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CSPA DISHARMONY: USCIS ALLOWS CHILD'S AGE TO BE PROTECTED UNDER THE DATE FOR FLING WHILE DOS ALLOWS CHILD'S AGE TO BE PROTECTED UNDER THE FINAL ACTION DATE

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On February 14, 2023, the USCIS recognized that the age of the child gets protected under the Child Status Protection Act when the Date for Filing (DFF) in the Department of State ("DOS" or "State Department") Visa Bulletin becomes current.

Since October 2015, the State Department Visa Bulletin two different charts to determine visa availability – the Final Action Dates (FAD) chart and the Dates for Filing (DFF) chart. The DFF 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. The FAD is the date when permanent residency 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.

Prior to February 14, 2023, the USCIS maintained that the FAD protected the age of the child and not the DFF. Using the 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 maintained since September 2018 that only the FAD could protect the age of the child.

The USCIS on February 14, 2023 at long last agreed to use the DFF to protect the age of the child, and acknowledged this:

"After the publication of the May 2018 guidance, the same applicant for

adjustment of status could have a visa "immediately available" for purposes of filing the application but not have a visa "become available" for purposes of CSPA calculation. Applicants who filed based on the Dates for Filing chart would have to pay the fee and file the application for adjustment of status without knowing whether the CSPA would benefit them. To address this issue, USCIS has updated its policies, and now considers a visa available to calculate CSPA age at the same time USCIS considers a visa immediately available for accepting and processing the adjustment of status application. This update resolves any apparent contradiction between different dates in the visa bulletin and the statutory text regarding when a visa is "available."

Even if the child's age is protected when the DFF becomes current, the applicant must have sought to acquire permanent resident status within one year INA 203(h)(1)(A). According to the USCIS Policy Manual this could include filing a Form I-485, Form DS 260, paying IV fee, I-864 fee, I-824 or requesting transfer of underlying basis of an I-485.

Unfortunately, USCIS's policy of using the DFF to protect a child's age seems only to pertain to individuals who apply for adjustment of status within the United States. The Department of State (DOS) has yet to issue any corresponding guidance or update the Foreign Affairs Manual (FAM) in accordance with USCIS's new policy. The FAM still states that an applicant's "CSPA age' is determined on the date that the visa, or in the case of derivative beneficiaries, the principal applicant's visa became available (i.e., the date on which the priority date became current in the Application ***Final Action Dates*** and the petition was approved, whichever came later) (emphasis added)". Thus, an applicant outside the U.S. who pays an immigrant visa (IV) fee may satisfy the "sought to acquire" requirement, but only based on the FAD becoming current. This uneven policy makes little sense, and the DOS should promulgate its own guidance in accordance with USCIS's policy to ensure that the DFF can also be used to protect the age of a child who processes for a visa overseas.

This results in an odd anomaly. A child who is seeking to immigrate through consular processing in the foreign country may not be able to take advantage of the CSPA under the DFF while a child who is seeking to adjust status while in the US can have the age protected under the DFF. Take the example of an Indian born beneficiary of a Family-Based Third Preference Petition, which applies to married sons and daughters of US citizens. The I-130 petition was filed by the US citizen parent on behalf of the married daughter, Nikki, on

March 2, 2009. The FAD on this I-130 petition became current under the State Department Visa Bulletin on January 1, 2024 and Nikki has been scheduled for an immigrant visa interview date on February 1, 2024 at the US Consulate in Mumbai. But the daughter's son, Vivek, who was born on June 1, 1998 has already aged out and cannot get protected under the FAD since he is already 26.

On the other hand, the DFF on this petition became current on June 1, 2020. The NVC notified Nikki and her derivative Vivek to pay the fee and complete the rest of the processing such as filing the DS 260 application. On June 1, 2020, Vivek was already 22 years. However, the I-130 petition that was filed on March 2, 2009 took one year and 1 day to to get approved on March 3, 2010. Under INA 203(h)(1)(A) the CSPA age is calculated based on the age of the child when the visa becomes available reduced by the number of days during which the I-130 petition was pending. So even though Vivek's biological age on June 1, 2020 was 22, his CSPA age was under 21. By seeking to acquire permanent residency within one year of June 1, 2020, Vivek's CSPA age got permanently locked in under the DFF.

