



# CSPA AND CHILDREN OF PERMANENT RESIDENTS AND OTHER DERIVATIVE BENEFICIARIES

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The Child Status Protection Act (CSPA),<sup>1</sup> enacted on August 6, 2002, is a complex law that attempts to compensate for delays in processing visas that lead to children of immigrants “aging out” when they become too old to immigrate as “children.” As a result, they become ineligible for certain immigration benefits or move to new waiting lists with far longer wait-times, both of which can be devastating. The Immigration and Nationality Act (INA) defines “child” as a person who is unmarried and under 21 years old;<sup>2</sup> the CSPA does not change this definition, but allows some people to remain classified as “children” beyond their 21st birthdays (as long as unmarried).

The CSPA applies in different ways to different types of applications for immigration benefits in which children are either direct beneficiaries or included as derivative beneficiaries. This practice advisory is one of a series of ILRC Practice Advisories on the CSPA in which we will go into detail about how the CSPA applies to different types of beneficiaries.<sup>3</sup> Here, we address how the CSPA applies to the children of lawful permanent residents (LPRs) and other derivative beneficiaries; please see the accompanying advisories in this series for more on how CSPA applies to other types of cases. We suggest these CSPA advisories be read together so that you can best understand the interaction between different provisions of the CSPA for different beneficiaries, especially if, for example, an LPR petitioner naturalizes to become a U.S. citizen (USC), because the CSPA operates very differently depending if the petitioner is an LPR or USC.

In the context of children of permanent residents and other derivative beneficiaries, “aging out” can mean someone moves from the family-based 2A category to 2B, with a considerably longer wait for a visa. Or, for a derivative child of a parent’s fourth preference petition (filed by a USC aunt or uncle on behalf of a parent), turning 21 can mean that that individual may no longer immigrate through that petition at all. In some cases, the CSPA may help mitigate these consequences.

## I. Introduction

The CSPA does not solve the problem of “age outs” for all children of LPRs and other derivative beneficiaries. Further, the CSPA provisions pertaining to preference immigrants, including petitions by LPR parents, are the most complex part of this law (in comparison, the CSPA’s application to children of U.S. citizens is much more straightforward and also more generous). In this advisory, we will address the following CSPA provisions pertaining to children of LPRs and other derivative beneficiaries:

1. **“CSPA-Adjusted Age”:** The CSPA creates a formula for determining the “adjusted age” of a preference immigrant depending on the amount of time that the petition in question was pending adjudication. The age is calculated on the date that a visa number becomes available. If that adjusted age turns out to be under 21, the beneficiary remains a “child” for immigration purposes. To properly apply this

formula, it is necessary to understand how USCIS interprets the term “pending,” and how the adjusted age is calculated.

2. **“Seek to Acquire”:** Someone whose “adjusted age” is determined to be under 21 according to the CSPA formula must “seek to acquire” an immigrant visa within one year of visa availability in order to take advantage of the CSPA-adjusted age calculation. Practitioners need to be aware of how the term “seek to acquire” has been interpreted by USCIS and case law, including what happens when a priority date regresses, and what circumstances may excuse a failure to file within the one-year deadline.
3. **“Opt-Out” Provision:** The CSPA also provides that a beneficiary whose parent has become a U.S. citizen may opt out of classification as a first preference immigrant in favor of remaining a 2B preference immigrant, if the wait to immigrate for first preference is longer than the wait to immigrate in the 2B preference category.
4. **Retention of Priority Dates:** When a person ages out, they may or may not be able to retain the priority date of the original petition, depending on whether that petition can be converted into another type of preference petition.
5. **The Effect of a Parent’s Naturalization on Derivative Child Beneficiaries:** A major unresolved issue in interpreting the CSPA is how to analyze when a derivative child becomes an immediate relative upon the petitioning parent’s naturalization.
6. **Special VAWA Provisions:** There are some special provisions that apply to VAWA beneficiaries that are different from the rules for other children of LPRs.
7. **Effective Date and Pending Cases:** The CSPA came into effect on August 6, 2002 and is not retroactive; however, the beneficiaries of some petitions or applications that were filed before the effective date are covered under its provisions.

We will address each of these concepts in this practice advisory.

