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BIA RULES THAT CHILD STATUS PROTECTION ACT RETROACTIVELY APPLIES TO CHILDREN OF US CITIZENS

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The Board of Immigration Appeals (BIA) in *Rodolfo Avila-Perez*, 24 I&N Dec. 78 (BIA 2007) ruled that the Child Status Protection Act (CSPA) applies to beneficiaries of immediate relative visa petitions that were approved before August 6, 2002, its date of enactment.

Section 201(f)(1) of the Immigration and Nationality Act (INA) freezes the age of a child upon the filing of a petition (Form I-130) by the US citizen parent. Therefore, even if the child turns over 21 after the filing of the I-130 petition, the child can still qualify as an immediate relative of a US citizen.

At issue is whether the CSPA protects the status of a child who was the beneficiary of an I-130 petition and who turned 21 before August 6, 2002. Prior agency interpretation suggested that such a child should have had an adjustment of status application pending on August 6, 2002 in order to obtain the protection of the CSPA. [1]Likewise, a Department of State (DOS) cable advised that the child should have filed an immigrant visa application at the US Consulate on the date of enactment in order to claim CSPA protection. [2]

The facts in *Rodolfo Avila-Perez* did not conform to government agency prescriptions. Although the Respondent was the beneficiary of an approved I-130, he aged out much before August 6, 2002 and did not have an adjustment of status application pending on the date of enactment. Yet, the BIA held that the CSPA protected him as a child.

The Respondent was born on April 4, 1976. On August 30, 1996, his mother filed an I-130 petition to accord him immediate relative status as a child of a US

citizen, which got approved on November 1, 1996. It is unclear as to why no adjustment application was not filed before he turned 21 on April 4, 1997. In any event, after his 21st birthday, he ceased to be a "child" and qualified under the Family First Preference (F1), as a son or daughter of a US citizen. Under the F1 preference, the Respondent was no longer eligible to adjust status until his priority date became current. [3] Nevertheless, on October 15, 2003, Respondent filed an adjustment application claiming he was still a child under the CSPA. The DHS, instead, initiated removal proceedings against the Respondent and also moved to pretermit his adjustment application. The DHS stuck to its prior policy arguing that the Respondent would only qualify as a "child" if his adjustment application had been filed prior to August 6, 2002 on which no final determination had been made as of that date.

The BIA disagreed, and took pains to interpret Section 8 of the CSPA, which has not been codified in the INA. Section 8 states that the CSPA only applies to:

1. Immigrant petitions that have been approved but where no final determination has yet been made on the beneficiary's application for an immigrant visa or adjustment of status;
2. Immigrant petitions pending before or after the enactment date; and
3. Applications pending before the Department of Justice or Department of State on or after the enactment date.

According to the BIA, the outcome of the case hinged on 8(1) of the CSPA - whether it required the beneficiary of an approved I-130 petition to have also filed an adjustment application or not. The BIA reasoned that since 8(2) and 8(3) of the CSPA specifically required visa petitions and applications to have been "pending" on the enactment date (and thus requiring a filing), Congress deliberately excluded the term "pending" in 8(1). The BIA stated, "Where Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is generally presumed that Congress acted intentionally with respect to the inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); *Russello v. United States*, 464 U.S. 16, 23 (1983). Also, the BIA opined that statutes should be given their ordinary and natural meaning. *INS v. Cardoza-Fonseca, supra*.

The BIA also looked to the legislative history of the CSPA for further interpretation. Originally, the bill proposed to cover only children of US citizens

and had no limitation to retroactivity. After the Justice Department expressed concern over the unlimited retroactive scope, the House passed the bill applying the CSPA to "all petitions and applications pending before the Department of Justice or Department of State at the time of enactment." When the bill got to the Senate, the protections were expanded to cover children of lawful permanent residents, refugees and asylees. The Senate's effective date provision was passed in 8(1), 8(2) and 8(3). While 8(2) and 8(3) encapsulated the House's version of the effective date, the Senate created 8(1). The BIA reasoned that the Senate, through 8(1), "intended to expand coverage of the statue beyond those individuals whose visa petitions and applications were pending on the date of the CSPA to also protect those individuals whose visa petitions were approved before the effective date, but only if their applications had not already been finally adjudicated." The BIA further noted, "the new language in section 8(1) extended more protection by ensuring that certain individuals whose visa petitions were approved before August 6, 2002, were protected, without affording reopening to those who applications for a visa or adjustment of status had already been subject to a final determination."

What is the scope of *Rodolfo Avila-Perez*? It appears to only retroactively cover children of US citizens who were beneficiaries of approved I-130 petitions and who aged out before August 6, 2002. Most children should have obtained permanent residence, unless they the I-130 was filed close to their 21st birthday and either they or the government were tardy in pursuing permanent residence. These children, who have slipped into the F1 preferences quota, can potentially hope to be once again be accorded the status of a "child" under the CSPA and fall under the "immediate relative" category of a US citizen.

Those who believe that *Rodolfo Avila-Perez* retroactively applies to children of permanent residents, whose adjustment applications or visa petitions were not pending as of August 6, 2002, should hold their breath. INA Section 203(h) extends "age out" protection to the children of legal permanent residents. This provision covers children who have directly been sponsored by their parents under the Family 2A preference or who are accompanying or following to join family-sponsored, employment-based and diversity immigrants. The age of the non-citizen child is determined on the date on which an immigrant visa becomes available, reduced by the number of days the petition was "pending." However, this provision only triggers if the child has sought to acquire permanent residency within one year of such availability. The BIA specifically

distinguished Section 203(h) from 8(1), which appears to retroactively only apply to CSPA protection under Section 201(f)(1), covering the child of a US citizen, whose age is frozen upon the filing of an I-130 petition without regard to the child applying for permanent residency within a certain time period.[4]

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[1]*See* Memorandum of Johnny Williams, Executive Associate Commissioner, Office of Field Operations, February 14, 2003, HQADN 70/6.1.1, *reprinted* in 80 Interpreter Releases, No. 11, Mar. 17, 2003.

[2]*See* DOS cable dated January 3, 2003 (03 State – 015049).

[3]According to the State Department February 2007 Visa Bulletin, the cut-off date for Mexico in the F1 preference is January 1, 1994.

[4]For more analysis on the potential retroactive application of Section 203(h), *See*, Mehta, *Pushing The Envelope With The Child Status Protection Act*, November 14, 2003, www.cyrusmehta.com