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EVERY COUNTRY EXCEPT THE PHILIPPINES: NEW DEVELOPMENTS IN OPT-OUT PROVISION UNDER THE CHILD STATUS PROTECTION ACT

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Section 6 of the Child Status Protection Act (CSPA) allows beneficiaries of I-130 petitions that have been converted from the Family Second Preference (F2B) to the Family First Preference (F1), after the parent has naturalized, to opt out and remain in the F2B. The American Immigration Council's February 2015 advisoryprovides a comprehensive overview of the CSPA.

While the wait in the F1 is generally less than in the F2A, in some instances, it is possible for the F1 to be more backlogged than the F2B. The Philippines has been the prime example, and was the only country where the F1 was worse off than the F2B for several years. Thus, the issue of whether to opt out of the F1 mainly concerned people born in the Philippines for several years. Since June 2014, this has changed. The Philippines F1 has been doing better than the F2B, and there has been no need for beneficiaries of I-130 petitions born in the Philippines to opt out. On the other hand, since June 2014, with the sole exception of Mexico, beneficiaries born in all other countries are better off under the F2B than the F1. This changed too for Mexico as of October 1, 2014, when even Mexican born beneficiaries started doing better under F2B than F1. Under the latest State Department Visa Bulletin of March 1, 2015, http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-march-2015.html, except for the Philippines, beneficiaries of I-130 petitions born in all other countries are better off under the F2B than the F1.

An quick analysis of how the F-1 has compared to the F2B since 1992 is provided below (courtesy David Isaacson):

According to the list of Family Worldwide priority dates for FY1992-2014 available at

http://travel.state.gov/content/dam/visas/family-preference-cut-off-dates/Cut-off_Dates_worldwide_online.pdf, F1 has always been ahead of F2B, with a brief exception in FY-2001 (when F1 but not F2B became briefly unavailable in August and September 2001), until June 2014, when F2B pulled ahead (at first it was just 01APR07 for F2B versus 22MAR07 for F1, then the gap widened). F2B has also been ahead in the three Visa Bulletins so far of FY2015, http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-october-2014.html , http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-november-2014.html, http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-december-2014.html , http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-january-2015.html, http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-february-2015.html , and http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-march-2015.html.

For the Philippines, according to the FY1992-2014 list at http://travel.state.gov/content/dam/visas/family-preference-cut-off-dates/Cut-off_Dates_Philippines_online.pdf, F2B pulled ahead of F1 in August of 1992, and stayed ahead until July of 2014. Beginning in August 2014, Philippines F1 pulled back ahead of Philippines F2B, and it too has stayed that way October 2014-March 2015.

As for Mexico, the Mexico FY1992-2014 list at http://travel.state.gov/content/dam/visas/family-preference-cut-off-dates/Cut-off_Dates_Mexico_online.pdf shows F1 generally ahead of F2B, but there have been more anomalies over the years. At the end of FY1996 and in February-March of 2002, F1 was unavailable but F2B wasn't. There was an inversion in July 2001 right before both became unavailable for the remainder of FY2001. In July-September of 2005, Mexico F1 retrogressed all the way to January 1, 1983, while F2B was at January 1, 1991. In May of 2006, Mexico F2B again pulled slightly ahead of Mexico F1 before falling behind again in the remaining months of FY2006. In FY2007, Mexico F2B was ahead of Mexico F1 in May 2007 through September 2007. In FY2009, Mexico F2B pulled ahead, or rather F1 feel behind, during July-September 2009. The next inversion after that was indeed October 2014, and then it has stayed inverted since.

Section 6 of the CSPA has been codified in Section 204(k) of the Immigration &

Nationalization Act (INA) entitled "Procedures for unmarried sons and daughters of citizens," which provides:

- ***In general***. – Except as provided in paragraph (2), in the case of a petition under this section initially filed for an alien unmarried son or daughter's classification as a family-sponsored immigrant under section 203(a)(2)(B), based on a parent of the son or daughter being an alien lawfully admitted for permanent residence, if such parent subsequently becomes a naturalized citizen of the United States, such petition shall be converted to a petition to classify the unmarried son or daughter as a family-sponsored immigrant under section 203(a)(1).
- ***Exception***. – Paragraph (1) does not apply if the son or daughter files with the Attorney General a written statement that he or she elects not to have such conversion occur (or if it has occurred, to have such conversion revoked). Where such an election has been made, any determination with respect to the son or daughter's eligibility for admission as a family-sponsored immigrant shall be made as if such naturalization had not taken place.
- ***Priority date***. – Regardless of whether a petition is converted under this subsection or not, if an unmarried son or daughter described in this subsection was assigned a priority date with respect to such petition before such naturalization, he or she may maintain that priority date.
- ***Clarification***. – This subsection shall apply to a petition if it is properly filed, regardless of whether it was approved or not before such naturalization.

