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# CSPA AND RETROACTIVITY

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**by**
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A new Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, US Citizenship and Immigration Services (USCIS), *Revised Guidance for the Child Status Protection Act* (CSPA), HQ DOMO 70/6.1, *AFM* Update AD07-04 ("Neufeld Memo"), sheds new light on whether the CSPA is retroactive. The CSPA allows, under certain circumstances, children who have turned 21 to continue to enjoy a more advantageous position as if they were still under 21. Previous interpretations have suggested that an adjustment of status application must have been pending on August 6, 2002, the date of CSPA's enactment, or that an immigrant visa application should have been filed and pending at the US consulate on the date of the enactment in order for the CSPA to apply to a child who turned 21 before its enactment.[1]

On the other hand, the Board of Immigration Appeals in *Rodolfo Avila-Perez*, 24 I&N Dec. 78 (BIA 2007) held that the CSPA applied to beneficiaries of immediate relative visa petitions that were approved before August 6, 2002, seeming to suggest that the CSPA had unlimited retroactive application.

While *Avila-Perez* was an important breakthrough, it was unclear whether the decision extended to all CSPA beneficiaries (*See BIA RULES THAT CHILD STATUS PROTECTION ACT RETROACTIVELY APPLIES TO CHILDREN OF US CITIZENS*). *Avila-Perez* involved the beneficiary of an approved I-130 petition filed by a US citizen under the immediate relative category.[2] 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 at any time thereafter can still qualify as an immediate relative of a US citizen.

On the other hand, 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." But, unlike the treatment of immediate relative children under Section 201(f)(1), this provision will only trigger if the child has sought to acquire permanent residency within one year of such availability.

It is therefore uncertain whether *Avila-Perez*, holding that the CSPA applied retroactively, also applied to CSPA beneficiaries under Section 203(h) because the provision only triggers if the child has sought to acquire permanent residence within one year of availability.

The Neufeld Memo now indicates that the CSPA beneficiaries under Section 203(h) are also covered retroactively, but under limited circumstances. The Neufeld Memo covers two groups of non-citizen children who may have become eligible prior to August 6, 2002. With respect to the first group, the Neufeld Memo clarifies that a non-citizen child who did not have an application for permanent residence pending on August 6, 2002, and who subsequently filed an application for permanent residence that was denied solely because he or she aged out, may file a motion to reopen or reconsider without a filing fee if : (a) the child would have been considered under the age of 21 under applicable CSPA rules; (b) the child applied for permanent residence within one year of visa availability; and (c) the child received a denial solely because he or she aged out.

Regarding the second group, the Neufeld Memo indicates that some children can get CSPA coverage even if they did not have an application for permanent residence on August 2002 and did not file subsequently for permanent residence. Such a child who had a visa number available on or after August 7, 2001 and would have qualified for CSPA coverage, but did not apply for permanent residence because of prior policy guidance concerning the CSPA effective date, may apply for permanent residence presently.

Although the Neufeld Memo upholds the retroactive application for CSPA, it only goes back to August 7, 2001. This is because as of August 6, 2002, the CSPA

required children claiming protection under Section 203(h) to have sought to acquire LPR status within one year of visa availability.[3] How does the Neufeld Memo square with the BIA's holding in *Avila-Perez*?

It can be argued that the unlimited retroactively concept in *Avila-Perez* still applies to immediate relatives covered under Section 201(f)(1) as there is no requirement, unlike Section 203(h) that the child should have sought permanent residency within one year of visa availability. The relevant portion of the Neufeld Memo that supports this view is extracted below:

(i) Adjustment as an Immediate Relative (IR). The CSPA amended section 201(f) of the Act to fix the age of an alien beneficiary on the occurrence of a specific event (e.g. filing a petition). If the alien beneficiary is under the age of 21 on the date of that event, the alien will not age out and continue to be eligible for permanent residence as an IR. It does not matter whether the alien reaches the age of 21 before or after the enactment date of the CSPA, when the petition was filed, or how long the alien took after 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. (emphasis added).[4]

The Neufeld Memo does not offer any more breakthroughs in demystifying the CSPA. Many are eagerly waiting to hear how the USCIS and the State Department will interpret the "Retention of Priority Date" provision, which is codified in Section 203(h)(3) of the INA. This provision allows for an aged-out child who cannot get protection under the CSPA to allow for the automatic conversion of the petition to the appropriate category and allow the retention of the original priority date. The Neufeld Memo remains silent on this provision notwithstanding the BIA's holding in *Matter of Garcia*, which correctly interpreted Section 203(h)(3). For further details, *See BIA RULES FAVORABLY ON AUTOMATIC CONVERSION PROVISION IN CSPA*

Finally, the Neufeld Memo adds some insight with respect to limited coverage for certain K-4 and K-2 aliens. Although the CSPA does not generally cover K-4 visas or extensions, a K-4 nonimmigrant who is child of a spouse of a US citizen "may utilize the CSPA upon seeking adjustment of status because a K-4 alien seeks to adjust as an IR on the basis of an approved Form I-130." Thus, the K-4

nonimmigrant is considered an immediate relative and the age is fixed on the date that the I-130 petition was filed by the US citizen parent. On the other hand, a K-2 nonimmigrant is inherently never covered by the CSPA status unless the US citizen parent files a Form I-130 visa petition on his or her behalf. Note that an I-130 petition can only be filed on behalf of a K-2 child (who is a step-child of the US citizen parent) if the marriage took place before the child turned 18 years.

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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; DOS cable dated January 3, 2003 (03 State - 015049).

[2] The US District Court for the Central District of California arrived at a similar conclusion in the context of an I-130 petition that was filed on June 8, 1999 but was not approved until October 23, 2001 when the child was over 21. *See Rodriguez v. Gonzales*, No. CV 04-8671 (C.D. Cal. May 31, 2006).

[3] The Neufeld Memo reminds adjudicators that an I-824 can be concurrently filed with the Form I-485 applicant as evidence of having "sought to acquire" LPR status within one year of visa availability especially when the parent is adjusting in the US and the child is overseas. A previously filed I-824 that was denied, the Neufeld Memo goes on to add, because the principal alien's

adjustment of status application had not yet been approved can serve as evidence of having "sought to acquire" LPR status.

[4] To the extent that there is a conflict between the Neufeld Memo and *Avila-Perez*, the BIA decision is controlling under INA Section 103(a)(1), which states that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."