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CSPA TRIUMPHS IN CUTHILL V. BLINKEN: CHILD OF PARENT WHO NATURALIZES SHOULD NOT BE PENALIZED

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By Cyrus D. Mehta

One of the unresolved conundrums in our immigration law is the inability of children of lawful permanent residents to be protected under the Child Status Protection Act (CSPA) when their parents naturalize to US citizenship. The CSPA was enacted to ensure that a child remained under the age of 21 in order to obtain permanent residency with the parent or to stay in a more advantageous family visa category. Sure enough, the CSPA protects the age of a minor child of a who has been sponsored for permanent residency by the parent who is a green card holder even when the child turns 21. Unfortunately, based on erroneous government policy, the goal of the CSPA gets thwarted when the parent of this child naturalizes especially after the child's biological age is over 21 years.

The Second Circuit in *Cuthill v. Blinken* recently clarified by holding that a child of a permanent resident whose age is protected under the CSPA ought to be able to continue to claim age protection under the CSPA even when the parent naturalizes to US citizenship.

Section 2 of the CSPA, codified in the Immigration and Nationality Act, protects the age of minor children of US citizens under the age of 21. These minor children are termed Immediate Relatives (IR) under INA 201(b)(2)(A)(i). When a US citizen parent files an I-130 petition for an IR minor child, the child's age will be frozen under 21 even if there is a delay in the grant of permanent residency and the biological age of the child crosses 21. See INA 202(f)(1).

What happens when a minor child of a permanent resident naturalizes? The

child automatically converts from the Family Second (2A) to the IR category. If the biological age of the child is under 21 at the time of the parent's naturalization, the child's age pursuant to INA 201(f)(2) freezes. Even if there is a delay in the grant of permanent residency and the child's biological age is over 21, the child's statutory age remains frozen under 21.

So far so good. What happens if the child's biological age under the F2A was over 21 but was protected under the CSPA? Section 3 of the CSPA protects the age of a child who is the beneficiary of a F2A petition under a special formula. This is how it works:

When the Family 2A petition becomes current under the State Department Visa Bulletin, one has to look at the age of the child on the first day of the month when the F2A becomes current. If the biological age of the child is over 21 at that time, the age can be subtracted by the amount of time the I-130 petition took to get approved from the date of filing. If this subtraction reduces the age of the child under 21, the child can remain under F2A rather than slide into the less favorable Family 2B preference (F2B), which applies to unmarried sons and daughters of permanent residents. There is clearly a big advantage of remaining under F2A rather than F2B. The F2A is current under the March 2021 Visa Bulletin while the F2B cutoff date in the worldwide category is July 22, 2015.

Although the age of the child is protected under F2A, when the parent naturalizes, the USCIS has taken the position that the age could no longer be protected. Thus, the child gets penalized when the parent became a US citizen. It also leads to the absurd result of inhibiting the parent from naturalizing as the child is better off remaining the child of a lawful permanent resident than a citizen.

These were precisely the facts in *Cuthill v. Blinken*. On September 29, 2016, when Veronica Cuthill was a permanent resident, she filed an I-130 petition for her daughter, Tatiana Maria Diaz de Junguitu Ullah, who was exactly 19 years 9 months and 6 days old. U.S. Citizenship and Immigration Services (USCIS) took 363 days to process the I-130 petition and approve it. Although the daughter's biological age exceeded 21 while she was waiting for the F2A visa, under the CSPA formula the daughter remained in the F2A preference.

On June 25, 2018, while Diaz was waiting for an F2A visa, Cuthill naturalized as a US citizen. At that time Diaz was still statutorily eligible under the F2A visa

based on the 363 days of subtraction of processing time from her biological age. Cuthill sought to convert Diaz's F2A petition for an IR visa, but the State Department instead notified her that Diaz would be placed in the Family First Preference (F1) queue rather than be considered an IR.

The key issue is whether Cuthill's daughter Diaz could remain in F2A or whether she would convert into F1. If the daughter converted from F2A to F1, it would cause a great setback. Under the March 2021 Visa Bulletin, the cutoff final action date for F1 beneficiaries is August 8, 2015. The F2A, on the other hand, is current.