Nikki paid the NVC fee on December 1, 2020 but took her time with the completion of the DS 160 applications, which were submitted sometime in the month of July 2021. Vivek's age is protected under the DFF on June 1, 2020, which became current well before the FAD became current. He also sought to acquire lawful permanent resident status by paying the NVC fee within one year of June 1, 2020 along with his mother, Nikki, even though they filed their DS 260 applications after a year from the DFF becoming current. If Vivek is seeking to process the case through consular processing at the US Consulate in Mumbai, he cannot do so as the State Department only recognizes the FAD to protect the child under the CSPA. But if Vivek is in the US in a nonimmigrant status such as F-1 he will luck out. Once Nikki is issued the immigrant visa in Mumbai, she can get admitted in the US as a permanent resident. Vivek can subsequently file an I-485 application in the US while in F-1 status as a follow to join derivative. Vivek can also argue that he sought to acquire permanent resident status by paying the NVC fee within 1 year of the DFF becoming current.

If for any reason Vivek's I-485 application is denied because the USCIS did not accept that the payment of the NVC fee amounted to Vivek seeking to acquire, he would still arguably as explained in our prior blog be able to maintain F-1

status under *Matter of Hosseinpour*, which recognized inherent dual intent in nonimmigrant visas. *Matter of Hosseinpour* involved an Iranian citizen who entered the U.S. as a nonimmigrant student and later applied for adjustment of status. After his adjustment of status application was denied, he was placed in deportation proceedings and found deportable by an immigration judge on the ground that he violated his nonimmigrant status by filing an adjustment of status application. The BIA disagreed with this interpretation of the nonimmigrant intent requirement for foreign students, noting the amendments to the Immigration and Nationality Act had expressly removed a provision stating that an individual's nonimmigrant status would automatically terminate if he filed an adjustment of status application. Thus, the BIA held that "filing of an application for adjustment of status is not necessarily inconsistent with the maintenance of lawful nonimmigrant status". The BIA also referred to legal precedent which states that "a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status." (See Brownell v. Carija, 254 F.2d 78, 80 (D.C. Cir. 1957); Bong Youn Choy v. Barker, 279 F.2d 642, 646 (C.A. 9, 1960). See also Matter of H-R-, 7 I & N Dec. 651 (R.C. 1958)).

Notwithstanding the disharmony between the USCIS and State Department CSPA policy, Vivek is able to take advantage of the more favorable DFF because he happened to be in the US in F-1 status and the USCIS belatedly recognized that the DFF could be relied on to protect the age of the child on February 14, 2023. Not all derivative beneficiaries might be so fortunate. Take the example of Vivek's twin sister Kamala who is not in the US in F-1 status like her brother. Her only option to take advantage of the more favorable DFF is to obtain a B-2 visa and then file an I-485 in the US after Nikki is admitted as a lawful permanent resident. It might be impossible for Kamala to obtain a B-2 visa as the nonimmigrant visa applicant needs to demonstrate a foreign residence abroach which she has not abandoned. A consular officer may well refuse her application for the B-2 visa under INA 214(b) as she has not been able to establish that she is not an intending immigrant. Even if Kamala already obtained a B-2 visa stamp previously, she would need to enter the US in B-2 status and subsequently file the I-485 with the USCIS. The USCIS may deny the I-485 if Kamala entered the US with an intent to file for permanent residency in the US under the fraud or willful misrepresentation ground of inadmissibility under INA 212(a)(6)(C)(i). Of course, if Kamala is able to get admitted into the US

on a dual intent H-1B or L-1 visa, she can file the I-485 application without any issues.

If the DOS aligned its CSPA policy with the USCIS, there would be no need for such convoluted albeit legal workarounds. Both Vivek in the US and Kamala in India would be able to seek the protection of the CSPA based on the DFF becoming current on June 1, 2020.