## I. CSPA-Adjusted Age

If an LPR parent files a visa petition (I-130) on behalf of a child who is under 21 (including petitions filed for a spouse with children listed as derivative beneficiaries), the child’s age for purposes of immigrating is calculated *on the date that a visa becomes available*.<sup>4</sup> A child may be under 21 when the petition is filed and therefore qualify to be included at that stage in the process, but by the time a visa is available, the child may be over 21 and potentially too old to ultimately immigrate under that petition. The I-130 still must be filed while the child is both under 21 and unmarried.

The CSPA attempts to address the problem of children aging out due to large case processing backlogs by allowing children of LPRs and other derivative beneficiaries to *deduct the amount of time the petition was pending from their age on the date a visa becomes available*. The amount of time the petition is pending is the time between the petition receipt date and approval date. This includes any time in which a petition is pending on appeal.<sup>5</sup> It does not include the time the beneficiary was waiting for the priority date to become current, which is usually much longer than the time it takes for the petition to be approved. The date the visa becomes available is *either the date that the priority date becomes current* for the beneficiary’s preference category,<sup>6</sup> *or the date the petition is approved, whichever is later*.

### Calculating CSPA Age:

$$\{\text{Age on date visa available}\} \textit{ minus } \{\#\text{ days petition pending}\} = \text{CSPA Age}$$

**Practice Tip:** CSPA Age Calculators. Because a CSPA age calculation may come down to days, it can be helpful to use a calculator to assist you in making this calculation. There are online calculators specifically for CSPA age.

If the calculated “CSPA age” is under 21, then even though the person’s biological age is over 21, they will still be able to immigrate as if they are under 21. In order to use a CSPA age, they must also “seek to acquire” within one year (see below for more on the “seek to acquire” requirement).

**Example:** Juan, a permanent resident, files a visa petition for his son Emilio on July 15, 2006, when Emilio is 19. The petition is approved on July 15, 2007, when Emilio is 20, but the priority date does not become current until July 15, 2017 (this is the visa availability date). Emilio is now 30. He can subtract the one year his visa petition was pending (time from filing date to approval date) from his biological age, but that still makes him 29. Emilio has aged out, and cannot immigrate as a child. He is now in the 2B preference category and must wait for the priority date in that category to become current before he can immigrate.

**Example:** Michelle files a visa petition for her daughter Adele on March 11, 2011, when Adele is 18. It is approved on March 11, 2012, when Adele is 19. The priority date becomes current on March 11, 2014, when Adele is 21. Adele can subtract the time her visa petition was pending (March 11, 2011 to March 11, 2012), which is one year, from her biological age under the CSPA formula, making her CSPA-adjusted age 20. She is therefore eligible to immigrate as a child under the 2A preference category, if she complies with the additional requirement that she “seek to acquire” an immigrant visa within one year of the visa availability date (the date the priority date became current). This additional requirement is explained in the next section.

### III. The Beneficiary Must “Seek to Acquire” an Immigrant Visa Within One Year of the Visa Availability Date

#### A. What Actions Satisfy the “Seek to Acquire” Requirement

In the example above, Adele met the first requirement for immigrating as a child through the visa petition her mother filed on her behalf, because her “CSPA-adjusted age” was under 21 on the date her priority date became current. But that’s not enough. In order to be able to take advantage of her “CSPA age,” Adele must also “seek to acquire” an immigrant visa within one year of the date her priority date became current.<sup>7</sup>

USCIS has interpreted “seek to acquire” to include taking any of the following actions within one year of the visa availability date:<sup>8</sup>

- Filing an adjustment application (I-485);<sup>9</sup>
- Filing an immigrant visa application in the consular processing context (DS-260);<sup>10</sup> or
- Filing an I-824 Application for Action on an Approved Application or Petition (sometimes required if someone originally was planning to adjust status but is now switching to consular processing, or vice versa).<sup>11</sup>

The Board of Immigration Appeals (BIA) and other courts have acknowledged that other actions besides simply filing an application may qualify as “seeking to acquire.” For instance, in *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012), the BIA outlines a slightly more expansive interpretation for “sought to acquire.” In *Matter of O. Vasquez*, the applicant did not file an adjustment application until approximately 19 months after the visa

became available, but he tried to argue that within the 12 months after visa availability his parents had consulted with a *notario* regarding applying for LPR status. While the BIA said that this did not meet the “seek to acquire” requirement, it left open the possibility that other “substantial steps” towards filing might count. It also stated that being able to show that an application was filed within the one year, even if rejected due to a defect, would count, as well as proving extraordinary circumstances prevented an individual from filing within one year. The Eleventh Circuit, in *Tovar v. U.S. Attorney General*, 646 F.3d 1300 (11th Cir. 2011), agreed that “seeking to acquire” is broader than just filing an application, although the court rejected Medina Tovar’s claims that his communications with the National Visa Center (before ultimately deciding to adjust status) were sufficient.<sup>12</sup>