What Section 204(k) means is that an F2B beneficiary of an I-130 petition is automatically converted into F1 upon the naturalization of the parent who was previously a lawful permanent resident (LPR). However, such a beneficiary may opt-out, either prior to the conversion or after the conversion, by requesting such an election through a written statement. If an election has been made, the son or daughter would be considered under the F2B as if such naturalization of the parent never took place.

At issue is the interpretation of the phrase "in the case of a petition under this Section *initially filed* for a alien's unmarried son or daughter's classification as family-sponsored immigrant under Section 203(a)(2)(B)."

In a previous USCIS Memo dated March 23, 2004 *(March 23, 2004 Memo)*, the USCIS opined that the opt-out provision applied only to a beneficiary whose initial Form I-130 was filed after he or she turned 21 or over as the unmarried son or daughter of an LPR. If on the other hand, the I-130 petition was filed by an LPR on behalf of his or her child when the child was under 21 years of age, and the child attained the age of 21, and then the parent naturalized, the opt-out provision would no longer be applicable according to that Memo.

Fortunately, the USCIS reversed itself in a subsequent Memo from Michael Aytes, dated June 14, 2006 *(June 14, 2006 Memo)*, and opined that the phrase "initially filed" would be applicable to the beneficiary who was sponsored as a minor. The June 14, 2006 Memo generously notes that the prior policy had a perverse result of older siblings who were originally sponsored under F2B acquiring permanent residency more quickly than the younger siblings who had to wait longer under the F1. The Memo also notes that it is reasonable to interpret "initially filed" as "initially filed for an alien *who is now* in the unmarried son or daughter classification."

At present, beneficiaries born in all countries excepting the Philippines may opt out from F1 and remain in F2B, and thus the guidance provided in the March 23, 2004 Memo regarding contacting the USCIS Officer in Charge in Manila may no longer be relevant. According to a April 2008 Memo from Donald Neufeld (April 2008 Neufeld Memo), one must file a request in writing at the USCIS District Office with jurisdiction over the beneficiary's residence. For example, one would have to make such a request with the New Delhi Field Office (which covers India, Pakistan, Bangladesh, Nepal, Bhutan, Sri Lanka, Afghanistan, and the Maldives) if the beneficiary resides in any of these countries. The question is whether all USCIS District offices are set up to accept unsolicited requests of this sort, and whether such a request would truly be effective.

In addition to writing to a USCIS District Office, one should not be prevented from also writing to either the Service Center that processed the I-130 petition or to the National Visa Center, if the approved I-130 petition is already residing there. It may also be well worth it to notify the USCIS at the time of filing an adjustment of status application if the beneficiary resides in the United States. For instance, if the beneficiary has automatically converted to F1 and finds that F2B is more advantageous, he or she should still go ahead and file the adjustment of status application accompanied by a letter requesting that he or she be allowed to opt-out of F1. The adjustment-application option arguably

complies with the April 2008 Neufeld Memo because a family-based adjustment filing with the lockbox is made with the expectation that it will likely be ultimately forwarded to the local District Office for an interview, by way of the National Benefits Center.

The timing of making such a request is also crucial. It is probably advisable to make the request to opt out just prior to the priority date becoming current or at the time when it has become current. While one may in principle be able to reverse an opt-out, it is preferable to wait until the F-2B is current or almost current before opting out. One would not want to be the test case for how many times you can opt out, and reverse, and reverse your reversal, if the relative positions of the F-1 and F-2B keep changing over time before the priority date is current.

Finally, the USCIS has always taken the position, affirmed by the Board of Immigration Appeals in *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011) that it is the beneficiary's biological age that is locked in when the petitioner naturalizes and not the protected CSPA age. Hence, if the beneficiary, who has already turned 21, has his or her age protected under the CSPA so as to remain in the Family Second Preference (2A), as the minor child of a permanent resident parent, then it may not be advisable for the parent to naturalize if the child would be disadvantaged under the F1, or if there is an opt out, under the F2B. *Zamora-Molina* further held that the child could not opt out from F1 to F2A, only to F2B. It is thus important to strategically consider whether naturalization by the parent would be worth it if it would disadvantage the child's ability to more quickly receive the green card.

(The information contained in this blog is of a generalized nature and does not constitute legal advice).