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THE DENIAL OF ADJUSTMENT OF STATUS APPLICATIONS OF DERIVATIVE CHILDREN WHO TURN 21 BEFORE THE FINAL ACTION DATE IN THE VISA BULLETIN BECAME CURRENT IS INCONSISTENT WITH THE CHILD STATUS PROTECTION ACT: CAN MORE LAWSUITS REVERSE ERRONEOUS USCIS AND DOS POLICY?

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By Cyrus D. Mehta

Several children who filed I-485 applications as derivatives of their Indian born parents under the October 2020 Visa Bulletin are being denied because they turned 21 years before the Final Action Dates became current. The backlogs for India in the employment-based second and third preferences have already caused untold suffering to beneficiaries of approved I-140 petitions who have to wait for over a decade in the never ending backlogs. When the Dates for Filing in the India EB-3 overtook the India EB-2 under the October 2020 Visa Bulletin thousands of applicants filed I-485 applications for themselves, spouses and minor children. Hence, the denial of the I-485 applications of their children who turn 21 and are not allowed to claim the protection of the Child Status Protection Act through the Dates for Filing exacerbates the problem for these beneficiaries.

The USCIS Policy Manual, https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-7, states that only the Final Action Dates (FAD) protects the age of the child under the Child Status Protection Act (CSPA). The State Department too has the same policy of using the FAD for purposes of freezing the age of the child at 9 FAM

502.1-1(D)(4) .

Using the Dates for Filing (DFF) to protect the age of the child who is nearing the age of 21 is clearly more advantageous – the date becomes available sooner than the FAD – but USCIS policy erroneously maintains that only the FAD can protect the age of the child. Thus, if an I-485 application is filed pursuant to a DFF and the child ages out before the FAD 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 FAD becomes available while the child's application gets denied.

I had first advocated in my blog of September 22, 2018 entitled Recipe for Confusion: USCIS Says Only the Final Action Date Protects a Child's Age under the Child Status Protection Act that the DOF should protect the age of the child under the CSPA rather than the FAD.

There is a clear legal basis to use the filing date to protect the age of a child under the CSPA:

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 can be filed under the DFF rather than the FAD. As explained, the term "immigrant visa is immediately available" has been interpreted more broadly to encompass dates ahead of when a green card becomes 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 in the policy manual 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, the applicant still will meet 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 DFF, but only the FAD can freeze the age! This reasoning is inconsistent. If an applicant is allowed to meet the sought to acquire requirement from the DFF, the age should also similarly freeze on the DFF and not the FAD. Based on USCIS's inconsistent logic, the I-485s of many children will get denied if they aged out before the FAD becomes available.

Neither the USCIS nor the DOS have considered reversing this policy by allowing CSPA protection based on the DFF. Brent Renison challenged this policy in *Nakka v. USCIS*, details of which can be found on his blog at http://www.entrylaw.com/backlogcspalawsuit. The plaintiffs in this case not only challenged the CSPA policy but also argued that they were denied equal protection under the Fifth Amendment on the ground that children of parents who were born in countries such as India and China that have been impacted by the per country limits have a worse outcome than children of parents born in countries that have not been impacted by the per country limits. Magistrate Judge Youlee Yim You found on November 30, 2021 that plaintiffs' claims that the USCIS Policy Manual and Foreign Affairs Manual dictating the use of the FAD to calculate the CSPA age instead of DOF was not "final agency action" and thus could not be reviewed under the Administrative Procedure Act.

Magistrate Judge You also found that plaintiffs could not claim a violation of

equal protection under the U.S. constitution for unequal treatment. The Magistrate Judge's decision is only a recommendation to the district court judge presiding over the case, who is Judge Simon. The Magistrate Judge's recommendation also does not pass any judgment on the policy itself and whether it is appropriate to rely on the FAD rather than the DOF. It should also be noted that a Magistrate Judge is not an Article III judge and her findings and recommendations will not be binding leave alone persuasive on another court.

Prior to *Nakka v. USCIS*, there was another challenge in *Lin Liu v. Smith*, 515 F. Supp. 3d 193, 199 (S.D.N.Y. 2021) to the policy in the FAM requiring the use of the FAD rather than the DOF to protect the CSPA age. In this case too, Judge Koeltl opined that the policy in the FAM is an interpretive rule rather than a legislative rule. The plaintiffs also claimed that the government unlawfully applied the updated Visa Bulletin to the plaintiff retroactively. Here too the court dismissed the claim because the court held that DOS did not implement a new policy, and therefore there was nothing that could have been applied retroactively to the plaintiff. Judge Koeltl made the following observation:

> *The Visa Bulletin formerly contained one chart that listed the priority dates that were current for visa number availability. DOS updated the Visa Bulletin to include a second chart showing when applicants could file their applications with the NVC. However, the Final Action Date chart, not the Dates for Filing chart, reflects the information previously listed in the one-chart Visa Bulletin. In other words, the Dates for Filing chart is the new feature in the Visa Bulletin, not the Final Action Date chart. Both before and after the modernization of the Visa Bulletin, DOS used the same information to determine when a visa number became available, namely, when a visa number could be issued legally given the limits set by Congress. While DOS did change the format in which it conveyed this information—posting two charts to the Visa Bulletin rather than one chart—the substantive policy did not change. The newly added Dates for Filing chart reflects useful information for when applicants can begin submitting materials to the NVC, but it does not reflect when visa numbers are legally available. Therefore, the plaintiff has not pleaded adequately that the defendants changed their policy with respect to tethering visa number availability to when the visa number could be issued lawfully given country and category limits to visa allocation.*

Lin Liu v. Smith should not be considered the final word on challenging the USCIS CSPA policy. The plaintiff in this case was a derivative child who was outside the US processing her immigrant visa at the US Consulate. Her father had received a visa under the EB-5 but she had been denied the visa because she was not able to demonstrate that her age had been protected under the DOF and not the FAD. However, Judge Koeltl did not deal with the paradox that is applicable to adjustment applicants in the US. Unlike applicants pursing an immigrant visa at a US consulate, they are allowed to file an adjustment application under the DOF because the USCIS has interpreted the DOF to signify that a visa number is immediately available under INA 245(a)(3). However, the child is then deprived of the ability to demonstrate that the visa is immediately available under INA 203(h)(1)(A) for purposes of protecting his or her age.

The setbacks in *Nakka v. USCIS* and *Lin Liu v. Smith* ought not discourage a plaintiff from continuing to challenge the inconsistent USCIS policy of allowing an adjustment application to be filed under the DOF but not allowing CSPA age protection. One involves the findings and recommendations of a non-Article III magistrate judge, which can be overruled by the district judge presiding over the case. The other decision involves a plaintiff who was applying for an immigrant visa at a US Consulate overseas where the DOF does not have any significance. A child applicant whose I-485 was denied because the age could not be protected when the DOF became current should certainly consider seeking judicial review of the decision under the Administrative Procedures Act. Alternatively, if the child is placed in removal proceedings, the child's I-485 can potentially be renewed in removal proceedings and he or she should be able to argue that neither the USCIS nor DOS policy regarding the FAD protecting the CSPA age is binding on an Immigration Judge. If the IJ affirms a denial, the decision can be appealed to the Board of Immigration Appeals, and if the BIA reaffirms the IJ's decision, a petition for review can be filed in a Court of Appeals. Hence, there are two avenues for judicial review – through the APA in federal district court or through a petition for review in a court of appeals – that may be able to reverse the erroneous USCIS policy.