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CONSEQUENCES OF VISA BULLETIN CUTOFF DATE RETROGRESSION UNDER THE CHILD STATUS PROTECTION ACT

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In recent months, the Visa Bulletin issued by the Department of State has shown a "retrogression" of priority dates in a number of Family-based categories. This means that the cutoff date determining which priority dates are early enough to make a visa number available to particular immigrants so that they can move forward with the process of seeking permanent residence, and which priority dates are not early enough, has moved backward in time rather than forward. Some people who were previously eligible – who appeared to have reached the front of the waiting line – will need to wait until their priority date once again becomes current to get a visa number. This retrogression, which affected the Philippines in the December 2010 Visa Bulletin, http://www.travel.state.gov/visa/bulletin/bulletin_5197.html, and then expanded to the cutoff dates for the rest of the world in the January 2011 Visa Bulletin, http://travel.state.gov/visa/bulletin/bulletin_5212.html, has the potential to create complications for those who seek to make use of the Child Status Protection Act ("CSPA").

The CSPA protects certain applicants from losing their status as children even though they have turned twenty-one. The provision of the CSPA relevant here is section 203(h) of the Immigration and Nationality Act ("INA"), which provides, in part:

(h) RULES FOR DETERMINING WHETHER CERTAIN ALIENS ARE CHILDREN-
(1) IN GENERAL.-- For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding

subparagraph (A) of section 101(b)(1) shall be made using--
(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.
(2) PETITIONS DESCRIBED- The petition described in this paragraph is—
(A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or
(B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).

Subsection 203(a)(2)(A) refers to a petition filed by a Lawful Permanent Resident ("LPR") on behalf of his or her spouse or child, and 203(d) provides for " spouse or child" to derive status from the primary beneficiary of various sorts of I-130 and I-140 petitions. In the context of both a "2A" preference petition for one's child under 203(a)(2)(A), and an application by a derivative child under 203(d), one must determine whether the applicant for an immigrant visa or for adjustment of status still qualifies as a "child" by the time that he or she is eligible to obtain an immigrant visa or adjust status.

Pursuant to INA § 101(b)(1), a "child" ordinarily must be less than twenty-one years old. Thus, there is the possibility of "aging out"—of losing one's status as a child by getting too old. INA § 203(h)(1) says that, as long as the person seeking to be classified as a child has sought to acquire LPR status within one year of visa availability, their age for these purposes is calculated by taking the age at the time of visa availability, and subtracting the time that the I-130 or I-140 petition was pending. In effect, it is as if the child stopped aging at the time the petition was filed, did not start again until the petition was approved, and then stopped again on the day that a visa number became available. (Beneficiaries of petitions that were pending on September 11, 2001, who would otherwise have aged out after that date, should also be able to subtract an additional forty-five days from their age pursuant to section 424 of the USA PATRIOT Act, as clarified by section 42.42, note 12.8(b.) of Volume 9 of the State Department's Foreign Affairs Manual, available online at

http://www.state.gov/documents/organization/87848.pdf.) If the CSPA-adjusted age under INA § 203(h)(1) is under twenty-one years, then the child – assuming that he or she otherwise qualifies as a "child", such as by being unmarried – may still adjust status or obtain an immigrant visa under the 2A preference petition, or derivatively on the petition covered by INA § 203(d).

Retrogression complicates matters by creating the possibility that there may no longer be only a single "date on which an immigrant visa number becomes available", but rather multiple such dates. If, for example, the Visa Bulletin for November 2010 said that a particular priority date was current for the first time, but the Visa Bulletin for January 2011 retrogresses the relevant cutoff date so that this priority date is no longer current, then there will be (at least) two dates on which an immigrant visa number becomes available for someone with that priority date. The first will be November 1, 2010, when the visa number initially became available. The second, following the retrogression, will be the first day of the future month on which the cutoff date finally moves far enough forward that the priority date is current again. In effect, the CSPA is looking to the date on which people pass through the door at the front of a waiting line, but the retrogression has caused many people who had just passed through the door to move backwards and go back outside the door. As the line moves forward, those same people will one day pass through the door yet again, creating a second date of visa availability.

