International Adoption Law involves the interplay of two laws/practices: the adoption of the child (controlled by either the laws and regulations of a foreign government, or the laws of the US state in which the adoptive parents reside/will reside), and US immigration of that child. As an attorney, you should always investigate the applicability of both of these issues when you are presented with a case that involves either:

(1) a child who was not born in the United States (i.e. a “foreign-born” child) – even if that child is physically in the United States; or
(2) potential adoptive parent(s) who is/are foreign-born, AND are not United States citizens or Legal Permanent Residents.

GOVERNING REGULATIONS:

- **International Treaty:**
- **US Implementing Regulations:**

APPLICABLE LAWS/REGULATIONS:

Adoption, if completed in the US, remains a state issue, handled through the relevant county and state court systems. The immigration issues are then addressed in the following regulations:

(1) INA §101(b)(1)(E) – allows for adopted children to be the beneficiaries of direct and derivative immigration benefits after certain criteria met;
(2) INA §101(b)(1)(F) – allows for the immigration of “orphans,” as that term is defined at 8 CFR §204.3;
(3) INA §101(b)(1)(G) – allows the immigration of Hague Convention adoptees. This provision of the law was created by the US ratification and implementation of Hague Convention Article 33 on April 1, 2008, and was

RELEVANT MEMOS AND OTHER AGENCY DOCUMENTS:

- DOS FAQs (released 10/25/2007) – AILA Doc No. 07102562
- Release of forms I-800A and I-800 for processing of Hague Adoptions (released 02/29/2008) – AILA Doc No. 08022962
- USCIS Reopens Comment Period for Interim Rule (released 03/25/2008) – AILA Doc No. 08032536
- Inclusion of I-800A and I-800 in Direct Mail Program (released 08/26/2008) – AILA Doc No. 08082562
- USCIS FAQ on Intercountry Adoption (released 09/29/2008) – AILA Doc No. 08093064
- USCIS Adoption Policy for Hague Transition Cases (released 10/14/2008) – AILA Doc No. 08101472
- USCIS Policy Memorandum PM-602-0070.1, Guidance for Determining if an Adoption is Valid for Immigration Purposes (release 11/06/2012) – AILA Doc 12120577

FOREIGN-BORN ADOPTIVE PARENTS:

If the potential adoptive parents are foreign-born, you must first assess the immigration status of the adoptive parents:

- If one or both of the adoptive parents are naturalized US citizens, they are treated the same as US-born citizens as it relates to both non-Hague and Hague Convention adoptions (see below).
- If the potential adoptive parents are LPRs, they are not eligible to utilize INA section 101(b)(1)(F) or (G). These are available only if one or both of the adoptive parents is/are USCs.
- If the potential adoptive parents are in the US as non-immigrants, or have no status in the United States at all, you must identify the country of origin/citizenship of the adoptive child. If the parents plan to adopt a US-born child, the parents are citizens of a Hague Convention country, AND the family plans to immigrate the child to the foreign country, you must advise the family regarding the applicability of Hague as it relates to outgoing cases (note that this presentation does not address outgoing cases). If the child is foreign-born, and the parents wish to have the child included as a derivative beneficiary in any immigration benefit (nonimmigrant or immigrant), you will utilize the definition of “child” within INA section 101(b)(1)(E). For purposes of nonimmigrant visas, especially as they relate to derivative statuses (H-4, L-2, etc), the consulate and the USCIS should apply INS section 101(b)(1)(E) before any derivative NIV benefits are provided. In other words, the consulates/ USCIS should first
determine if the child has been fully and finally adopted, if that adoption occurred before the child’s 16th birthday, and the child has been in the physical and legal custody of the adoptive parent(s) for 2 years. The word “should” has been underlined because the consulates sometimes do not look at the satisfaction of this section of the law, and will mistakenly issue derivative nonimmigrant visas to newly-adopted children. It is imperative that you advise the family of this mistake, and work with the family to satisfy the definition before further applications. In the alternative, the adoptive parent(s) can request a humanitarian B-2 for US entry, to accompany an NIV parent.

FOREIGN-BORN CHILDREN:

In most cases, the potential adoptive parents will be US citizens or LPRs of the United States, and will come to you seeking to adopt and immigrate a foreign-born child.

