APPLICATION OF THE CHILD STATUS PROTECTION ACT TO ASYLEES AND REFUGEES

The Child Status Protection Act (CSPA),[1] enacted on August 6, 2002, is a complex law that applies in different ways to certain types of applications for benefits under the Immigration and Nationality Act (INA) in which the petitioners' or principal applicants' children were included as derivative beneficiaries. 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 immigration benefits as derivatives of their parents. "Aging out," becoming too old to qualify as a child, is possible because the definition of a "child" for many immigration benefits requires the child to be under 21 and unmarried.[2] Before the CSPA, individuals would have become ineligible to immigrate as derivatives of their parents if they turned 21 while their parents' applications were pending. After implementation of the CSPA, many of these children remain eligible for the sought-after benefit after turning 21.

This practice advisory only addresses how the CSPA applies to asylees and refugees; the application of the CSPA to other types of cases is addressed in separate practice advisories.

A. The CSPA and Derivatives of Asylees

1. A Child's Age is Frozen as of the Date the I-589 is Filed

Under CSPA, a child who is under 21 at the time of filing the asylum application will remain a derivative child for purposes of asylum eligibility regardless if her actual age is over 21 at the time of adjudication. If a child is listed as a child on the application for asylum, Form I-589, this protection extends to later filings, including Form I-730 and adjustment.

a. Children included as derivatives on the Form I-589

Form I-589 and its instructions require that an asylum applicant list all of his or her children, including stepchildren and adopted children, regardless of age, and whether alive or deceased, married or unmarried. All children listed in the application and under 21 at time of filing for asylum benefit from the CSPA. If such a child is also "included" in the application as a derivative, they will become an asylee at the time the parent is granted, regardless of their actual age.

Identifying or listing the child as a dependent in the I-589 is not the same as including them in the application process as a derivative. "Included" for purposes of the I-589, means that the parent as the principal applicant not only listed the child in the I-589, but also checked the box that indicates she wants this child included in the application.[3]

[1] Pub. L. No. 107-208 (Aug. 6, 2002).
[2] See INA § 101(b).
[3] See both Form I-589, and the Instructions to Form I-589, Part A II.

Only those children who meet the definition of a "child" in INA §101(b)[4] at the time that the principal applicant parent files the asylum application may be "included" in the application.[5] Even if the child is not initially included in the I-589, if she is added before the application is adjudicated, she will be protected.[6]

If the principal parent's I-589 was filed affirmatively before USCIS, and the child is both in the United States and was included in the I-589, the child will automatically be granted asylum at the same time as the parent. If the principal parent is granted asylum by an immigration court, and the child is in the United States, the derivative child must also be in proceedings for the immigration judge to have jurisdiction to grant asylum to the child. Once the parent and children are granted, they will have to make an appointment with USCIS to acquire I-94s that demonstrate that they have been granted asylum.

b. Children of Asylees Who Were Either Not Included in the Parent's I-589 or Are Residing Abroad

Children who were listed, but not included as derivatives in a parent's I-589, whether they were living in the United States or abroad, must complete the "following to join" process to gain asylum status. The parent who was granted asylum must file an Asylee/Refugee Relative Petition (Form I-730) within two years of the asylum grant for the derivative to qualify to follow to join the parent as a derivative asylee.[7] The parent must file a separate Form I-730 for each derivative beneficiary.

Before the CSPA, if a child turned 21 before the I-730 was adjudicated, she would have aged out and been found ineligible for derivative asylum status. After the CSPA, the child may follow to join so long as they were under 21 at the time the parent filed for asylum. Under section 4 of the CSPA, the child's age is frozen as of the date that the principal parent filed for asylum on Form I-589, provided the child was listed in the I-589 before it was granted.[8] If the parent failed to list the child on Form I-589, then the child's age is frozen as of the date that the I-730 is filed.[9] Usually, the parent would have listed the child on the I-589, which is required; if not, she would have to explain why she failed to do so when filing the I-730.

c. Children Who Lose Derivative Status Before the Principal Asylee Parent's Application for Asylum is Adjudicated

Although the CSPA locks in a derivative child's age at the time the parent files the I-589, or at the time the I-730 is filed, if a child marries or the principal applicant dies before the asylum application is adjudicated, the child will lose derivative status.

Former derivative children in this situation must file their own applications for asylum as principal applicants. The loss of their derivative status qualifies as a changed circumstance excusing them from the one-year filing deadline, provided they file as principals within a reasonable period of time after learning of the loss of their derivative status.[10]

B. The CSPA and Derivatives of Refugees

Refugees are approved for refugee status while outside the United States but do not actually obtain refugee status until they are admitted as refugees upon arrival in the United States. Like asylees, they are entitled to bring in their spouses and children as derivatives.

