



APPLICATION OF THE CHILD STATUS PROTECTION ACT TO THE CHILDREN OF U.S. CITIZEN PETITIONERS

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This practice advisory is one of a series of ILRC Practice Advisories on the Child Status Protection Act (CSPA).¹ CSPA, enacted on August 6, 2002, is a complex law that applies in different ways to different types of immigrant offspring. The overall intent of this law is to compensate for delays in processing that in the past caused the children of immigrants to age out and become ineligible for certain immigration benefits through their parents. This is because the Immigration and Nationality Act (INA) defines the term “child” as a person who is unmarried and under 21.² Before CSPA, these individuals would have become ineligible to immigrate as “children” of their parents if they turned 21 while their parents’ applications were pending.

This practice advisory only addresses how the CSPA applies to the children of U.S. citizen petitioners; the application of the CSPA to other types of cases are addressed in separate practice advisories. See ILRC’s additional CSPA advisories here.³

I. Classification of Children as Immediate Relatives

A. Child’s Age Frozen on Petition Filing Date

The CSPA amended the definition of “immediate relative” in Section 201 of the Immigration & Nationality Act, so that the age of a child is frozen on the date that the U.S. citizen parent files a visa petition on the child’s behalf.⁴ If the child was under 21 when the visa petition was filed (meaning received by USCIS), then the “child” will remain an immediate relative, no matter how the child is on date of final adjudication of the related petition. The “child” must remain unmarried in order to be classified as an immediate relative.⁵

Example: Chris was 20 years old and 10 months when his USC father petitioned for him to come to the United States. Because the I-130 was filed before Chris turned 21, Chris may consular process as an immediate relative regardless of how old he is at the time his visa is finally processed.

¹ Pub. L. No. 107-208 (Aug. 6, 2002).

² See INA § 101(b).

³ The two advisories are: The CSPA and Children of Permanent Residents, <https://www.ilrc.org/cspa-and-children-permanent-residents>, and The CSPA and Asylees, <https://www.ilrc.org/cspa-and-asylees>

⁴ INA § 201(f)(1)

⁵ See INA § 101(b).

B. Child's Age Frozen on the Date of the Parent's Naturalization

The CSPA also amended Section 201 of the INA to provide that if a permanent resident parent who had filed a visa petition on behalf of his or her child naturalizes, the age of the child on the date of the parent's naturalization determines whether or not that child may be classified as an immediate relative. If the child was under 21 on the date of the petitioner's naturalization, then the child becomes and remains an immediate relative, as long as he or she remains unmarried.⁶

The BIA has held that the age of the child on the date of the parent's naturalization under this provision is the child's biological age.⁷ However, the Ninth Circuit Court of Appeals holds that the child's "adjusted age" under the CSPA formula⁸ is the relevant age for calculating whether the child becomes an immediate relative when his petitioning parent naturalizes.⁹ This controversy is likely to be the subject of future litigation in other circuits.

Example: LPR Monika filed a petition on behalf of her daughter, Lourdes, when she was 14. Two years later, Monika naturalized. Lourdes's age is locked is frozen at 16, her age at the time of her mother's naturalization. She can thus process as an immediate relative with this petition.

Example: LPR Jacob petitioned for his child Luca. At the time the petition was filed, Luca was already 20 years old. It took 2 years for USCIS to adjudicate the petition. Just after Luca turned 21, Jacob naturalized.

In the Ninth Circuit, pursuant to *Tovar v. Sessions*, Luca is now classed as an immediate relative. His age is locked in as under 21, because applying the CSPA calculation in this situation would mean that Luca's CSPA calculated age was under 21 at the time of his father's naturalization.¹⁰

Pursuant to Board precedent, Luca's biological age at time of naturalization controls, and he would not be classed as an immediate relative. Instead, he would need to wait for the first preference category for unmarried sons and daughters of USCs to become current.

C. Formerly Married Child Who Terminates the Marriage While Under 21 is an Immediate Relative

The third amendment to Section 201 of the INA concerns the formerly married children of U.S. citizens whose parents had petitioned for them. Upon marriage, such a child will fall into the third preference category for family petitions: married sons and daughters of U.S. citizens. If such a child were to legally divorce or annul the marriage while still under the age of 21, under the CSPA that child automatically becomes an immediate relative.¹¹

Example: USC Jane petitions for her child Pete. Pete gets married at the age of 18. When Pete marries, he is no longer classified as an immediate relative. The petition Jane filed on his behalf moves to the third preference category for married sons and daughters of U.S. citizens. However, Pete's marriage doesn't work out. Pete

⁶ INA § 201(f)(2).

⁷ *Matter of Zamora-Molina*, 25 I. & N. Dec. 606 (BIA 2011).

⁸ The adjusted age for CSPA applies to preference petitions, and is the beneficiary's biological age minus the amount of time the visa petition has been pending on the date that an immigrant visa becomes available (visa approval date or date a visa becomes available, whichever is later).

