

USCIS ISSUES NEW GUIDANCE ON THE CHILD STATUS PROTECTION ACT



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*

In an era of increased immigration enforcement and harsh immigration decisions, it is not everyday that the United States Citizenship and Immigration Services (USCIS) issues a memorandum or guidance that actually extends benefits or provides an interpretation of existing law that is more beneficial than previous interpretations of the same law. However, that is exactly what happened earlier this month when USCIS issued revised guidance on the Child Status Protection Act (CSPA). The full text of the USCIS memorandum providing this new guidance can be viewed on our website at www.longchangonline.com.

In reading this article, keep in mind that this article is general in nature and should not be relied upon with respect to the specific facts of your immigration case.

CSPA Background

As background, the Child Status Protection Act became effective August 6, 2002. The CSPA essentially provides a way to keep certain qualifying immigrants from “aging out,” thus allowing them to remain classified as children for immigration purposes. “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. The CSPA allows certain immigrants to reduce their biological age based on certain events or certain formulas listed in the CSPA. If an immigrant can effectively reduce his age below the age of 21 for immigration purposes, then he may be able to remain a “child” for immigration purposes.

Previous CSPA Guidance

Previously, USCIS argued that the CSPA did not apply to immigrants who aged out prior to August 6, 2002 (the enactment date of the CSPA). In a February 14, 2003 memorandum, USCIS stated:

*“ . . . Pursuant to section 8 of the CSPA, the provisions of the CSPA took effect on the date of its enactment (August 6, 2002) and are **not** retroactive. For adjustment applications based upon a provision of section 204 of the Act, the amendments made by the CSPA to the Act benefit an alien who aged out on or after August 6, 2002.*

If the alien aged out prior to August 6, 2002, the only exception allowed by the CSPA is if the petition for classification under section 204 of the Act was pending on or after August 6, 2002; or the petition was approved before August 6, 2002, but no final determination had been made on the beneficiary’s application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition. Thus, if an alien aged out prior to August 6, 2002, the petition must have been filed on or before August 6, 2002, and either: 1) remained pending on August 6, 2002, or 2) been approved before August 6, 2002, with an adjustment application filed on or before August 6, 2002, and no final determination made prior to August 6, 2002.”

New CSPA Guidance

In its most recent CSPA guidance, USCIS reversed this prior policy and determined that certain immigrants who aged out (turned 21) before August 6, 2002 still may benefit from the CSPA. USCIS guidance now clearly provides the following:

“It does not matter whether the alien reaches the age of 21 before or after the enactment date of the CSPA [August 6, 2002], when the petition was filed (either before or after [August 6, 2002], or how long the alien took after [I-130] petition approval to apply for permanent residence provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence based on the immigrant visa petition upon which the alien claims to be a child.”

One common scenario (among many possible scenarios) to which this new guidance would apply is the following: A U.S. citizen parent files a Form I-130 Petition for his unmarried child under age 21. The I-130 petition is filed and approved prior to August 6, 2002 and the I-130 beneficiary turns 21 before August 6, 2002. Under the prior guidance, this I-130 beneficiary would have “aged out” and would not benefit from the CSPA. Under the new guidance, this same I-130 beneficiary (so long as he has remained unmarried) will benefit from the CSPA and may be able to file for adjustment of status as an “immediate relative” of a U.S. citizen parent.

The new CSPA guidance also provides that certain individuals whose adjustment of status (I-485 application) was denied based on the prior CSPA interpretation to file a motion to reopen without filing fee in order to reopen the denied I-485 and have it adjudicated based on this new CSPA guidance.

Example

After reading this new CSPA guidance earlier this month, the attorneys at Long, Chang & Associates, L.L.P. began reviewing cases of existing clients who might benefit. One of the earliest cases we reviewed was for a client whose mother (a lawful permanent resident) filed an I-130 Petition for him in June 1995, when he was only 15 years old. As such, the case was classified under the Family 2A Preference Category. The I-130 Petition was approved in year 2000. The mother became a naturalized citizen later in year 2000, just 3 months before her son reached the age of 21. The son never filed an adjustment application since he turned 21 shortly after his mother got her U.S. citizenship. Since the CSPA did not exist at that time, the son's I-130 Petition was converted to the Family 1st Preference Category (as an unmarried son over age 21 of a U.S. citizen). The son has been waiting for several years for his priority date to become current. However, due to the new CSPA guidance, we have determined and advised him that even though he is now almost 27 years of age, he can still qualify as an "immediate relative" as the child of a U.S. citizen parent. Needless to say, this unexpected news made this client's day!

Summary

If you are the beneficiary of an immigrant visa petition filed and approved before August 6, 2002, you should consider how the USCIS's new guidance on the Child Status Protection Act may 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@longchangonline.com.

This article should not be taken as legal advice for any individual case or situation. This information is intended to be general and should not be relied upon for any specific situation. For legal advice, consult an attorney experienced in immigration law.