CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

GRANTING DEFERRED ACTION TO AGING OUT CHILDREN IN LAWFUL STATUS IS PREFERABLE TO HAVING THEM START ALL OVER AGAIN

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By Cyrus D. Mehta

Children of beneficiaries of approved I-140 petitions that are caught in the employment-based backlogs are in danger of aging out if they turn 21 and are unable to obtain permanent resident status with their parents. Although the Child Status Protection Act (CSPA) is able to protect the age of some children from aging out, not all children can benefit from the CSPA especially when neither the Date for Filing or the Final Action Date in the State Department Visa Bulletin is nowhere close to becoming current with respect to the I-140 petition filed on behalf of the parent. Indian born beneficiaries in the employment based first, second and third preferences are particularly impacted as the wait time before their priority dates become current can be an absurd 195 years. Over one million Indian born beneficiaries and their dependents will be waiting for the rest of their lives in the backlogs.

Although Congress can easily fix this problem by infusing more visa numbers in the employment-based categories along with reducing the per country limits, due to the intense polarization between the two parties and the obsessive focus on the border, those in Congress who desire to fix the problem are unable to get support to pass meaningful legislation. On June 13, 2024, a bipartisan group of 43 members of Congress sent a letter to Homeland Security Secretary Alejandro Mayorkas and U.S. Citizenship and Immigration Services Director Ur Jaddou requesting an administrative fix for children who will age out.

The letter requests three policy changes as follows:

> *First, "Clarify the applicability of potential grants of deferred action on a case-by-case basis, where discretion is warranted, for children of long-term visa holders who age out of status."*
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> *Second, "Expand eligibility for Employment Authorization to child dependents of visa holders, and to individuals with approved I-140 petitions." The letter also urges USCIS to expand eligibility for employment authorization (an EAD) under "compelling circumstances" to include "children who are aging out."*
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> *Third, "We urge USCIS to create a process to allow children of long-term visa holders who have aged out to seek parole on a case-by-case basis, if warranted for urgent humanitarian reasons or to advance a significant public benefit."*

My views on this bipartisan letter have been extensively reflected in an article in Forbes written by Stuart Anderson of the National Foundation for American Policy, which are extracted below:

> *"The administrative proposals are both interesting and intriguing as they may only give a temporary benefit to the child who has aged out with no pathway to permanent residence," said immigration attorney Cyrus Mehta. "Still, until Congress provides a legislative solution, these proposals, especially the first and second, would be an interim solution."*
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> *A child granted deferred action can remain in the United States and obtain employment authorization. "The big disadvantage under this proposal is that once the parent had been granted permanent residence, what happens to the child?" said Mehta. "The child will have to remain a recipient of deferred action for a very long time until they can obtain their own basis to immigrate to the U.S." A new presidential administration could rescind the deferred action, leaving an aged-out child in a situation similar to DACA recipients.*
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> *On the letter's second proposal, Mehta explains while it would be good for dependent children to obtain EADs under compelling circumstances, "Children who age out and cannot protect their age under the Child Status Protection Act will not be able to obtain immigrant visas along with their parents." A rule on the regulatory agenda that has not been issued*

> *would clarify and likely expand compelling circumstances for children at risk of aging out.*
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> *The letter also recommends granting employment authorization documents to the principal green card applicants waiting for permanent residence. "While granting EADs to beneficiaries of approved I-140s is a good thing, advocates should realize it will not lead to permanent residence if an individual changes jobs unless the new employer files the labor certification and I-140 again and the beneficiary is able to recapture the old priority date," said Mehta. The child may not be protected from aging out depending on the circumstances.*
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> *The third proposal—being paroled into the United States—also does not offer a clear pathway to permanent residence. A future administration can choose not to extend parole. Depending on when a parent obtains permanent residence, sponsoring a son or daughter may be possible, although likely via consular processing.*

While these proposals are less than ideal as they do not put aged out children on the path to permanent residence, an executive action that authorizes children to lawfully remain in the US long after they have aged out, and obtain work authorization and travel permission, is preferable to the status quo.

Presently, a child who is turning 21 would most likely be in H-4 status while the parent who is caught in the backlog is in H-1B status. The child must seek to change status before turning 21 to another nonimmigrant status. Most children of skilled workers are studying in college, and so they can change to F-1 status. Requesting a change to F-1 status is fraught with peril. Changing to F-1 status is fraught with risk as F-1 nonimmigrant classification requires one to have a temporary intent to remain in the US and ultimately return to a residence abroad, which has not been abandoned. It is difficult for a child in this situation who has been in the US for most of their life to demonstrate such a nonimmigrant intent. Furthermore, even if the child is successful in changing to F-1 status, travelling abroad is fraught with even greater risk as a US consul can deny the F-1 visa under INA 214(b), because the visa applicant has not overcome the presumption of immigrant intent by sufficiently demonstrating that they have strong ties to their home country that will compel them to leave the United States at the end of their temporary stay. H-1B and L visa applicants,

along with their spouse and any minor children, are excluded from this requirement, but when the child has switched to F-1 status, they have to meet this requirement.

If this child was not born to an Indian born backlogged beneficiary, they would have obtained permanent residence along with the parent. Unfortunately, this child who has aged out needs to start all over again in the labyrinthine immigration system like their parent has miserably experienced by first obtaining F-1 nonimmigrant status, then take their chance in the H-1B lottery. It is likely that most of them will not get selected in this lottery. If they are fortuitously selected, they can seek an employer to sponsor them for permanent residency while not getting any credit for their parent's priority date. They will need to establish a new priority date upon their employer sponsoring them for labor certification, and filing an I-140 petition, and then they too will have to wait for more than a lifetime to obtain permanent residence unless they happen to marry a US citizen, and get rescued from quotas and file for adjustment of status.

Instead of stating all over again in F-1 status, if a child is granted deferred action, they are authorized to remain in the US and even work by applying for employment authorization. If the child wishes to travel, they can request advance parole. This is probably better than remaining in nonimmigrant F-1 status, and then trying to switch to H-1B status under the H-1B lottery. They will need to be a recipient of deferred action for a very long time until they get sponsored for permanent residence through an employer or as an immediate relative of a US citizen spouse or through a family member under one of the family preferences.

Although a new president can yank the deferred action, they will be more stable so long as they have deferred action rather than being thrown into vagaries of the US immigration system. They can also hope that at some point Congress will bless this executive action and provide a pathway for these children to apply for permanent residence and citizenship just as DACA recipients have been hoping and advocating for a long time.

Finally, I also favor advancing the "Dates of Filing" in the State Department Visa Bulletin as much as possible to allow those waiting in employment-based green card categories to file I-485 applications for adjustment of status. This action would enable individuals to obtain employment authorization documents,

advance parole for travel purposes and protect the age of the child for an immigration filing.