**Step/Question #1** – What is the current US immigration status of that child? If the child is already an LPR, that child can be freely adopted in the US without concern for resulting immigration. If the child has the potential to immigrate via a non-adoption-based method (such as Special Juvenile Immigrant, or as a step-child of a US citizen), you should always review the potential avenues for immigration that are not related to adoption. In general, advise clients to seek adoption-based immigration as a last remedy, not as first one; adoption-based immigration is unpredictable and uncertain, and other options should first be investigated.

If you determine that SIJS or other immigration options are not viable, proceed to Question #2.

**Step/Question #2** – Is the child a citizen of a Hague Convention country (or did the child reside on a long-term basis in a Hague Convention country before coming to the United States)? This is vital to assess what provision of the law will apply.

You can identify the Hague Convention countries by visiting the following link:

[www.hcch.net](http://www.hcch.net)

You can also visit the State Department’s website as following:

[www.adoption.state.gov](http://www.adoption.state.gov)

The Department of State maintains and updates information for each country. New countries join on a regular basis, so it is imperative that you frequently check this list to prevent misapplications.

If the child’s country of citizenship or last long-term residence is NOT a Hague Convention Country, proceed to Question #3. If the child’s country of citizenship or last long-term residence IS a Hague Convention Country, proceed to Question #4.
NOTE: Mexico and Canada, our nearest neighbors, are both Hague Countries. Therefore, when addressing cases of children from Mexico, you will always proceed directly to Question #4 below.

**Step/ Question #3** [Does not apply to cases Hague Convention member countries] –
You’ve determined that the Hague Convention does not apply because the child is not a citizen or long-term resident of a Hague Convention country. You now need to determine the applicable provision of the INA for your case.

- **INA §101(b)(1)(E)** – this section of the INA applies to most cases of adopted children. This section allows US immigration benefits for an adopted child if:
  - A full and final adoption of the child was accomplished before the child’s 16th birthday (or 18th birthday, if a biological sibling was also adopted by the same individual(s), and that sibling is under 16 years of age);
  - The adoptive parent(s) has/have completed two years of physical AND legal (court-ordered/ recognized) custody of the child;

Once those criteria have been satisfied, the adoptive parent can apply for immigration benefits, including non-immigrant derivative visas; I-130 family petitions; and consular processing or adjustment of status for the child. The children do not have to be “orphans” and direct relinquishments are okay. However, as attorneys, you should be aware of the potential fraud/ misrepresentation issues associated with this kind of immigration, and question your clients on the true need for the adoption; adoption for the sole purpose of immigration is no different and no less fraudulent than marriage for the sole purpose of immigration. USCIS also recognizes the potential for fraud, especially within family cases, and will ask for extensive proof that the biological parents are not involved in the daily raising of the children (including, potentially, the physical address of the biological parent(s)).

This provision of the law applies to US citizens, LPRs and non-immigrant visa holders.

- **INA §101(b)(1)(F)** – this section allows for the immigration of “orphans,” as that term is defined at 8 CFR §204.3. This process involves the filing of an I-600A and/or I-600, and issuance of an IR-3 or IR-4 visa through the overseas US consulates and embassies. This process is not generally available for children who are already in the United States, unless they were paroled into the US for that specific reason (as an example, for those children brought to the US from Haiti following the earthquake on special paroles).

**Step/ Question #4** – if you have determined that:

- the child is a citizen of a Hague Convention country, AND
- the potential adoptive parents are also citizens of a Hague Country (such as the United States), AND
(c) the child is not an LPR in the United States (or has no other potential for US immigration),

then you need to determine if the Hague Convention and INA §101(b)(1)(G) applies to your case. Note that if the case is Hague exempt, your case will default back into INA sections 101(b)(1)(E) or (F) as appropriate.

