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STATE DEPARTMENT'S VISA OFFICE TAKES BROADER VIEW OF "SOUGHT TO ACQUIRE" PROVISION UNDER THE CHILD STATUS PROTECTION ACT

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Many cases involving complex interpretations of the Child Status Protection Act (CSPA) occur while the applicant is applying for an immigrant visa at an overseas consular post. The CSPA protects a child who may turn 21 or more from "aging out," and thus being eligible for permanent residence as a derivative, when his or her parent is issued permanent residence. Often times, while there is room for interpretations under the CSPA, the consular officer may take a restrictive view of a CSPA provision and refuse the visa. There is no appeal process to review a consular officer's decision at an overseas post, and the refusal may seem to be the end of the road and separation from the "aged out" child from the parent. Fortunately, despite the absence of an appeal process, one can seek an advisory opinion on a purely legal issue with the State Department's Visa Office in Washington DC via legalnet@state.gov, and a denial under the CSPA mostly involves a legal issue rather than a factual issue. By contrast, the denial of a tourist visa application is almost always fact based, and under such circumstances, it may not be possible to seek an advisory opinion from the Visa Office.

This author has had success in overturning a consular official's denial on at least two occasions in the past. On both these occasions, the State Department's Visa Office agreed that the 45 days provided in section 421(2) of the USA Patriot Act can be subtracted from the age of a child if the age subtraction formula under the CSPA did not bring down the age of the child under 21 years. In other words, the child can use the benefit of both the Patriot Act and the CSPA to lower the age of a child below 21 years. Although this author had previously advocated that there was nothing in the CSPA preventing

the use of the 45 days from the Patriot Act in addition to the age subtraction formula provided in the CSPA, this is now no longer an issue as it has been clearly acknowledged in 9 FAM 42.42 N12.4(e.) and 9 FAM 42.42 N12.8(b.).

Our recent success, which we report here for the benefit of others, was regarding the interpretation of "sought to acquire the status of permanent residency" within one year of visa availability. At issue is whether the payment of the visa processing fees with the National Visa Center within the one year period constituted "sought to acquire" permanent residency within the one year period. The actual application for the immigrant visa, DS 230 Part I or II, had not been filed within one year. The applicant was unrepresented at that time and was not aware of the precise requirement to apply for permanent residence within one year of visa availability.

As a background, INA §203(h), introduced by Section 3 of the CSPA, provides the formula for determining the age of a derivative child in a preference petition even if the child is older than 21 years. To qualify as a child under INA §101(b)(1), one must be below the age of 21 and unmarried. The age is determined by taking the age of the alien on the date that a visa first became available (i.e. the date on which the priority date became current and the petition was approved, whichever came later) and subtracting the time it took to adjudicate the petition (time from petition filing to petition approval). Based on this formula, if the child's age falls below 21, the child is protected under the CSPA. Specifically, §203(h)(1)(A) also requires the alien to have "sought to acquire" LPR status within one year of visa availability.

The CSPA thus artificially freezes the age of a child below 21 years of age so that he or she is not deprived of permanent residency when the parent is granted the same status. One of the requirements, however, is for the child to seek permanent residency within one year of visa availability. Often times, a CSPA protected child falls through the cracks by failing to meet the prevailing rigid filing requirements within the one-year deadline.

Both the Department of Home Security (DHS) and the Department of State (DOS) have interpreted the phrase "sought to acquire" narrowly, although unpublished decisions of the Board of Immigration Appeals have taken a broader view. DHS limits this phrase to filing an I-485 application for adjustment of status. See "Revised Guidance for CSPA" (April 30, 2008). The DOS too has interpreted "sought to acquire" narrowly and indicated that in

consular processing cases, the date that a child seeks to acquire LPR status is the date Form DS 230, Part I, is submitted by the child, or by the child's parent on the child's behalf to the National Visa Center (NVC). See "Child Status Protection Act: ALDAC 2" (January 17, 2003), See "Child Status Protection Act: ALDAC 2" (January 17, 2003). If the principal beneficiary parent adjusts status in the US, and the child will be applying for the visa overseas, the DOS requires the principal to file Form I-824 to initiate the child's follow-to-join application. The DOS has also indicated that since Form I-824 is not the only way to initiate the process, posts may seek advisory opinions in cases in which some other "concrete" step has been taken.

The US consular post we were dealing with insisted that the applicant did not seek to acquire permanent residence within one year because the applicant only paid the visa processing fees with the National Visa Center, but did not file the DS 230, Part 1, within one year of visa availability. The payment of the visa processing fee was not sufficient to constitute "sought to acquire" permanent residence within the one year time frame.

Upon receiving official confirmation of the refusal at the US consular post, we sought an advisory opinion from the Visa Office through legalnet@state.gov. Although we acknowledge that they are not binding on the State Department, we pointed to recent unpublished decisions of the Board of Immigration Appeals (BIA), which have interpreted the "sought to acquire" term more broadly, that should still be persuasive. For example, In *In re Murillo*, 2010 WL 5888675 (BIA Oct. 6, 2010) the BIA reaffirmed its broadened "sought to acquire" to include substantial steps towards the filing of the relevant application, although these steps may fall short of an actual filing of an application. In this case, the applicant claiming protection under the CSPA hired an attorney to prepare an I-485 adjustment application within the one year time frame, but filed it within a reasonable time thereafter. This decision follows closely on the heels of other unpublished Board decisions that have applied the same "sought to acquire" standard. *See In re Kim*, 2004 WL 3187209 (BIA Dec. 20, 2004), (the child beneficiary "sought to acquire" LPR status within one year of visa approval because her parents hired an attorney to start preparing the adjustment application within the one-year period); *In re Castillo-Bonilla*, 2008 WL 4146759 (BIA Aug 20, 2008) (the respondent "sought to acquire" LPR within the one-year period when, during this time, he informed both the Immigration Judge and the Board that he wished to file an adjustment application, even though the

application was not actually filed within one year).

It is in the same spirit as the unpublished BIA decisions, and consistent with INA §203(h)(1)(A), we requested that the Visa Office advise the Consul to consider the fact that the filing fee paid within the one year time frame constituted a very concrete step towards seeking permanent residency. Indeed, payment of the fees constituted a much more credible step towards seeking permanent residency than making an informal request to the NVC or contacting an attorney, which are the facts supporting the aforementioned BIA decisions. We also pointed out to Visa Office, as we did with the consulate unsuccessfully, that the Foreign Affairs Manual (FAM) at 9 FAM 42.42 N12.9 recognizes the complexity of the CSPA, and advises that a Consul may seek an advisory opinion in the following instance:

If the officer encounters a case involving a derivative following to join a legally admitted immigrant, or adjusted principal, who has not filed Form I-824, Application for Action on an Approved Application of Petition, on the derivative's behalf within the required time frame, but the consular officer determined that the derivative has taken some other concrete step to obtain LPR status within the required one year time frame.

We therefore asked that the Visa Office provide such an advisory opinion under the authority laid out in the FAM, and advise the consular officer that other concrete steps taken to obtain LPR status, such as the payment of immigrant visa fees that occurred here, may be considered.

In less than two weeks from seeking the advisory opinion just prior to the New Year (2012), we received the following communication from the Visa Office:

Thank you for your inquiry to LegalNet. Since the derivative applicants submitted their IV fee within one year of visa availability, the Consular office will consider CSPA's sought to acquire requirement satisfied. The visa unit in will contact the applicants to resume processing.