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[4] Including biological children, stepchildren where the marriage creating the relationship occurred while the child was under 18, and adopted children as defined in INA § 101(b).
[5] The filing date is the date the application is received by USCIS. See 8 CFR § 103.2(a)(7) and INS Memorandum, Joseph E. Langlois, *H.R. 1209- Child Status Protection Act*, August 7, 2002.
[6] The child cannot be ineligible for asylum due to other reasons, such as persecution of others, conviction of a particularly serious crime, etc. See 8 CFR §§208.21(a), 1208.21(a).
[7] The 2-year filing deadline for an I-730 may be extended for humanitarian reasons. 8 CFR §208.21.
[8] The child need not have been "included" in the application as a derivative as long as she was *listed* on the I-589. *See* Langlois, Joseph E., "*H.R. 1209 – Child Status Protection Act*," August 7, 2002; and Yates, William R., "The Child Status Protection Act – Children of Asylees and Refugees, Memorandum for Regional Directors, Service Center Directors, District Directors," August 17, 2004; *See also: Affirmative Asylum Procedures Manual,* Section III.E, Subsection 5, p. 51-52.
[9] See USCIS National Stakeholder Engagement on Refugee/Asylee Relative Petition, February 22, 2011 (AILA InfoNet Doc. No. 11020364).
[10] See 8 CFR § 208.4(a)(4)

The way the CSPA works for refugees is similar to the way it works with asylees. The ages of the children of refugees are frozen at the time the principal's application for refugee status (Registration for Classification as a Refugee, Form I-590) is filed, as long as the children were included in the application before it was adjudicated. The filing date of the I-590 is also the date that the principal refugee is interviewed by USCIS abroad.

If the principal refugee's derivatives are present with the principal at the time that refugee status is approved, they will be approved for refugee status at the same time as the principal. The derivatives will then accompany the principal to the United States and be admitted as refugees with the principal. Derivatives can also accompany the principal if entering the United States within four months of the principal's arrival in the United States.

However, derivatives who will arrive in the United States more than four months after the principal are not eligible to accompany the principal, but are eligible to follow to join the principal refugee. This means that the principal refugee parent must file a separate Form I-730 Asylee/Refugee relative petition for each derivative beneficiary. Once approved, the beneficiaries will be eligible to follow to join the principal, as long as the parent-child relationship existed both before the principal refugee parent arrived in the United States and continues to exist up to the time the derivative child enters the United States as a refugee.[11] The principal refugee must file Form I-730 for each beneficiary within 2 years of the principal's arrival in the United States as a refugee.

A derivative refugee who is already residing within the United States at the time his or her I-730 Relative Petition is approved will be considered a refugee as of the date of the approval.[12]

As with asylees, if the principal refugee failed to include a derivative child on his or her Form I-590, then under the CSPA the child must be under 21 at the time the I-730 is filed to remain a child for purposes of immigrating as a derivative of the principal refugee.[13]

Usually, applicants for refugee status include their children on Form I-590. If a principal refugee parent failed to include a child on the I-590, she may be required to submit additional proof that the derivative was indeed a "child" of the principal in order for the I-730 to be approved.

The parent-child relationship must continue to exist both at the time the principal enters the United States as a refugee and at the time the derivative enters the United States. This does not mean that the derivative must be under 21 at the time of admission; if the I-590 or I-730 was filed before the derivative turned 21 she will remain a "child" under CSPA and be eligible to immigrate as a derivative. However, if a derivative beneficiary of a refugee parent marries, she will no longer be considered a child and will no longer eligible for derivative refugee status.[14]

Derivative refugees must also be admissible to the United States. In other words, they cannot be inadmissible under any of the mandatory bars to admission described in INA § 207(c)(3).

C. CSPA and Asylee Adjustment under INA § 209(b)

Asylees and derivative asylees adjust status under INA § 209(b).[15] A derivative asylee can apply for adjustment under INA § 209(b) independently of the principal asylee. INA § 209(b)(3). To be eligible, the derivative asylee must have been physically present in the United States for at least one year following the asylum grant before filing the application for adjustment. INA § 209(b)(2). Once the application for adjustment of status is approved, the asylee's date of admission to permanent residence is calculated to be one year before the application's approval date.