For examples of situations where the applicant’s steps, while falling short of filing an application, were nonetheless found to meet the “seek to acquire” requirement, see *In re Kim*, A77 828 503 (Dec. 20, 2004) (unpublished) (applicant did not file permanent resident application until 17 months later, but within one year her parents had hired an attorney to prepare the adjustment applications); *In re Murillo*<sup>13</sup> (filed adjustment application in 20 months, but sought an attorney within one year); *In re Castillo-Bonilla*<sup>14</sup> (in removal proceedings, applicant requested permission from the immigration judge to file adjustment application within one year although actual application was filed more than one year later).

## B. The Effect of Visa Regression on Seeking to Acquire

Sometimes a visa availability date regresses, so that a priority date that once was current is no longer current, and the prospective immigrant now has a longer wait than originally anticipated. This presents a dilemma for the derivative beneficiary who seeks to acquire an immigrant visa within one year of the visa availability date under the CSPA.

USCIS has determined that if the visa availability date becomes current again, after a visa regression, and the beneficiary sought to acquire an immigrant visa within one year of that *original* date, then the beneficiary’s adjusted age will be calculated as of the *original date that the priority date became current, not the later date following the visa regression*.<sup>15</sup> Of course, this is preferable because earlier means younger, and more likely that the beneficiary will still be able to immigrate as a “child.”

*If, however, the beneficiary failed to seek to acquire an immigrant visa within one year of the original date, the beneficiary’s adjusted age will be calculated as of the later date, when the priority date again becomes current.* Essentially, an applicant’s age will not be locked in unless they sought to acquire within one year of original visa availability. Because visa regression is unpredictable, the safest approach is to take steps to acquire as soon as possible after the priority date becomes current. Thus, even if a priority date is only current for one or two months before regressing, and then does not become current again until two years later, the applicant’s age will be locked in based on the date of original visa availability rather than the applicant’s present age, two years later.

**Example:** Joshua’s father filed a visa petition for him on February 1, 2010, when he was 18. The petition was approved three years later, on February 1, 2013, when he was 21. The priority date first became current on February 1, 2015, when he was 23. Because the petition had been pending for three years, his adjusted age under the CSPA was 20 because he could deduct those three years the petition was pending. Joshua filed an application for adjustment of status two months later, on April 18, 2015. However, the priority date regressed in May 2015, and his application for adjustment remained pending. The priority date did not become current again until one year after it first became available, on February 1, 2016, when he was 24.

Because Joshua sought to acquire an immigrant visa within one year of the first date that his priority date became current, he is allowed to use his CSPA-adjusted age as of that first date. He can therefore

still immigrate as a “child” because his adjusted age is still 20. If he had to calculate his age on February 1, 2016, he would be out of luck, because his adjusted age would then be 21, and he would have aged out even with the CSPA protections. If he had failed to file his I-485 (or otherwise “sought to acquire” an immigrant visa) within a year of the first visa availability date, he would also be out of luck, because in that case his age would not be locked in and his adjusted age would have to be calculated as of the second visa availability date.

### C. Extraordinary Circumstances May Excuse Failure to “Seek to Acquire” Within One Year

Pursuant to the BIA’s decision in *Matter of O. Vazquez*,<sup>16</sup> USCIS and the Department of State now recognize that circumstances short of the filing of an actual application may satisfy the “seek to acquire within one year” requirement, and also that in limited circumstances, immigration officers may exercise discretion when someone failed to seek to acquire within one year if due to extraordinary circumstances.<sup>17</sup> Specifically, the Board held that a person “may meet the requirement by establishing, through persuasive evidence, that an application he or she submitted to the appropriate agency was rejected for a procedural or technical reason or that there were other extraordinary circumstances, particularly those where the failure to timely file was due to circumstances beyond the alien’s control.”<sup>18</sup>

Following this decision, the USCIS further elaborated on what constitutes extraordinary circumstances that could excuse the failure to seek to acquire an immigrant visa within one year, based on the regulation governing exceptions to the one-year requirement for filing asylum applications (8 CFR § 208.4(a)(5)).

