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# EB-3 TO EB-2 BOOST MAY NOT PROTECT YOUR CHILD UNDER THE CHILD STATUS PROTECTION ACT

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**By Cyrus D. Mehta**

If you were born in India and are being sponsored for a green card through your employer under the employment-based third preference (EB-3), the wait is likely to be 70 years. If your employer filed the first step towards the green card, the labor certification, sometime in 2006, and you managed to file an adjustment of status application (Form I-485) when the EB-3 miraculously opened up for one month under the July 2007 Visa Bulletin and closed after that, the wait may be shaved off by a few decades, but it will still be very long. The only saving grace, besides being able to derive the benefits as a pending adjustment applicant, is that the filing of the I-485 application in July 2007 may have frozen the age of your child under the Child Status Protection Act (CSPA) even if your child is substantially over 21 today. If the green card comes through for you finally after 40 years, your child will still be protected under the CSPA, even if he or she is middle aged by then, and be able to derivatively obtain the green card with you as a child.

Many who are in the never ending pipeline for the green card under the EB-3, especially those born in India, may have upgraded their qualifications and obtained an advanced degree, or if they already possess an advanced degree or the equivalent, they may today qualify for a position that requires an advanced degree. Their employers could file new labor certifications with a view to obtaining classification under the employment-based second preference (EB-2), which applies to job positions requiring advanced degrees or their equivalent while the EB-3 is applicable to positions requiring bachelor's degrees or 2 or more years of training or experience. The EB-2, while still backlogged for India, is moving substantially faster than the EB-3.

Take the example of a foreign national born in India whose employer originally filed a labor certification on November 1, 2006 for a position requiring only a bachelor's degree and some experience. The next step in the process upon the approval of the labor certification, the I-140 immigrant visa petition, was filed on March 1, 2007 under the EB-3 and was subsequently approved. At the time of filing the I-140 petition, his daughter, who was born on March 1, 1988, had just turned 19. When the State Department opened up the EB-3 during July 2007, our foreign national from India rushed to file the I-485 applications for himself, his spouse and his daughter who was still 19. The filing of the I-485 application for his daughter, on say July 15, 2007, permanently froze her age under INA section 203(h)(1). Under Section 3 of the CSPA, which has been codified in INA section 203(h)(3), if the child's age is below 21 when the visa petition is approved and the priority date becomes current, whichever happens later, the child's age remains permanently frozen under 21 provided she also sought to apply for permanent residence within one year of visa availability. In our example, the daughter's priority date became current on July 1, 2007, when the State Department announced that the EB-3 was current. Eligible people could file adjustment applications until August 17, 2007 as a result of a threatened law suit, which compelled the State Department to extend the filing period beyond July 30, 2007. After the July 2007 Visa Bulletin, the EB-3 severely retrogressed several years and has moved forward again at a snail's pace, especially for India, since then. As of the time of writing, the cut-off date for India under the EB-3 is July 22, 2002. However, since the daughter filed her I-485 when the EB-3 date became current in July 2007, her age at that time, which was 19, permanently froze under the CSPA.

Today in 2011, even though the daughter is over 23, her CSPA age is technically still 19 and she can some day in the distant future, when the priority date of November 1, 2006 becomes current under the India EB-3, adjust with her father as a derivative (as if she's still under 21) however old she may be.

While our Indian foreign national, his wife and his daughter can remain legally in the US as pending adjustment of status applicants, this is not of much solace for her father who is yearning to break free with a green card. He has been stuck with his job for many years, and even if he is provided some job mobility under INA section 204(j), he must work in a similar occupation under which he was sponsored through the labor certification. Thus, if he was sponsored as a Computer Programmer, and can now qualify for a position as a Controller of his

new IT company after obtaining an MBA in Finance through an evening executive MBA program at an Ivy League business school, his adjustment application will get denied when ultimately adjudicated if he is unable to show that he has "ported" to a same or similar occupation. One way to resolve this is if his present employer can file a new labor certification presently under the EB-2 as a Controller requiring an MBA and experience in the peculiar financial aspects of an IT company. Once the labor certification is approved, the employer files a new I-140 petition but can magically capture the priority date of the old I-140 under EB-3, which is November 1, 2006. A USCIS rule, 8 CFR 204.5(e), allows you to do this provided that petition is not subsequently denied or revoked. Once the I-140 petition under the EB-2 is approved, it can be inter-filed with the pending I-485 application that was initially filed with the original I-140, and since the EB-2 cut-off date is well beyond November 1, 2006, he will suddenly get the green card.

While this may be manna from heaven for him and his spouse, the filing of the new I-140 will most likely not be able to protect the daughter under the CSPA at this point as it was filed much after her 21st birthday, even though the new I-140 petition will recapture the priority date of the old I-140 petition filed under EB-3. While this can be open to interpretation, the CSPA applies to the "applicable" petition only, and it will be difficult to bootstrap the new I-140 onto the "applicable" EB-3 I-140 petition, which is no longer being utilized but was filed before her 21st birthday. While there may be some room to interpret the term "applicable" petition to include the new I-140 petition under EB-2, especially since the new I-140 petition recaptured the priority date of the prior I-140 petition especially if it was filed by the same petitioning employer (See *Li v. Renaud*), it will be extremely risky to go ahead with this knowing that there is an aged out child who is otherwise protected under the CSPA. Thus, while dad and mom get the green card, their daughter may get left behind. Parents who thus wish to upgrade from EB-3 to EB-2 should beware about doing so if they have a child who is over 21 but who has been protected under the CSPA through the filing of an adjustment application under a prior I-140 petition.

We have already written extensively about the Fifth Circuit's recent decision in *Khalid v. Holder*, which correctly interpreted INA section 203(h)(3) providing for the automatic conversion of the priority date of the earlier petition to the appropriate category. If the daughter is unable to seek the protection of the

CSPA, after her parents got their LPR status under EB-2, she can use the November 1, 2006 priority date, if she resides in a jurisdiction where *Khalid v. Holder* is binding, to a family-based second preference petition for an adult child (F2B) that her father can potentially file on her behalf as a green card holder. But even *Khalid v. Holder* may not throw her an immediate life line since the current cut-off date under the F2B is much earlier than November 1, 2006 at this time.

The CSPA is an extremely complex statute subject to varying interpretations, which even Circuit courts cannot agree upon, and the thin protective cover that it provides can quickly unravel based upon even an inadvertent misstep. Of course, this blog assumes that the child of an EB-3 beneficiary has already been covered under the CSPA through an earlier adjustment application. If the EB-3 for India is truly expected to take 70 years before a green card materializes, a foreign national being sponsored today with a 1 year old child will have absolutely no hope of protecting the age of this child under the CSPA!