- Did the adoptive parents complete an adoption (either in the US or abroad) before 04/01/2008? If so, the case can proceed under 101(b)(1)(E) or (F) as applicable. *Nunc Pro Tunc* adoptions that are effective before 04/01/2008 may also be valid and recognized (see *Messina v. USCIS*, 2006 WL 374564 and, more recently, *Amponsah v. Holder*, ___ F.3d__ (9th Cir. 2013), No. 11-71311 (March 22, 2013), AILA Doc 13032651). See “USCIS Adoption Policy for Hague Transition Cases,” on the USCIS website (www.uscis.gov). If this applies, your case is Hague exempt.

- Did the adoptive/ potential adoptive parent file an I-600A or I-600 before 04/01/2008 (indicating a desire to adopt from that particular Hague country), and file all necessary extensions to keep the approval valid? This is going to be rare, as USCIS has begun terminating its grandfathering programs and allowable extensions (i.e. see cases from China) – but on occasion, you will see a lingering I-600A or I-600 from before April of 2008. The case is Hague exempt.

- Can you obtain a determination from the foreign government’s Central Authority that the child is actually a Habitual Resident of the US, and/or that the foreign government does not want to retain jurisdiction of the case? This involves direct communication with the foreign government’s Central Authority; contact information is found at www.hcch.net. If such a determination can be made, *AND that determination is mentioned in the adoption order or integrated into the decision of the family court*, either at the time of adoption OR as a supplemental or amended order, the case is “exempted” from Hague, and INA §101(b)(1)(E) applies. NOTE: this provision is related to the FAQs that were released by USCIS in September and October of 2008 (see above). If so, the case is Hague exempt.

This final exemption perhaps the thorniest and most current issue, and the one that consumes the most conversation among practitioners. For example, at this time, the Central Authority in Mexico (the country from which a great majority of the children come, at least in Southern California) has indicated that it will not cooperate with the issuance of these letters. The agency either ignores the request completely or indicates that it will not cooperate with a request regarding a foreign process. As stated above, USCIS will deny the I-130s unless the case includes an adoption decree/order (or supplemental order) that references or includes the letter/ determination/release from the foreign Central Authority. As such, the children are caught in a war between 2 government agencies: the USCIS demanding something that the foreign government will not provide.
** Note that the many of the cases on which you are asked to consult will resemble the following scenario: Minor child came to the US either lawfully with a visa and overstayed, or EWI, many years ago. A US family (friend, family members) wants to adopt the child via a US-based domestic adoption, and complete immigration for the child. In many cases, the family will have already completed the adoption (but after April 1, 2008) based either on faulty advice, or ignorance; they then come to you for filing of the I-130, OR because they have received a Request for Evidence or denial on the I-130. That I-130 will be denied unless (1) the family obtains the requisite determination of habitual residence and include that in the adoption (or amend the adoption to include it if the adoption has already been completed); or (2) complete 2 years OUTSIDE of the US with the child (see next section).

- Did the adoptive parent complete two (2) years of legal and physical custody of the child OUTSIDE of the United States while residing lawfully in that foreign country? If so, the habitual residency of the adoptive parents is determined to be outside of the United States, negating the application of Hague. INA §101(b)(1)(E) then applies, as the case is Hague exempt. In many cases, this may be the most appropriate solution for a family that has already completed an adoption, although many families are understandably not happy with this recommendation.

If none of these can be answered with a “yes,” then your case will be subject to the Hague Convention and INA §101(b)(1)(G). If you take away only ONE thing from this presentation, it is this:

If your case is subject to Hague, and you fail to advise the (potential) adoptive parents of this applicability, and you proceed with or recommend the adoption “out of order” (see below for Hague practices), you will have committed legal malpractice. That adopted child will not be eligible for US immigration on the basis of the adoption under the Hague. The adoption, of course, will remain valid; but the child cannot immigrate to the US as a Hague Convention Adoptee, requiring the family to complete 2 years of legal and physical custody with the child in the foreign country or amend the adoption with a habitual residency determination (if available) before then applying under the (E) provisions.

**Step/ Question #5** – if you have now determined that the case is subject to the Hague and INA §101(b)(1)(G), the case MUST progress through VERY specific steps, in a VERY specific order, to form the basis of immigration for the child.