Under this guidance, in order to establish “extraordinary circumstances,” the individual must demonstrate that:

1. The circumstances preventing the applicant’s seeking to acquire within one year were beyond the immigrant’s control and must not have been intentionally created by their own action or inaction;
2. Those circumstances were directly related to the immigrant’s failure to file the application within the one-year period; and
3. The delay was reasonable under the circumstances.<sup>19</sup>

According to USCIS, examples of what may be considered extraordinary circumstances, include, but are not limited to, the following:

- Serious illness or mental or physical disability during the one-year period;
- Legal disability, such as instances where the applicant is suffering from a mental impairment, during the one-year period;
- Ineffective assistance of counsel if certain requirements are met;<sup>20</sup> or
- Death or serious illness or incapacity of the immigrant’s legal representative or a member of the immigrant’s immediate family.<sup>21</sup>

Even if extraordinary circumstances are established, the beneficiary must still “seek to acquire” an immigrant visa within a reasonable time after the circumstances have ended. What constitutes a reasonable time depends on the beneficiary’s individual circumstances, and will vary from case to case, but the beneficiary bears the burden of proving that the delay was reasonable.

#### IV. “Opt-Out” Provision

The usual rules for conversion of petitions dictate that if a parent has filed a petition on behalf of an unmarried son or daughter (21 years old or older), otherwise known as a 2B preference petition (or filed a 2A preference petition that converted to 2B when the beneficiary turned 21 under the CSPA),<sup>22</sup> and then the petitioning parent naturalizes while that petition is still pending, the petition will convert to a first preference petition (unmarried son or daughter of a U.S. citizen).<sup>23</sup> The beneficiary’s priority date remains the same even though the petition’s classification has changed. However, the CSPA provides that a beneficiary may opt out of classification as a first preference immigrant in favor of remaining a 2B preference immigrant.<sup>24</sup> This provision was added to the CSPA primarily for the benefit of Filipino immigrants, for which at the time of CSPA enactment, the backlog for first preference was much longer than the backlog for 2B visa petitions. The underlying principle is that an LPR should not be penalized (by having their adult child move to a much longer waiting list for a visa) simply because they became a U.S. citizen.

Beneficiaries who want to “opt out” of automatic conversion to first preference may do so via a written request to the USCIS District Office with jurisdiction over the beneficiary’s residence.<sup>25</sup> Or, if they are adjusting status, they may do so at the same time as the adjustment application. A beneficiary does not have to make a decision about utilizing CSPA’s opt-out provision within any particular timeframe; the petitioning parent naturalizes, the beneficiary can continue to monitor both the waiting lists for 2B and first preference and opt out of automatic conversion if 2B is preferable.<sup>26</sup>

#### V. Retention of Priority Dates

The Immigration and Nationality Act contains provisions governing the conversion of various petitions from one visa classification to another due to a change in the status of the petitioner or the beneficiary (for instance, if an LPR petitioner becomes a U.S. citizen, or a beneficiary marries or turns 21, etc.). The priority date, however, does not change when a visa petition is automatically converted from one visa classification to another.

The regulations at 8 CFR § 204.2(i) set forth the circumstances under which a preference petition filed under one visa classification automatically converts to another visa classification while retaining the original priority date. For example, if a U.S. citizen has petitioned for an unmarried son or daughter who is over 21 (first preference) and the son or daughter later marries, the petition automatically becomes a third preference petition. Similarly, if a lawful permanent resident files a visa petition for an unmarried son or daughter (over 21), and the petitioner later naturalizes, the visa petition is automatically converted to a first preference petition.

When the CSPA was enacted, it added INA § 203(h) to the INA. Section 203(h)(3), regarding retention of priority dates, created some confusion due to the way in which the language of this statute was worded. It provides that if the adjusted age of a child, using the CSPA formula in INA § 203(h)(1), results in an age that is over 21, *“the alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.”* The wording of the statute is unclear, however, as to whether any preference petition would retain its original priority date when, even with the CSPA-adjusted age, the beneficiary is still over 21. The BIA determined,<sup>27</sup> and the U.S. Supreme Court deferred to the BIA’s interpretation in *Scialabba v. Cuellar de Osorio*,<sup>28</sup> that the CSPA only provides priority date retention to children who aged out as derivatives but who qualified or could have qualified as principal beneficiaries of the original petitioner. In other words, only second preference beneficiaries are able to retain their priority dates if their CSPA-adjusted age is over 21, and they move from 2A to 2B preference category. In this situation, they can retain their priority date. Unfortunately, this means that if a child who was included on their parent’s fourth preference petition (filed by an aunt or uncle on behalf of the child’s parent) ages out, they cannot benefit from the priority date of that petition when their parent later files a new I-130 for their adult child. Both third and fourth preference derivative beneficiaries are ineligible to retain the priority date of the original petition

based on the BIA's interpretation of the statute they cannot convert to a new category with the same petitioner.<sup>29</sup>