Under the CSPA, the derivative's age remains frozen from the date of filing the underlying asylum application. The child derivative may pursue an asylee adjustment of status, regardless of her age at time of filing Form I-485 to adjust status, so long as she remains unmarried and meets the other requirements to adjust. However, CSPA protection

[11] 8 CFR § 207.7(a) & (c).
[12] USCIS Policy Manual, Volume 7, Adjustment of Status, Part L, Refugee Adjustment.
[13] See USCIS National Stakeholder Engagement on Refugee/Asylee Relative Petition, February 22, 2011 (AILA InfoNet Doc. No. 11020364), *supra.*
[14] See INA § 101(b).
[15] See 8 CFR § 209.2(a)(iii); *Asylum Office Procedures Manual (AAPM),* Section III.E., Subsection 7.

extends only to the age of the derivative and cannot protect against other reasons a person might lose derivative status.

If the derivative child marries, or the principal asylee dies, the individual will no longer qualify as a child under INA § 209(b) and therefore will no longer be eligible to adjust as a derivative asylee. However, derivatives in this situation will not lose their status as asylees unless USCIS or EOIR formally terminates asylum. In addition, they may be granted *nunc pro tunc* asylum status.[16]

Likewise, if the derivative child is firmly resettled in another country, or the principal asylee naturalizes, the derivative child will no longer be eligible for adjustment as a derivative asylee. The derivative asylee also cannot be subject to any mandatory bars to adjustment under INA § 209, such as those found inadmissible for drug trafficking, terrorism, or espionage.[17]

D. Relief for Certain Former Derivative Asylee Children Who Lose Derivative Status: *Nunc Pro Tunc* Grant of Asylum Status

As noted above, some derivative asylee children may lose their ability to be classified as a derivative to the principal for reasons other than aging out. For instance, a child might get married after being granted derivative asylum status and before adjusting to a lawful permanent resident. In these cases, derivative asylum status is not terminated, but the asylee derivative no longer can show they remain a derivative for purposes of adjustment.

There is a mechanism to protect those who lose derivative status through marriage or the death of the principal asylee parent after the parent's asylum grant but before adjustment. As long as they are in the United States, they may file their own individual asylum applications as principals with the Asylum Office that has jurisdiction over their place of residence so that they may be classified as an asylee in their own right. This process grants the person asylum nunc pro tunc back to the date derivative asylee status was first granted.

Unlike former derivatives who lose status *before* the principal parent's I-589 is adjudicated, these former derivatives who have been granted asylum but have lost derivative status after the parent was granted asylum generally *do not have to independently prove eligibility for asylum.*[18] Instead, the applicant may submit form I-589 that simply states they had derivative status, without stating a new basis for a claim.

There are some exceptions to this rule. The former derivative may have to prove eligibility for asylum under the following circumstances:

- The derivative is a national of country different from the principal applicant, and does not appear to have a fear of harm in that country.
- The derivative never lived with the principal applicant.
- The derivative's parent appears to have derived asylum through fraud, but the parent's asylum status has not been terminated. [19]

Former derivatives who are not subject to the above exceptions will be granted asylum retroactively, or *nunc pro tunc,* to one of the following dates:

- If USCIS, INS, or EOIR granted the individual derivative asylum status, the Asylum Office will grant asylum *nunc pro tunc* to the date of the principal parent's asylum approval (this should also be the date of the former derivative's original asylum approval as a dependent).
- If the individual entered the United States pursuant to an approved Form I-730, the Asylum Office will grant asylum *nunc pro tunc* to the date of the individual's entry into the United States.
- If the individual obtained derivative asylee status pursuant to an approved Form I-730 while in the United

[16] See INA § 209(b)(3); 8 CFR § 209.2(a)(iii); *see also* subsection D, below.
[17] See INA § 209; 8 CFR § 209.2(b).
[18] See *Affirmative Asylum Procedures Manual,* Section III, Subsection 7 a.
[19] See *Affirmative Asylum Procedures Manual,* Section III, Subsection 7 b.

States, the Asylum Office will grant asylum *nunc pro tunc* to the date of the approval of the I-730.[20]

Former derivatives in this situation must not be subject to any of the mandatory bars to asylum in order to be granted asylum in this way. For example, this process does not apply to those who are firmly resettled in another country.

E. CSPA and Refugee Adjustment under INA § 209(a)

There are some significant differences between asylee adjustment under INA § 209(b) and refugee adjustment under INA § 209(a).

Refugees (unless their refugee status has been terminated) are supposed to file for adjustment of status under INA § 209(a) after they have been physically present in the United States for one year, or, if they were within the United States when Form I-730 was filed on their behalf, when they have acquired one year of physical presence since the I-730 approval date.[21]

However, the failure to file an adjustment application within one year is not a basis for either terminating refugee status or initiating removal proceedings.[22] A refugee's status will not be terminated unless the individual did not qualify for refugee status at the time it was granted.[23]

Refugees are not eligible to adjust status under INA § 209(a) if they have already acquired permanent residence.[24] In other words refugees can only adjust once through a INA § 209(a) adjustment.

