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RECIPE FOR CONFUSION: USCIS SAYS ONLY THE FINAL ACTION DATE IN VISA BULLETIN PROTECTS A CHILD'S AGE UNDER THE CHILD STATUS PROTECTION ACT

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The Child Status Protection Act is one of the most complex pieces of immigration legislation. Passed in 2002, the CSPA protects the age of children who would otherwise not qualify as children if they turned 21. The lack of any regulation has made the legislation even more confusing especially in light of more recent developments such as the introduction of the dual chart State Department Visa Bulletin in October 2015.

On August 24, 2018, however, the USCIS Policy Manual consolidated the guidance on the CSPA that the USCIS has developed over the years, and definitively confirmed that the Final Action Date in the State Department Visa Bulletin protects the age of the child rather than the Filing Date. There are other significant interpretative changes too, but this blog will focus on the change relating to the interplay between the dual chart Visa Bulletin and the CSPA.

On October 1, 2015, DOS introduced two charts in the monthly visa bulletin – Chart A - Final Action Dates and Chart B – Filing Dates. The Filing Date in the Visa Bulletin potentially allows for the early filing of I-485 adjustment of status applications if eligible applicants are in the United States and the filing of visa applications if they are outside the country. The Final Action Date is the date when permanent residency (the green card) can be granted. The Filing Date, if the USCIS so determines, allows for the early submission of an I-485 application prior to the date when the green card actually become available. Similarly for those who are outside the United States and processing for an immigrant visa

overseas, the Filing Date allows applicants to submit the DS-260 immigrant visa application and become documentarily qualified prior to the issuance of the immigrant visa when the Final Date becomes available. The DOS has historically issued a qualifying date prior to the visa becoming available so that applicants could begin processing their visas. This informal qualifying dates system morphed into a more formal Filing Date in the Visa Bulletin from October 1, 2015 onwards. As a result, the USCIS also got involved in the administering of the Visa Bulletin with respect to the filing of I-485 adjustment applications. Even if the Filing Date becomes available, it is the USCIS that determines whether applicants can file an I-485 application or not each month.

The Filing Date has become practically useless for employment-based I-485 applicants since USCIS only allowed I-485 applications to be filed pursuant to the Filing Date in October 2015 and November 2015. Since December 2015, USCIS has never allowed employment-based adjustment applicants to file their I-485s under the Filing Date. On the other hand, the USCIS allows family-based beneficiaries of I-130 petitions to file I-485 applications under the Filing Date, and has continued to so in the September 2018 and the forthcoming October 2018 Visa Bulletins.

Using the Filing Date to protect the age of the child who is nearing the age of 21 is clearly more advantageous – the Filing Date becomes available sooner than the Final Action Date. As of August 24, 2018, the USCIS has made clear through the Policy Manual that only the Final Action Date can be used to determine and freeze the age of a child. Thus, if an I-485 application is filed pursuant to a Filing Date and the child ages out before the Final Action Date becomes available, the child will no longer be protected despite being permitted to file an I-485 application. The I-485 application will get denied, and if the child no longer has an underlying nonimmigrant status, can be put in great jeopardy through the commencement of removal proceedings, and even if removal proceedings are not commenced, can start accruing unlawful presence, which can trigger the 3 and 10 year bars to reentry. If the child filed the I-485 as a derivative with the parent, the parent can get approved for permanent residence when the Final Action Date becomes available while the child's application gets denied.

In order to avoid such an absurd and cruel outcome, I have consistently advocated that there is a clear legal basis to use the Filing Date to protect the age of a child under the CSPA. While the USCIS has not agreed, I continue to advocate that affected children can challenge USCIS' interpretation in federal

court. There may also be a basis to challenge this interpretation before an Immigration Judge and the Board of Immigration Appeals, and further before a Court of Appeals, if the applicant is placed in removal proceedings upon the denial of the I-485 application. Immigration Judges are not bound by the USCIS Policy Manual. The USCIS Policy Manual is not law, although applicants should follow the Final Action Date for making the CSPA age calculation unless they have no choice but to challenge this interpretation.

Here is how one can argue the case for CSPA protection under the Filing Date: INA 245(a)(3) only allows for the filing of an I-485 adjustment of status application when "an immigrant visa is immediately available." Yet, I-485 applications, at least family-based under the current Visa Bulletin, can be filed under the Filing Date rather than the Final Action Date. This suggests that the term "immigrant visa is immediately available" has been interpreted more broadly to encompass dates ahead of when a green card becomes available. Indeed, the Visa Bulletin describes the Filing Date as "dates for filing visa applications within a timeframe justifying immediate action in the application process." Under this permissible interpretation, I-485 applications can be filed pursuant to INA 245(a)(3) under the Filing Date. There is a difference, for example, in the F2A worldwide Final Action Date in the September 2018 Visa Bulletin, which is July 22, 2016, and the F2A worldwide Filing Date, which is December 1, 2017. Thus, under the Filing Date, those with later priority dates, December 1, 2017, can file I-485 applications even though those with an earlier priority date, July 22, 2016, are actually eligible to receive the green card. Still, applicants who file I-485s under both the Filing Date and the Final Action Date must satisfy INA 245(a)(3), which only permits the filing of an I-485 application when "an immigrant visa is immediately available."

Under INA 203(h)(1)(A), which codified Section 3 of the CSPA, the age of the child under 21 is locked on the "date on which an immigrant visa number becomes available…but only if the has sought to acquire the status of an alien lawfully admitted for permanent residency within one year of such availability." If the child's age is over 21 years, it can be subtracted by the amount of time the applicable petition was pending. See INA 203(h)(1)(B).

Under INA 245(a)(3), an I-485 application can only be filed when an "immigrant visa is immediately available."

Therefore, there is no meaningful difference in the verbiage relating to visas

availability – "immigrant visa becomes available" and "immigrant visa is immediately available" under INA 203(h)(1)(A) and INA 245(a)(3) respectively. If an adjustment application can be filed based on a Filing Date pursuant to 245(a)(3), then the interpretation regarding visa availability under 203(h)(1)(A) should be consistent, and so the Filing Date ought to freeze the age of the child, and the child may seek to acquire permanent residency within 1 year of visa availability, which can be either the Filing Date or the Final Action Date.

Unfortunately, USCIS disagrees. It justifies its position through the following convoluted explanation that makes no sense: "If an applicant files based on the Dates for Filing chart prior to the date of visa availability according to the Final Action Dates chart, USCIS considers the applicant to have met the sought to acquire requirement. However, the applicant's CSPA age calculation is dependent on visa availability according to the Final Action Dates chart. Applicants who file based on the Dates for Filing chart may not ultimately be eligible for CSPA if their calculated CSPA age based on the Final Action Dates chart is 21 or older." The USCIS recognizes that the sought to acquire requirement is met when an I-485 is filed under the Filing Date, but only the Final Action Date can freeze the age! This reasoning is inconsistent. If an applicant is allowed to meet the sought to acquire requirement from the Filing Date, the age should also similarly freeze on the Filing Date and not the Final Action Date. Now, based on USCIS's inconsistent logic, the I-485s of many children will get denied if they aged out before the Final Action Date became available. These children must not hesitate to challenge USCIS's interpretation. Government policy manuals are not the law, and when there is an erroneous interpretation, they ought to be challenged so that USCIS is forced to make the appropriate correction.