⁹ *Tovar v. Sessions*, 882 F.3d 895 (9th Cir. 2018).

¹⁰ For more information on CSPA age calculations for the preference categories, see ILRC's advisory here: <https://www.ilrc.org/cspa-and-children-permanent-residents>.

¹¹ INA § 201(F)(3)

divorces at the age of 20. Because Pete is still under 21, he can use the petition his mother filed for him as an immediate relative. His immediate relative status is locked in (unless Pete marries again!).

D. VAWA Petitioners

VAWA¹² petitioners also benefit from the CSPA. Children of U.S. citizens who are unmarried and under 21 at time of filing the VAWA self-petition (Form I-360), are immediate relatives. Whether they are the derivative beneficiaries of a parent's I-360 or they file their own self-petitions, they remain immediate relatives under CSPA no matter how old they are when their petitions are adjudicated, as long as they remain unmarried.¹³

In addition to the CSPA, VAWA self-petitioning children may be eligible to apply for VAWA benefits up to age 25 if they can demonstrate that the abuse they suffered was one central reason for the failure to file before age 21. However, the abuse must have taken place before the applicant turned 21; otherwise s/he will not be eligible for VAWA benefits. This is a separate provision under VAWA that was enacted prior to the CSPA.¹⁴

A VAWA self-petition filed and accepted under this provision will be treated as if it had been filed before the applicant turned 21, even though in actuality it would have been filed between the beneficiary's 21st and 25th birthday.¹⁵ For children of USC abusers, this will lock in their status as an immediate relative.

A note on marriage: A self-petitioner cannot be married at time of filing. If the self-petitioning former child marries while the petition is pending, and remains married when it is adjudicated, it will be denied. However, if the self-petitioner marries while the petition is pending and then the marriage is terminated before the I-360 is adjudicated, the self-petitioner will remain eligible for VAWA approval.

E. Effective Date of CSPA Changes

The CSPA went into effect on August 6, 2002. It is not retroactive.

However, Section 8 of the CSPA provides that certain individuals who were the beneficiaries of visa petitions filed both before they turned 21 and before the August 6, 2002 effective date are covered under its provisions. These include:

1. Those whose relative petitions or VAWA petitions were approved before the August 6, 2002 effective date but whose applications for adjustment of status or consular processing had not been adjudicated before that date.
2. Those whose relative petitions or VAWA petitions were pending on August 6, 2002.
3. Those whose applications for adjustment of status or consular processing were pending on August 6, 2002.¹⁶

¹² The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. 109-162 (2006), and the Violence Against Women and Department of Justice Reauthorization Act of 2005 Technical Amendments, Pub. L. 109-271 (2006).

¹³ USCIS Interoffice Memorandum, "Age-Out Protections Afforded Battered Children Pursuant to The Child Status Protection Act and the Victims of Trafficking and Violence Protection Act, August 17, 2004.

¹⁴ USCIS Policy Memorandum, "Continued Eligibility to File for Child VAWA Self Petitioners After Attaining Age 21," PM-602-0048, September 6, 2011.

¹⁵ AFM §21.14(c)(1)(G): A self-petitioner petitioning for eligibility under sub-paragraph (v) of section 204(a)(1)(D) of the Act shall be treated as if the self-petition had been filed on the day before the self-petitioner attained age 21. When a self-petition is approved, however, a self-petitioner's continued eligibility and subsequent classification for visa issuance or adjustment of status shall be governed by section 201(f) of the Act or paragraph (i) of section 204(a)(1)(D) of the Act, whichever is appropriate.

¹⁶ See CSPA § 8, 116 Stat. at 930, which states: The amendments made by this Act shall take effect on the date of the enactment of this Act [August 6, 2002] and shall apply to any alien who is a derivative beneficiary or any other beneficiary of – (1) a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) approved before such date but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition; (2) a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) pending on or after such date; or (3) an application pending before the Department of Justice or the Department of State on or after such date.

4. It is not necessary for the application for adjustment of status or consular processing to have been pending on the CSPA effective date in order for the provisions of the CSPA to apply, as long as the application for adjustment or consular processing had not been finally adjudicated as of that date. *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007).

Example: Pilar, a U.S. citizen, filed form I-130 on behalf of her daughter Carmela on June 1, 2000, when Carmela was 20. The I-130 was approved on June 1, 2001 when Carmela was 21. However, Carmela did not file her adjustment application until June 1, 2003, when she was 22.

Carmela is an immediate relative under CSPA, because even though she turned 21 before the CSPA effective date of August 6, 2002, her visa petition was filed before she turned 21, and her adjustment application had not been finally adjudicated as of the CSPA effective date of August 6, 2002. The fact that she filed her adjustment application after August 6, 2002 is irrelevant. What counts is her age at the time the visa petition was filed, and the fact that there was no final determination on her adjustment application until after the CSPA effective date.¹⁷

¹⁷ See *Matter of Avila-Perez*, *supra*; see also *Arobelidze v. Holder*, 653 F.3d 513 (7th Cir. 2011).



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