## VI. The Effect of a Parent's Naturalization on Derivative Child Beneficiaries

A major question that remains in analyzing how CSPA applies to preference immigrants has to do with children of LPRs whose petitioning parents naturalize and become U.S. citizens. Generally, "children" of U.S. citizens are immediate relatives. So if the petitioning parent becomes a U.S. citizen while the petition they filed on behalf of their child is still pending, and the child is still unmarried and under age 21, the child's age "freezes" on the date the parent naturalized and they become an immediate relative. For more on the CSPA and children of U.S. citizens, see our accompanying advisory.<sup>30</sup> *What happens if the child is over 21 when the parent naturalizes, but the child's CSPA-adjusted age is under 21?*

The BIA, in *Zamora-Molina*,<sup>31</sup> determined that the child's biological age on the date the parent naturalizes is the age that freezes upon the parent's naturalization,<sup>32</sup> and governs whether the child's petition converts to immediate relative status, or to the first preference category if over 21. However, the Ninth Circuit reached a contrary interpretation in *Tovar v. Sessions*.<sup>33</sup> In *Tovar*, the Ninth Circuit held that the "age" which freezes on the date a parent naturalizes is the child's "adjusted age" under the CSPA formula set forth in INA § 203(h)(1). The Ninth Circuit reasoned that to conclude otherwise would lead to an absurd result, and would be contrary to the intent of Congress when it enacted the CSPA. In *Tovar*, the appellant was a young man whose LPR father had filed a visa petition on his behalf when he was under 21; in other words, a 2A visa petition. The petition was pending for four years before it was approved. While he was waiting for a visa to be available in the 2A preference category, his father naturalized. At the time of his father's naturalization, Rodriguez Tovar's biological age was 23, but his CSPA age was only 19. Rodriguez Tovar applied for adjustment of status, but was denied because his biological age was over 21, and he was placed in removal proceedings.

If his father had never become a U.S. citizen, he would have been able to immigrate as a 2A beneficiary in 2007. However, if his father's naturalization converted him to the first preference category, the wait for him to become a permanent resident could easily exceed 20 years. The Ninth Circuit found that this was an absurd result, and contrary to the legislative intent governing the CSPA.

In particular, the Ninth Circuit reasoned that because the CSPA contains a provision for 2B beneficiaries whose parents naturalize to opt out of categorization as first preference, so as to avoid being penalized because their parents have become U.S. citizens, and contains no similar opt out provision for 2A beneficiaries, the only logical conclusion is that Congress intended the "age" of the child on the date of the parent's naturalization to be the adjusted age under CSPA, so that all 2A beneficiaries would automatically convert to immediate relative status upon the naturalization of their parents. Since Rodriguez Tovar's CSPA age was under 21 at the time of his father's naturalization, the Ninth Circuit found that he should have been treated as an immediate relative. The Ninth Circuit therefore reversed the BIA decision denying him adjustment of status.

To date, no other appellate court has ruled on this issue. The Ninth Circuit's opinion in *Tovar* applies to all cases within the Ninth Circuit, but is not binding on other circuits. Other circuits may follow the BIA's interpretation in *Matter of Zamora-Molina*, but practitioners in other circuits should make arguments based on *Tovar's* reasoning.

## VII. Special VAWA Provisions

There are some special CSPA provisions relating to VAWA second preference (2A or 2B) petitions that are significantly different from the requirements for other second preference petitions and are worth noting here.

