

HOW TO PREVENT A CHILD FROM “AGING OUT” IN THE IMMIGRATION WORLD EVEN AFTER TURNING 21



by

*Kristen A. Chang and David J. Long
Long, Chang & Associates, L.L.P.
4915 Piedmont Parkway, Suite 103
Jamestown, NC 27282
Phone: (336) 855-5700
www.longchangonline.com*

Turning 21 for most young people is a happy time. It is a time when they have reached a certain level of independence and freedom represented by their biological age. While most people celebrate with a party, for many immigrant children, turning 21 means something entirely different – AGING OUT!

This article will discuss (a) what it means to turn 21 years of age for immigration purposes, and (b) how a foreign national who turns 21 years of age can lock his immigration age at an age under 21 so that he will retain the benefits of being a “child”. If you are about to turn 21 or have recently turned 21, or if you have a child who is about to turn 21 or recently turned 21, you need to understand how the “Child Status Protection Act” (one of the few “good” changes to U.S. immigration law in the last several years) can save you or your child from “aging out” and may save your immigration life!

What does “aging out” mean and why is it so important to avoid “aging out” if at all possible?

“Aging Out” is a common immigration phrase used in discussing what typically happens to a foreign national when he turns 21 years of age. On the day the foreign national turns 21, he “ages out” and is no longer considered a “child” for immigration purposes. Why? Because the Immigration and Nationality Act typically defines a child as an unmarried son or daughter under the age of 21. Once a “child” marries or turns 21 years old, he is no longer considered a child for immigration purposes.

Why does it matter if a child “ages out” (turns 21 years of age) for immigration purposes?

The U.S. immigration laws provide various benefits to a child based on his relationship to a parent. These benefits are “derivative” in nature because the child can often derive benefits from a parent’s immigration status. As a result, a child (an unmarried son or daughter under the age of 21) is often referred to as a derivative beneficiary with respect to his parent.

How “Aging Out” Affects Non-immigrant Visa Status

In the non-immigrant visa (NIV or temporary visa) context, a child is often entitled to derivative non-immigrant visa status through his parent. This means that the child will derive or obtain his NIV status through his parent. For instance, if a parent holds R-1 status as a religious worker, his child is entitled to R-2 status. If the parent obtains H-1B status, his child is entitled to H-4 status. The child of an F-1 parent is entitled to F-2 status. These are just some of the many examples. The list goes on and on. The key in each of these examples is that the parent is the principal or primary visa holder and the child is given derivative status in the same NIV classification based on his parent. The child can typically keep this status only until he turns 21. Once he turns 21, he “ages out”. He is no longer considered a child and loses his derivative NIV status. He is forced to change status to another NIV status based not on his parent but on himself. If he does not do so before turning 21, he will fall out of status.

How Aging Out Affects the Immigrant Visa (Green Card) Process

The stakes are even higher when it comes to the green card process. A child can often obtain a green card through his parent since, as explained above, a child typically is considered a derivative of his parent. This means that, if the parent obtains a green card through the immigrant visa process, the parent’s child can also obtain the green card as a derivative.

There are 2 common scenarios (one involving family-based immigration and one involving employment-based immigration) where “aging out” or turning 21 is typically a major concern.

The first scenario involves a 4th Preference I-130 Petition (a U.S. citizen brother or sister filing for a brother or sister who has children). Since the 4th Preference category is backlogged over 10 years for most countries, an I-130 beneficiary who has children often worries that his or her children will not be able to get their green cards along with the parents since the children may turn 21 by the time they can file under this category. Consider where the I-130 beneficiary has children aged 7 and 14 at the time his U.S. Citizen brother or sister files an I-130 Petition for him. If it takes 10 years before being eligible to file for the green card, his kids will have turned 17 and 24.

The second scenario involves a parent who is the beneficiary of a labor certification and obtains a green card based on the employer’s labor certification and I-140 Petition. In filing for the green card, the parent is considered the “principal beneficiary” or “primary applicant”, and his child is referred to as the “derivative beneficiary”. As such, the child files his own separate I-485 green card application and can get his green card at the time his parent’s green card is approved so long as he is still unmarried and is still considered under age 21 for immigration purposes.

In both of these scenarios, it is very common for the child to reach the age of 21 before he or she can file for and obtain the green card. Prior to the “Child Status Protection Act”,

these kids would be out of luck – they would not be entitled to green cards as derivatives of their parents. All because they reached the age of 21 too fast. With the enactment of the Child Status Protection Act, many of these same kids who, in the past, would have “aged out” by turning 21, can still be considered under age 21 for immigration purposes. Thanks to the “Child Status Protect Act” (CSPA), all hope is not lost when turning 21!

