean that the child could not seek to acquire before this one year period commences; she just has to conclude the step of "sought to acquire" within the one year period after an immigrant visa is available. Our provisional filing approach would still require yet allow the child to seek to acquire green card status with final ratification firmly conditioned upon availability of an immigrant visa. This has been done before. That is precisely how the Department of State interpreted "sought to acquire" when it allowed the I-824 consular notification form to be used in exactly this same way. As the BIA reminded us in *Avila-Perez*, the precise moment when an adjustment of status is filed should command neither our rapt attention nor unquestioning obedience. It can be filed at any time; since

the CSPA neither demands nor instructs the child to have "sought to acquire" in any particular way or time, why not allow a provisional submission to suffice?

If freezing the age of the child based on a re-interpretation of visa availability is too shocking for the faint of heart, we offer another, perhaps more soothing reason, why our provisional adjustment filing honors the spirit to the CSPA in a way that the traditional understanding of the age formula simply does not. We turn now to the automatic conversion mechanism under INA § 203(h)(3) that allows for seamless transfer of a child to the appropriate preference if that child cannot claim CSPA protection. While we acknowledge that the BIA, in *In re Wang*, 25 I&N Dec. 28 (BIA 2009) overturned its more generous interpretation in the unpublished decision of In re *Maria T. Garcia*, 2006 WL 2183654 (BIA June 16, 2006), *In re Wang* does not faithfully interpret INA § 203(h)(3), which rings loud and clear for the automatic conversion of the child to an appropriate preference category, and provides the government with ample running room to re-interpret the provision consistent with *Garcia*. *See*, David A. Isaacson, *BIA Rejects Matter of Maria T. Garcia in Precedent Decision Interpreting the Child Status Protection Act*, June 22, 2009.

Allowing the child to provisionally file her adjustment of status with the parent(s) means that the child still remains an adjustment applicant even after "aging out." Then, when the parent gets the "green card," the child shifts over to the Family 2-B category which, mirable dictu, might then be current. The parents need not file a new I-130 petition. Since the child's adjustment of status was already filed under the provisional priority date, the "aged out" child will either get the "green card" simultaneously with the parent if F-2B is ready and waiting or, if not, the child can wait it out a bit longer, but still as an adjustment applicant under a provisional date under F-2B. The key is to allow the child to file their adjustment of status with the parents while minors under a provisional date so that, once they become adults, they will continue to be adjustable when they automatically convert to Family 2B after Mom and Dad are done.

Unless we look at the CSPA in a new light, it will be impossible for the law to do what Congress wanted it to do, namely preserve family unity in the face of external factors for which the affected children were not responsible. The nature of the delay has changed from administrative processing to systemic visa retrogression. Such a change, however, has not removed the need for remediation but, on the contrary, made it more pressing than ever. While

Congress could calm the waters by revising the age fixing formula to save the children from the tyranny of priority dates, there is no reason why the USCIS has to wait for that to happen. It could save the children now as we suggest entirely through notice and comment rulemaking. Congress can, and doubtless will, bless it later.