1. If the abusive LPR parent filed an I-130 on behalf of a child, or on behalf of a spouse in which the child was included as a derivative beneficiary, then a subsequently filed I-360 on behalf of the child either as a derivative or self-petitioner will retain the priority date of the original I-130 petition.<sup>34</sup>
2. A derivative child beneficiary of a parent's I-360 who ages out (is over 21 using the CSPA formula) does not lose eligibility for benefits, but instead automatically becomes a principal VAWA self-petitioner and is not required to file a new I-360. In addition, the former derivative child retains the parent's self-petition priority date.
3. Even if the abused parent principal VAWA self-petitioner dies while the I-360 is pending, the derivative child of the VAWA self-petitioner may retain eligibility for permanent residence.<sup>35</sup>
4. 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 in order to be eligible for VAWA benefits.<sup>36</sup> 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 birthdays.<sup>37</sup>

If the self-petitioning adult child marries while the VAWA self-petition is pending and is still married at time of adjudication it will be denied.

## VIII. Effective Date and Pending Cases

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:

- Those whose petitions were pending on August 6, 2002;
- Those whose 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; and
- Those whose applications for adjustment of status or consular processing were pending on August 6, 2002.<sup>38</sup>

The BIA clarified in *Matter of Avila-Perez*,<sup>39</sup> that 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 CSPA to apply, as long as the application for adjustment or consular processing had not been finally adjudicated as of that date. Therefore, even if a visa petition had been finally approved before the CSPA effective date of August 6, 2002, and no application for adjustment or consular processing was pending on that date, a subsequently filed application for adjustment or consular processing would be covered under the CSPA's provisions as long as it had not been finally adjudicated before August 6, 2002.



## End Notes

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<sup>1</sup> Pub. L. No. 107-208 (Aug. 6, 2002).

<sup>2</sup> See INA § 101(b)(1).

<sup>3</sup> The accompanying CSPA practice advisories are available online at [www.ilrc.org](http://www.ilrc.org).

<sup>4</sup> See INA § 203(h).

<sup>5</sup> USCIS Policy Memorandum, “Revised Guidance for the Child Status Protection Act (CSPA),” issued April 30, 2008, which can be found at [www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2008/cspa\\_30apr08.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/cspa_30apr08.pdf).

<sup>6</sup> This is the first day of the month in which the Department of State (DOS) Visa Bulletin indicates availability of a visa for that preference category according to Chart A, Final Action Dates. See also USCIS Policy Memorandum, “Revised Guidance for the Child Status Protection Act (CSPA),” *Id.* For VAWA beneficiaries, the priority date of the original I-130, if one was filed, is also the priority date of the subsequently filed I-360. If no I-130 was filed, then the date the I-360 was filed is the priority date.

<sup>7</sup> See INA § 203(h)(1). (CSPA-adjusted age may be used “only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability...”).

<sup>8</sup> See INS Policy Memorandum, “The Child Status Protection Act” (Sept. 20, 2002), available online at [www.aila.org](http://www.aila.org), AILA Doc. No. 02092732.

<sup>9</sup> Filing Form I-485 on behalf of the derivative’s parent (the principal petitioner), does not satisfy the “seek to acquire within one year” requirement for the derivative beneficiary child. See USCIS Policy Memorandum, “Guidance on Evaluating Claims of ‘Extraordinary Circumstances’ for Late Filings When the Applicant Must Have Sought to Acquire Lawful Permanent Residence Within 1 Year of Visa Availability Pursuant to the Child Status Protection Act,” PM-602-0097 (April 15, 2015), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0415\\_Extraordinary\\_Circumstances\\_PM.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0415_Extraordinary_Circumstances_PM.pdf).

<sup>10</sup> Because of the way consular processing works, the filing of Form I-824, or I-864 (Affidavit of Support) will satisfy the “seek to acquire within one year” requirement. See USCIS Policy Memorandum, “Guidance on Evaluating Claims of ‘Extraordinary Circumstances’ for Late Filings When the Applicant Must Have Sought to Acquire...” PM-602-0097 (April 15, 2015).

<sup>11</sup> See USCIS Policy Memorandum, “Revised Guidance for the Child Status Protection Act (CSPA),” HQ DOMO 70/6.1 (April 30, 2008), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2008/cspa\\_30apr08.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/cspa_30apr08.pdf).

<sup>12</sup> *Tovar v. U.S.A.G.*, 646 F.3d 1300, 1302 (11th Cir. 2011) (“We agree with Medina that the term ‘sought to acquire’ in the CSPA is broad enough to encompass substantial steps taken toward the filing of the application for permanent residency either with the NVC or with Homeland Security within the one year period, but conclude under the facts of this case, that Medina’s actions do not satisfy this broader interpretation.”).