USCIS has said, in a 2008 memorandum from Acting Associate Director Donald Neufeld (updating § 21.2(e) of their Adjudicators Field Manual) that is available online at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/cspa_30apr08.pdf, that "f a visa availability retrogresses, and an alien has already filed a Form I-485 based on an approved Form I-130 or Form I-140," then USCIS will "retain the Form I-485 and note the date a visa number first became available." When the visa number again becomes current, this original visa availability date, having been locked in by the prior filing of the Form I-485 adjustment application, will be used to calculate the CSPA-adjusted age. If, however, a Form I-485 is not filed before retrogression, but only within a year of when the priority date next becomes current, then the CSPA-adjusted age is "determined using the subsequent visa availability date." (The filing of an I-485 may not be the only way to lock in a CSPA age, since as discussed in a recent article and blog post by Gary Endelman and Cyrus D. Mehta,

http://blog.cyrusmehta.com/News.aspx?SubIdx=ocyrus20101018430 57&Month=&From=Menu&Page=4&Year=All and http://cyrusmehta.blogspot.com/2010/10/bia-continues-to-reaffirm-broad-sought.html, the Board of Immigration Appeals has indicated in unpublished decisions that one may seek to acquire lawful permanent residence for CSPA purposes without actually filing an adjustment application; that same logic ought to make it possible to lock in a CSPA-adjusted age before retrogression without actually filing the I-485, but relying on this would be very risky.)

Under the USCIS approach, therefore, you can lock in a child's CSPA age if you file before a retrogression, but otherwise the child will in effect keep aging until the visa number becomes current again, and the child then seeks to acquire permanent residence within a year of this second date on which a visa has become available. The bright side of retrogression under the USCIS approach is that the subsequent visa availability date can give you another year in which to seek to acquire permanent residence, as long as the child's adjusted age will still be under twenty-one on that second date.

The Department of State has indicated in Volume 9, Section 42.42 of its Foreign Affairs Manual, http://www.state.gov/documents/organization/87848.pdf, that its approach is similar but subtly different. Just as USCIS does with those who have filed an I-485, the Department of State will look to a child's age at the first visa availability date if the relevant forms – which in the DOS context are the DS-230, Part 1, or a Form I-824 for a child following to join a principal applicant who adjusted in the United States – are filed within a year of that date and prior to the effective date of any retrogression. If not, the State Department will focus on whether the applicant had a full year to seek to acquire permanent residence before the retrogression:

In order to seek to acquire lawful permanent residence an alien beneficiary must actually have one full year of visa availability. If a visa availability date retrogresses . . . within one year of visa availability and the visa applicant has not yet sought to acquire LPR status, then once a visa number becomes available again the one year period starts over. The alien beneficiary's age under the CSPA is redetermined using the subsequent visa availability date.

9 FAM 42.42 Note 12.7.

This apparent refusal by the State Department to give children a second chance

after retrogression, if they had a full year to apply before retrogression and did not take advantage of it, may be stricter than the USCIS policy. Although the USCIS memo does not specifically address this situation, it strongly implies that whether a child has sought to acquire permanent residence within a year of visa availability can be measured from the second visa availability date that comes after a retrogression, regardless of how much time passed between the first visa availability date and the retrogression. That is, under the USCIS approach, if you miss your one-year deadline after the first visa availability date, you may get another chance if a retrogression followed by a second visa availability date occurs soon enough; under the Department of State approach, you will not.

Under either of these approaches, however, failing to move forward with the permanent residence process before a retrogressed Visa Bulletin takes effect can have dire consequences. If a child's adjusted age is anywhere near twenty-one based on the first date of visa availability, then missing the opportunity to file before retrogression takes effect, and having to wait for a future forward movement to make a priority date current again after the retrogression, can easily lead to the child aging out. It is extremely risky to hope for a second visa availability date coming soon enough after a retrogression to allow a child's adjusted age to remain under twenty-one. Therefore, it is essential that immigrants involved in CSPA-related cases affected by the retrogressions in the January 2011 Visa Bulletin act quickly to begin the process of seeking permanent residence before January 1.

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