Initially, you must also determine if the child will qualify as a Hague Convention adoptee. A Hague Convention adoptee can immigrate only if:

(1) that child has no living biological parents; or
(2) that child has only one living/ known/ present biological parent, and that biological parent has permanently released the child for adoption and immigration [note that if the child’s second biological parent is alive and known, it must be
shown that that parent has abandoned or otherwise failed completely to care for the child, effectively providing the child with only one biological parent; or
(3) that child has two, married biological parents, AND those parents are incapable of caring for the child according to the standards of the child’s country of citizenship. In other words, even for THAT country, the parents’ and child’s living conditions are terrible, OR the parents are incapable of caring for the child due to a serious disease or similar.

If the child (for example) has two married biological parents who are capable of caring for the child, but the family believes it best that an aunt/ uncle/ sibling in the US adopt that child to “give the child a better life,” you will not accomplish a successful Hague Convention adoption and immigration.

The Hague process is generally as follows (no step can be moved ahead of or under another):

(1) Adoptive family obtains an approved homestudy from an accredited/ authorized provider (see 22 CFR section 96)
(2) I-800A filed with homestudy
(3) I-800A approved
(4) Approval package is forwarded to the Central Authority of the designated foreign country
(5) Central Authority makes a referral to the family, which includes report on medical and social background
(6) Family accepts referral, and files I-800 w/ USCIS
(7) I-800 provisionally approved, forwarded to appropriate DOS officer
(8) DOS officer annotates the visa application with child’s ability to immigrate following adoption/ transmits “Article 5 Letter” to the Central Authority
(9) Family completes adoption/ guardianship
(10) IH-3 (adopted) or IH-4 (guardianship) visa issued to the child.

If the child enters the US on an IH-4, the adoption is then finalized in the US, according to relevant state law.

Note that the I-800A/ I-800 process can also occur for a child who is already in the US, and the child would then adjust his/her status in the US on the basis of the approved I-800.

Step/ Question #6 — if your client has completed an adoption and immigration under 101(b)(1)(E), (F), or (G), and at least one adoptive parent is a US citizen, the child automatically obtains US citizenship pursuant to Child Citizenship Act of 2000. Note that the child MUST have legally immigrated to the US, and been fully and finally adopted before the child’s 18th birthday. Children who are in the US unlawfully and are then adopted, without any actual US immigration, do not get any automatic US citizenship under CCA2000. A few well-meaning adoptive parents do not pursue immigration of adopted children, because they erroneously believe that the adoption
creates US citizenship for the child. That simply is not true, and exposes the child to potential removal from the US.

**Special Considerations Regarding Mexican Adoptions**

(1) The INA requires that the adoption be “full and final.” However, Mexico has two types of adoptions: SIMPLE and PLENA. In most circumstances, only the PLENA adoption will satisfy the INA; SIMPLE adoptions can, in theory, be terminated/reversed, leading to a natural finding that they are not full and final as the INA requires. Many inter-family adoptions in Mexico are finalized as Adoptions SIMPLE, leading to denials at the Consulate or I-130 state for lack of finality. The availability of these different procedures vary from State to State in Mexico, but when available, ALWAYS counsel your clients to obtain an Adoption PLENA. In some states of Mexico, an Adoption Simple can be converted into an Adoption Plena upon petition by the child after his/her 18th birthday (see, for example, the State of Baja California).

(2) Recently, the Mexican Consulates have refused to issue new Mexican passports with the child’s post-adoption name, if the adoption was completed in the US. In other words, the child’s name is legally changed as part of the adoption, and a new US-issued birth certificate (simply noting the change of parentage, NOT a change of citizenship) reflects the post-adoption name. The Mexican Consulates may refuse to issue new passports to the children under these new names, based on the US adoptions; instead, they are requiring that adoptive parents to domesticate the US-based in Mexico, and have a new/amended Mexican birth certificate issued. This practice varies from Mexican consulate to consulate, but may present major hassles upon US immigration (which requires a current passport in the child’s post-adoption name). You may want to consider advising your clients to avoid name changes at adoption if possible.

**Children in Families First Act of 2013 (CHIFF)**

At the time of press, a draft bill of CHIFF has been made available for review. The bill is expected to be introduced in the final quarter of 2013. This bill is the result of countless hours of discussion and negotiation between all levels of adoption professionals and interested parties, and reflects an understanding that while the Hague Convention and the IAA may have had good intentions, the results have not been as favorable. The bill may of course be amended as it winds through Congressional committees, but the current highlights include:

(1) Reallocation of personnel and resources to expedite agency processing of adoption-related cases.

