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OPT-OUT PROVISION UNDER THE CHILD STATUS PROTECTION ACT

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by
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Section 6 of the Child Status Protection Act (CSPA)[1] allows beneficiaries of I-130 petitions that have been converted from the Family Second Preference (F2B) to the Family First Preference (F1), after the parent has naturalized, to opt out and remain in the F2B.[2]

It is possible for the F1 to be more backlogged than the F2B. The Philippines is an example. In the November 2007 State Department Visa Bulletin, the cut-off date for the F2B is December 22, 1996 and the cut-off date for the F1 is July 22, 1992. Although the F1 for all other countries is more advanced than the F2B, it is the reverse with regards to the Philippines. Indeed, it would be disadvantageous for the beneficiary of an F2B petition to converted to an F1 if the beneficiary of that petition was born in the Philippines.

Section 6 of the CSPA has been codified in Section 204(k) of the Immigration & Nationalization Act (INA) entitled "Procedures for unmarried sons and daughters of citizens," which provides:

- ***In general***. - Except as provided in paragraph (2), in the case of a petition under this section initially filed for an alien unmarried son or daughter's classification as a family-sponsored immigrant under section 203(a)(2)(B), based on a parent of the son or daughter being an alien lawfully admitted for permanent residence, if such parent subsequently becomes a naturalized citizen of the United States, such petition shall be converted to a petition to classify the unmarried son or daughter as a family-sponsored immigrant under section 203(a)(1).

- ***Exception***. - Paragraph (1) does not apply if the son or daughter files with the Attorney General a written statement that he or she elects not to have such conversion occur (or if it has occurred, to have such conversion revoked). Where such an election has been made, any determination with respect to the son or daughter's eligibility for admission as a family-sponsored immigrant shall be made as if such naturalization had not taken place.
- ***Priority date***. - Regardless of whether a petition is converted under this subsection or not, if an unmarried son or daughter described in this subsection was assigned a priority date with respect to such petition before such naturalization, he or she may maintain that priority date.
- ***Clarification***. - This subsection shall apply to a petition if it is properly filed, regardless of whether it was approved or not before such naturalization.

What Section 204(k) means is that an F2B beneficiary is automatically converted into F1 upon the naturalization of the parent who was previously a lawful permanent resident (LPR). However, such a beneficiary may opt-out, either prior to the conversion or after the conversion, by requesting such an election through a written statement. If an election has been made, the son or daughter would be considered under the F2B as if such naturalization of the parent never took place.

At issue is the interpretation of the phrase "in the case of a petition under this Section *initially filed* for a alien's unmarried son or daughter's classification as family-sponsored immigrant under Section 203(a)(2)(B)."

In a previous USCIS Memo dated March 23, 2004 *(March 23, 2004 Memo)*,[3] the USCIS opined that the opt-out provision applied only to a beneficiary whose initial Form I-130 was filed after he or she turned 21 or over as the unmarried son or daughter of an LPR. If on the other hand, the I-130 petition was filed by an LPR on behalf of his or her child when the child was under 21 years of age, and the child attained the age of 21, and then the parent naturalized, the opt-out provision would no longer be applicable according to that Memo.

Fortunately, the USCIS has reversed itself in a more recent Memo from Michael Aytes, dated June 14, 2006 *(June 14, 2006 Memo)*,[4] and has opined that the

phrase "initially filed" would be applicable to the beneficiary who was sponsored as a minor. The June 14, 2006 Memo generously notes that the prior policy had a perverse result of older siblings who were originally sponsored under F2B acquiring permanent residency more quickly than the younger siblings who had to wait longer under the F1. The Memo also notes that it is reasonable to interpret "initially filed" as "initially filed for an alien *who is now* in the unmarried son or daughter classification."

At present, it is only the Philippines where the F1 is more backlogged than the F2B preference. With respect to the worldwide category, the F2B is September 15, 1998 and the F1 is December 8, 2001. Under Mexico, the F1 category is June 1, 1992 and the F2B is March 15, 1992 in the November 2007 Visa Bulletin. But in September 2007, Mexico's F2B was March 8, 1992 and the F1 was January 1, 1991. Thus, except for a beneficiary who is chargeable to the Philippines, it would not make any sense to opt out under the CSPA at this time. However, with respect to a beneficiary chargeable to the Philippines, opting out of the F1 is now possible for both the beneficiary who was directly sponsored under the F2B as well as for a beneficiary who was first sponsored under the Family 2A preference (for minor children of permanent residents) and then crossed over to F2B after reaching the age of 21.

The March 23, 2004 Memo's guidance as to the opting out procedure is still valid. All beneficiaries in the Philippines wishing to opt out of the automatic conversion must file a request, in writing, addressed to the Officer in Charge, Manila. The Officer in Charge shall provide written notification, on official USCIS letterhead, of a decision on the beneficiary's request and to the Department of State's visa issuance unit. If the beneficiary's request is approved, then the beneficiary's eligibility will be determined as if his or her parent had never naturalized and will continue to remain in the F2B.

Even if there is no official guidance on how a beneficiary who is in the US can opt-out, it should not prevent one from doing so by writing to either the Service Center that processed the I-130 petition or at the time of filing an adjustment of status application. For instance, if the beneficiary has automatically converted to F1 and finds that F2B is more advantageous, he or she should still go ahead and file the adjustment of status application accompanied by a letter requesting that he or she be allowed to opt-out of F1.

In the June 14, 2006 Memo, USCIS has also clarified that the age out calculation

applicable to other beneficiaries is not applicable to the opt-out provision. Thus, beneficiaries may be able to opt-out regardless of age.

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[1] Public Law 107-208, 116 Stat. 927.

[2] The F2B includes sons and daughters (21 and over) of lawful permanent residents. The F1 includes sons and daughters of US citizens.

[3] Memo, Joe Cuddihy, Director, International Affairs, USCIS, HQOPRD 70/6 (March 23, 2004).

[4] Memo, Michael Aytes, Associate Director, Domestic Operations, USCIS, HQ 70/6.1.3 (June 14, 2006).