<sup>13</sup> 2010 WL5888675 (unpublished).

<sup>14</sup> 2008 WL 4146759 (unpublished).

<sup>15</sup> See USCIS Policy Memorandum, “Revised Guidance for the Child Status Protection Act (CSPA),” HQ DOMO 70/6.1 (April 30, 2008), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2008/cspa\\_30apr08.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/cspa_30apr08.pdf). See also Adjudicator’s Field Manual, Redacted Public Version, Ch. 21, § 21.2(e)(1)(ii)(E)(I).

<sup>16</sup> 25 I&N Dec. 817 (BIA 2012).

<sup>17</sup> *Matter of O. Vazquez*, 25 I&N Dec. 817, 821; see also USCIS Policy Memorandum, “Guidance on Evaluating Claims of ‘Extraordinary Circumstances’ for Late Filings When the Applicant Must Have Sought to Acquire...” PM-602-0097 (April 15, 2015), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0415\\_Extraordinary\\_Circumstances\\_PM.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0415_Extraordinary_Circumstances_PM.pdf).

<sup>18</sup> *Matter of O. Vazquez*, 25 I&N Dec. at 823.

<sup>19</sup> USCIS Policy Memorandum, “Guidance on Evaluating Claims of ‘Extraordinary Circumstances’ for Late Filings When the Applicant Must Have Sought to Acquire...” PM-602-0097 (April 15, 2015), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0415\\_Extraordinary\\_Circumstances\\_PM.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0415_Extraordinary_Circumstances_PM.pdf).

<sup>20</sup> The following is required if claiming ineffective assistance of counsel resulted in a failure to seek to acquire within one year: (1) the immigrant filed an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this

regard; (2) Counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him and been given an opportunity to respond, or that a good faith effort to do so is demonstrated; and (3) the immigrant indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities and, if not, why not.

<sup>21</sup> USCIS Policy Memorandum, "Guidance on Evaluating Claims of 'Extraordinary Circumstances' for Late Filings When the Applicant Must Have Sought to Acquire..." PM-602-0097 (April 15, 2015), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0415\\_Extraordinary\\_Circumstances\\_PM.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0415_Extraordinary_Circumstances_PM.pdf).

<sup>22</sup> See INA § 203(a)(2)(B); 8 CFR § 204.2(i)(3).

<sup>23</sup> INA § 204(k)(1).

<sup>24</sup> CSPA §6, codified at INA § 204(k)(2).

<sup>25</sup> See USCIS Policy Memorandum, "Revised Guidance for the Child Status Protection Act (CSPA)," HQ DOMO 70/6.1 (April 30, 2008), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2008/cspa\\_30apr08.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/cspa_30apr08.pdf).

<sup>26</sup> See Section 5 below for a discussion of how a parent's naturalization affects the beneficiary's "adjusted age."

<sup>27</sup> *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009).

<sup>28</sup> 134 S.Ct. 2191 (2014).

<sup>29</sup> In the third preference category, married sons and daughters of U.S. citizens, the derivative beneficiaries are the original petitioner's grandchildren; in the fourth preference category, the derivative beneficiaries are the original petitioner's nieces or nephews.

<sup>30</sup> See The Child Status Protection Act (CSPA) and Children of U.S. Citizens, available at [www.ilrc.org](http://www.ilrc.org).

<sup>31</sup> 25 I&N Dec. 606 (BIA 2011).

<sup>32</sup> See INA § 201(f).

<sup>33</sup> 882 F.3d 895 (9th Cir. 2018).

<sup>34</sup> INA § 204(a)(1)(D)(i)(III).

<sup>35</sup> INA § 204(l)(2)(F).

<sup>36</sup> USCIS Policy Memorandum, "Continued Eligibility to File for Child VAWA Self Petitioners After Attaining Age 21," PM-602-0048 (Sept. 6, 2011).

<sup>37</sup> It is not clear at this time whether a beneficiary in this situation could claim immediate relative status under the CSPA, or whether they could only be treated as a first preference immigrant because the petition was filed when the beneficiary's biological age was over 21. See the disagreement between the BIA in *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011), and the Ninth Circuit in *Tovar v. Sessions*, 882 F.3d 895 (9th Cir. 2018) and discussion, *supra*.

<sup>38</sup> 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."

<sup>39</sup> 24 I&N Dec. 78 (BIA 2007).