(2) Amend the definition of “orphan” in 8 CFR section 204.3 to mirror that of a Hague Convention Adoptee as defined in 8 CFR section 204. This includes permitting direct relinquishment by a single birthparent (without need to show inability to care for the child), and also allows a child to qualify if from a two-
parent household (married birthparents OR if both birth parents are involved in
the child’s life) IF the biological parents are incapable of providing care to that
child according to the standards of that sending country.

(3) Creation of the new Bureau of Vulnerable Children and Family Security (VCFS)
within the Department of State, which will then be designated as the Central
Authority of the United States for Hague Convention cases (versus the current
Office of Children’s Issues).

(4) Create a central database of adoption-related cases, which will include the
information regarding the adoptive parents and the child(ren), the agency used (if
any), and the immigration and/or citizenship status of the child.

(5) Amend the current adjudication structure to permit USCIS (versus the DOS) to
adjudicate satisfaction of Hague or non-Hague regulations, and create a uniform
pre-approval process for non-Hague cases (similar to the current PAIR program
being utilized for cases from Taiwan, and which may be used for cases from
Ethiopia).

(6) Permit USCIS (versus the DOS) to process all Hague certifications.

(7) Permit USCIS to communicate directly with the Central Authorities of sending
countries, to permit more streamlined determinations of habitual residency of the
child.

(8) Extend the age for application of (F) and (G) regulations to 18 for all cases,
regardless of the processing of a younger sibling.

(9) Permits DHS to waive the application of the regulations of INA sections
101(b)(1)(E), (F) or (G), if the child substantially complies AND such a waiver is
in the child’s best interest.

(10) Codifies the USCIS FAQ regarding determinations of habitual residency
and the ability to exempt the case from Hague if such a determination is obtained.

(11) Permits DHS to parole a child into the United States under certain
circumstances, regardless of the applicability of Hague, for the purpose of
adoption and/or completion of 2 years of legal and physical custody (and then
permits the child to seek immigration via INA sections 101(b)(1)(E) and 245(a)).

Updates on CHIFF will be provided as they are available.
Second parent adoptions and Assisted Reproductive Technology (ART)
LGBT Parents

By Jennifer Fairfax

I. Legally Recognized Parents

A legal parent is a person who has the legal right to have care and custody of a child and make decisions about the child’s health, education, and well-being long term and day to day. A legal parent is also financially obligated to support the child. A person becomes a legal parent either through being a biological parent, adoption, parentage order or parental presumption (within the context of the marital presumption).

Legal parents have an equal right to seek custody and make decisions for their children, as well as the responsibility to support their children. When a legally recognized married couple has a child, they are both automatically presumed to be the legal parents of the child born during the marriage – this is referred to as the marital presumption or parental presumption. This means that, if they get divorced, they both remain legal parents with rights to custody and obligations of support. This presumption does not apply for most same-sex couples, although it does apply when children are born to couples who are recognized by their state as married or in a civil union or registered domestic partnership.

II. Second Parent Adoptions

Adoption is a creature of statute. In all states, adoption can only be accomplished by going through a judicial process where, at the end, a court issues a final order (judgment/decree) of adoption. An adoption takes place anytime legally recognized parents (biological or adoptive) no longer wish to have parental rights and there is another adult(s) who wishes to obtain parental rights OR in the case of a step parent or second parent adoption the legal parent wishes for their partner or spouse to have equal parental rights with them. The adoption transfers parental rights from the legally recognized parents to the adoptive parents or confers parental rights on the spouse or partner while reserving the other parents’ rights. When an adoption is granted the court confirms the legally recognized parents’ rights.

Second parent adoptions, domestic partner adoptions, and civil union adoptions are currently the most common means used by LGBT non-biological parents to establish a legal parental relationship with their child. A second parent adoption is the legal procedure by which a co-parent adopts his or her partner’s (or spouses) child without terminating the partner’s (or spouse’s) parental rights. As a result of the adoption, the child has two legal parents, and both partners have equal legal status in terms of their relationship to the child.