How Does the Child Status Protection Act Work?

How can this be? How can a child whose biological age is 21 still be considered a “child” when we’ve already discussed the general rule that a child “ages out” when he turns 21? The answer lies in the fact that U.S. immigration law essentially now recognizes a distinction between a child’s “biological age” and his “immigration age”. A child’s “biological age” is what it says it is – how old he is based on his date of birth. A child’s “immigration age” is the age that he or she is considered for immigration law purposes. Sometimes it is the same as his or her biological age, but sometimes (thanks to the Child Status Protection Act) his age can “locked in” for immigration purposes prior to turning 21.

Section 3 of the Child Status Protection Act provides a complicated formula for determining the “immigration age” of a child who is the derivative of his parent in either a family-based or employment-based case. By applying this formula, a child’s immigration age may be reduced to an age below 21 even if his biological age is over 21. If a child can do this, then he or she may still be a derivative of his parent and may still be eligible for a green card based on his parent’s case.

In family-based or employment-based green card cases (based on an approved I-130, I-140, I-360, I-526 or diversity visa) involving derivative children, the CSPA formula is as follows:

- (1) **Determine the biological age of the derivative child on the date that an immigrant visa becomes available to the child.** For an immigrant visa number to be available, the underlying petition (for example, either the I-130 for family-based cases or the I-140 for most employment-based cases) must be approved and the priority date of the approved petition (as shown on the approved I-130 or I-140) must become current according to the Visa Bulletin.
- (2) **Subtract from the biological age of the child (as determined in Step #1) the number of days that the immigrant visa petition (I-130, I-140, I-360 or I-526) was pending with U.S. Citizenship & Immigration Services.** The longer the underlying immigrant visa petition is pending, the better it is if you are trying to make the child younger than 21 for CSPA purposes. Keep this in mind if your I-140 Petition is being filed using Premium Processing (which usually results in a case being decided in 15 days or less). For example, if the I-130 Petition is pending for 4 years, then you may be able to reduce the child’s biological age by 4 years. The key is to determine the number of days between the date the immigrant visa petition was received by USCIS and the date that it was approved.

The result is the amount of time that can be subtracted from the biological age of the child determined in Step #1 above. For purposes of this article, the resulting age of the child (after subtracting the number of days the petition was pending) is what I call the child's "immigration age".

- (3) **If the resulting "immigration age" of the child is determined to be under 21, then the child is "locked in" and the child is still considered a "child" for immigration purposes but only if he files for the green card within 1 year of becoming eligible.** If the CSPA reduces the child's biological age to an age that is under 21 for immigration purposes, then he or she is still considered a "child" for immigration purposes so long as he or she remains unmarried AND files for the green card within one year of the date that the immigrant visa number became available.

Consider the situation where an I-130 Petition is filed by a U.S. citizen on behalf of his brother. If that brother has a child who is over the age of 21 when the immigrant visa becomes available according to the Visa Bulletin (usually at least 10 years after the I-130 was originally filed with USCIS), the child needs to apply the above CSPA formula to determine if he can still be considered a "child" (under age 21) for immigration purposes. For example, if he is 23 years old when the immigrant visa becomes available, and the I-130 was pending for 4 years, then his "immigration age" would be locked in at age 19 (after reducing his biological age by 4 years – the number of years the I-130 Petition was pending). However, in order to preserve this CSPA protection, the child must seek to acquire the green card (i.e., file for the green card) within 1 year of when he is eligible for the immigrant visa. In the above example, the fact that the I-130 Petition was pending for so long was actually extremely beneficial to the child since it allowed him to reduce his age by 4 years! The CSPA formula is applied in much the same way in employment-based immigration where the underlying petition is an I-140 or an I-360 (as opposed to an I-130 Petition).

Conclusion

The preceding example is just one of many examples in which the Child Status Protection Act can solve a family's potential nightmare where parents fear that they may get the green card after a long wait but their children may lose the chance as a result of turning 21. If you are facing this situation, you should consider whether the Child Status Protection Act can benefit you!

Kristen A. Chang and David J. Long are attorneys in the immigration law firm of Long, Chang & Associates, L.L.P. Ms. Chang and Mr. Long are members of the North Carolina State Bar and the American Immigration Lawyers Association (AILA). Ms. Chang is fluent in both the Korean and English languages. Mr. Long has been certified by the North Carolina State Bar as a Specialist in Immigration Law. They may be reached via telephone at (336) 855-5700 or via e-mail at info@longchangoonline.com.

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