Derivative refugees accompanying or following to join the principal refugee do not have to wait until the principal refugee has adjusted status to adjust their own status. They are considered refugees in their own right once admitted to the United States.[25]

The most significant differences between asylee adjustment under INA § 209(b) and refugee adjustment under INA § 209(a) are the following:

Derivative refugees do not have to maintain their familial relationship to the principal refugee after admission to the United States to be eligible to adjust status. In other words, a derivative refugee child who marries does not lose eligibility for adjustment under INA § 209(a).[26]

There is also no bar to adjustment of status for refugees who have firmly resettled in a foreign country subsequent to being admitted to the United States as refugees, as there is for asylees.[27]

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[20] See *Affirmative Asylum Procedures Manual,* Section III, Subsection 7 c.
[21] INA § 208(a); 8 CFR § 209.1(a); *see also* USCIS Policy Manual, Volume 7, Adjustment of Status, Part L – Refugee Adjustment, Subsection B.
[22] *See* Memorandum, Immigration and Customs Enforcement (ICE), *Detention of Refugees Admitted Under INA §207 Who Have Failed to Adjust to Lawful Permanent Resident Status,* May 10, 2010.
[23] USCIS Policy Manual, Volume 7, Adjustment of Status, Part L – Refugee Adjustment, Chapter 6, Termination of Status and Notice to Appear Considerations; *see also* INA § 207(c)(4); *Matter of Garcia-Alzugaray*, 19 I&N Dec. 407 (BIA 1986).
[24] USCIS Policy Manual, Volume 7, Adjustment of Status, Part L –Refugee Adjustment, Chapter 2, Eligibility Requirements, Subsection D.
[25] USCIS Policy Manual, Volume 7, Adjustment of Status, Part L – Refugee Adjustment, Chapter 2, Eligibility Requirements, Subsection F.
[26] USCIS Policy Manual, Volume 7, Adjustment of Status, Part L – Refugee Adjustment, Chapter 2, Eligibility Requirements, Subsection F.
[27] USCIS Policy Manual, Volume 7, Adjustment of Status, Part L –Refugee Adjustment, Chapter 2, Eligibility Requirements, Subsection F.

F. Applications Pending on the CSPA Effective Date of August 6, 2002

1. Asylees and Refugees with Pending I-589's or I-590's on the CSPA Effective Date

The CSPA went into effect on August 6, 2002. Although it is not retroactive, if a parent's Application for Asylum (Form I-589) or Registration for Classification as Refugee (Form I-590) was filed before August 6, 2002, but was still pending on that date, and the child was under 21 at the time the parent's application was filed, she will be protected by CSPA, and remain a child for purposes of qualifying for derivative asylum or refugee status.[28] This includes both children residing in the United States. and those residing abroad who would need to have the parent file an I-730 for each of them within 2 years of the asylum grant. There is no requirement that the child have been included as a dependent on the application, but the child must have been under 21 on the date the application was filed.[29]

2. Parent's I-589 or I-590 Granted Before August 6, 2002, but I-730 Pending on that Date

If an asylee parent was granted asylum before the CSPA effective date, but had filed an asylee/refugee relative petition/I-730 that was still pending on that date, the asylee's or refugee's children will be protected under CSPA, and remain eligible for derivative asylum status even after they turn 21. "Pending" in this context means that the petition was either pending at the Nebraska Service Center (NSC) or NSC approved the petition but the U.S. Embassy or Consulate involved had not yet issued travel documents to the child. However, a child who failed to pick up travel documents that were issued before August 6, 2002 would not be covered under CSPA.[30]

3. Derivative's Application for Asylee or Refugee Adjustment Pending on August 6, 2002

Similarly, if an asylee or refugee derivative's application for adjustment was pending on August 6, 2002, she remains a "child" under the CSPA even if she turns 21 if while the application is still pending, as long as the pending I-485 Adjustment Application was filed before the child turned 21.[31]

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[28] Unless, of course, the child marries, since a "child" is defined as someone under 21 and unmarried under INA § 101(b).
[29] See *Affirmative Asylum Procedures Manual,* Section III, Subsection 5; see also Langlois, Joseph E. H.R. 1209 – *Child Status Protection Act*, August 7, 2002; Yates, William R. *The Child Status Protection Act – Children of Asylees and Refugees, Memorandum for Regional Directors, Service Center Directors, District Directors,* August 17, 2004.
[30] See Yates Memorandum, August 17, 2004.
[31] *Id*.