States that recognize marriage between same-sex couples, as well as states that provide comprehensive domestic partnerships or civil unions, allow couples joined in these legal unions to use the step-parent adoption procedures that married couples may use so that both parents are legally recognized.

The trend across the nation is toward permitting persons who act as parents to a child to adopt, particularly when such a person shares a household and is in a committed relationship with the
A person who is already a legal parent. The following states have established laws (either through statutes or published appellate court opinions) that explicitly allow same-sex couples to adopt, either through a second parent adoption or through the step-parent adoption procedures: California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.

III. Second Parent Adoption Maryland and D.C.

A. Maryland

Under Maryland Code, Family Law § 5-3B-13(a), any individual may be adopted. Maryland Code, Family Law § 5-3B-13(b) allows any adult to petition a court to decree an adoption. Maryland Code, Family Law § 5-337(b) states “a juvenile court may not deny the petition solely because the petitioner is single or unmarried.” Thus, Maryland’s adoption laws do not require that petitioners seeking to adopt be married. In the case In re Adoption No. 90072022/CAD, 87 Md. App. 630, 590 A.2d 1094 (1991), an unmarried man and woman petitioned jointly to adopt the woman’s biological child. While the couple had intended to marry, the Court of Appeals held that Maryland’s adoption statute “does not require that the petitioner be married” to adopt. A long line of Maryland cases have held that a child’s welfare and best interests should be the primary considerations in an adoption. Cf. In Re Adoption No. 90072022/CAD, supra; Hicks v. Prince George’s County Dept. of Social Services, 281 Md. 93, 375 A.2d 558 (1977); Lloyd v. Schutes, 24 Md. App. 515, 332 A.2d 338 (1974), cert. denied, 275 Md. 752 (1975).

Accordingly, Maryland law does not limit adoptions to the traditional notions of a married couple, or even one male parent and one female parent.

In both recent cases involving LGBT parents, Janice M. v. Margaret K., 404 Md. 661 (2008) and Conaway v. Deane, 401 Md. 219 (2007) the Appeals court mentions second parent adoption in dicta.

In Maryland, when the adoptive parent is the minor child’s step-parent. MD. Code § 5-331(b)(2) provides that:

If a petitioner under this section is married, the petitioner’s spouse shall join in the petition unless the spouse:
(i) is separated from the petitioner under a circumstance that gives the petitioner a ground for annulment or divorce; or
(ii) is not competent to join in the petition.

Accordingly, if petitioners are married, both must join in the adoption or the birth parent’s rights to the child will be cut off pursuant to MD. Code § 5-331. Thus, Maryland law recognizes that it is in a child’s best interest to have the child’s birth parent’s rights preserved in a step-parent adoption.

As of February 10, 2011 and a result of the Attorney General’s Opinion stating that Maryland recognizes same-sex marriages from other jurisdictions the Maryland Department of Health and Mental Hygiene began issuing birth certificates for married same-sex women when one gives birth during the marriage.
B. District of Columbia

In the District of Columbia, second parent adoptions began with case law in which domestic or life partner of a birth parent was permitted to adopt as a stepparent without the birth parent losing parental rights. In re M.M.D. & B.H.M. 662 A2.d 837, 860 (D.C. 1995). Eventually this was codified in District of Columbia Code, §16-312(a). In D.C. a married or registered domestic couple does not have to undergo an investigation.

Another aspect of the D.C. law is under D.C. Code 16-909 (e)(1) which states that “

A person who consents to the artificial insemination of a woman as provided in subparagraph (A) or (B) of this paragraph with the intent to be the parent of her child, is conclusively established as a parent of the resulting child.

(A) Consent by a woman, and a person who intends to be a parent of a child born to the woman by artificial insemination, shall be in writing signed by the woman and the intended parent.

(B) Failure of a person to sign a consent required by subparagraph (A) of this paragraph, before or after the birth of the child, shall not preclude a finding of intent to be a parent of the child if the woman and the person resided together in the same household with the child and openly held the child out as their own.

This statute provides for a birth certificate to be issued upon the child’s birth to a married or registered domestic partner.