INA 201(f)(2) allows a conversion from F2A to IR when the parent naturalizes. This provision is reproduced below:

> ***Age of parent's naturalization date*** *– In the case of a petition under section 204 initially filed for an alien child's classification as a family-sponsored immigrant under section 203(a)(2)(A), based on the child's parent being lawfully admitted to permanent residence, if the petition is later converted, due to the naturalization of the parent, to a petition to classify the alien as an immediate relative under section (b)(2)(A)(i), the determination described in paragraph (1) shall be made using the age on the date of the parent's naturalization (emphasis added).*

The question before the Second Circuit was whether "the age on the date of the parent's naturalization" is the biological age of the child or the CSPA age of the child? Judge Katzmann writing the decision for the three judge panel, acknowledged that "although no one will ever accuse the CSPA of being reader-friendly" ingeniously found a textual path to hold that it is the CSPA age and not the biological age that counts. Although INA 203(h)(1)(A) (which protects the age of F2A beneficiaries) and INA 201(f)(2) (which protects the age of IRs) are separate sections within the INA, there is a connection between the two as they both reference the definition of a child under INA 101(b)(1).

Under INA 101(b)(1), a child is "an unmarried person under twenty-one years of age." However, the definition of the child is modified under INA 203(h)(1)(A) for F2A children. As noted, under this provision, a child's CSPA age under F2A can be reduced to under 21 even if the biological age has exceeded 21 by subtracting the age based on the amount of time the I-130 petition took to get approved. Since INA 201(f)(2) also references INA 203(a)(2)(A), there is a

connection between the two sections, and the child's age can be interpreted as the CSPA age rather than the biological age when the parent naturalizes, and thus Diaz should convert from F2A to the uncapped IR rather than remain in the backlogged F1.

Judge Katzmann did not end the analysis here, but examined the broader purpose of the CSPA. "We examine Congress's purpose in enacting the CSPA, and it is there that we find our clincher: The legislative history shows a clear desire by Congress to fix the age-out problem for all minor beneficiaries, and there is nothing to suggest that Congress intended to exclude beneficiaries like Diaz," Judge Katzmann wrote.

The government's argument of insisting that Diaz move from F2A to F1 after her mother Cuthill naturalized ran counter to CSPA's purpose of to protect child beneficiaries from aging out of their age-dependent visas. While reliance on legislative purpose is often criticized since Congress is a divided body, with respect to the CSPA, Judge Katzmann emphasized that it passed the House by a unanimous 416-0 vote, then passed the Senate by a unanimous vote and again passed the House again by a unanimous vote. "Penalizing people for becoming citizens runs counter to the entire family-based visa scheme," Judge Katzmann said. Finally, Judge Katzmann also did not give Chevron deference to a prior decision of the Board of Immigration Appeals, *Matter of Zamora-Molina,* 25 I&N Dec. 606, 611 (BIA 2011), in which the BIA adopted the same flawed interpretation as the government tried to unsuccessfully advance in *Cuthill*. When the intent of Congress is clear, a court need not give deference to an agency's interpretation of the statute.

The Second Circuit in *Cuthill v. Blinken* follows the Ninth Circuit's decision in *Tovar v. Sessions* that also held that the naturalization of a parent ought not to adversely impact the protected age of the child under the CSPA. Both these courts of appeals have ruled correctly and consistently with the purpose of the CSPA. Rather than appealing to the Supreme Court, it is about time that the DHS and the State Department under President Biden issue a policy to ensure that the holdings of the Second and Ninth Circuits be uniformly implemented - at the USCIS and State Department - for all children whose age is protected under F2A and whose parents subsequently naturalize.

If these decisions are not implemented uniformly, parents of children whose age is protected under the F2A will be inhibited from naturalizing to US

citizenship. If they go ahead and naturalize, children will be involuntarily converted into the F1 category, which is hopelessly backlogged. Such a result could not have been the intent of Congress when it spoke with one voice to pass the CSPA, and two courts of appeals, the Second Circuit and the Ninth Circuit, have correctly held that INA 203(h)(1) and INA 201(f)(2), when read together, unambiguously provide a pathway for children to gain permanent residency as immediate relatives even when their parents become US citizens.