C. Virginia

Virginia does not acknowledge or convey any legal status for unmarried parties or parties in a same sex relationship. Rather the state legislature has taken considerable steps to limit and deny the existence of these relationships. See http://www.sbe.state.va.us/cms/documents/2006_Constitutional_Amendments/2006ques_marriage_APPROVED.pdf

In 1975, the General Assembly enacted a statute (present Code of Virginia § 20-45.2) that states "A marriage between persons of the same sex is prohibited." In 1997, the General Assembly added a sentence to § 20-45.2 that states that:

*Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.*

In 2004, the General Assembly passed a law to prohibit certain civil unions or other arrangements between persons of the same sex. That law (Code of Virginia § 20-45.3) states that:
A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable. Thus, civil unions or other arrangements which purport “to bestow the privileges or obligations of marriage” are prohibited by statute.

While these laws clearly prohibit recognition of same sex marriages from Massachusetts, or Vermont civil unions, they do not impact basic legal rights which same sex couples can use to protect their families. Same sex couples can name each other as an agent to make end-of-life decisions by an Advance Medical Directive (Code of Virginia §54.1-2981), seek protections afforded under Domestic Violence laws (Code of Virginia § 18.2-57.2), own real property as joint tenants with or without a right of survivorship (Code of Virginia § 55-20.1), and dispose of property by will (Code of Virginia § 64.1-46).

It is not uncommon for gays and lesbians in Virginia share joint legal and physical custody over their children.

§ 16.1-241 provides:

The authority of the juvenile court to adjudicate matters involving the custody, visitation, support, control or disposition of a child shall not be limited to the consideration of petitions filed by a mother, father or legal guardian but shall include petitions filed at any time by any party with a legitimate interest therein. A party with a legitimate interest shall be broadly construed and shall include, but not be limited to, grandparents, stepparents, former stepparents, blood relatives and family members.

Petitions for custody and visitation are filed in Juvenile and Domestic Relations Court. With few exceptions, most matters are not open to the public.

The case of Denise v. Tencer, 617 S.E. 2nd 413 (Va. 2005) supported the position that if the biological parent agrees to an order conferring custodial rights on another person, for whatever reason, (it may or may not because they are committed partners in a same-sex relationship), the other person gets elevated status and has the continued right to be involved in the child’s life.

It is very important to advise the non-biological party to seek joint custody as early as possible. If they fail to be proactive in securing some sort of joint custody agreement or Order they stand very little chance fighting for it after the parties separate. On June 3, 2008 the Virginia Court of Appeals ruled in Stadter v. Siperko, Record No. 1494-07-2, that the non-biological party in a six
year relationship who actively participated in the upbringing and financially supported the minor child did not have any *de-facto* parental rights over the child.

D. Full Faith and Credit

Adoptions are court orders, which all states are required by the Full Faith and Credit Clause of the federal Constitution to recognize. For this reason, a final adoption by an LGBT parent should be recognized in every state, even if that state’s own laws would not have allowed the adoption to take place.

Many courts have specifically recognized that adoption decrees are entitled to full faith and credit. For instance, in a 2009 decision, a Florida Court of Appeal held that Florida must recognize a second parent adoption granted to the biological mother’s same-sex partner in Washington, and that the adoptive parent is entitled to all the rights and responsibilities of a legal parent under Florida law.1 Additionally, in 2002, the Nebraska Supreme Court said that Nebraska must recognize a second parent adoption granted in Pennsylvania, even though the adoption would not have been permitted in Nebraska.2 The federal Tenth Circuit Court of Appeals invalidated an Oklahoma law that refused to recognize adoptions where there were two parents of the same gender, holding that the Full Faith and Credit Clause of the U.S. Constitution required Oklahoma to treat all adoptions in an “even-handed manner.”3 The Fifth Circuit Court of Appeals recently held, however, that Louisiana could refuse to issue an amended birth certificate for a child adopted by a same-sex couple in another state without violating the Constitution.4

Courts have also recognized that, as a general rule, an adoption that has become final cannot be challenged later by one of the parties to the adoption. For example, the Iowa Supreme Court recently held that a parent who had consented to a second parent adoption years earlier could not later change her mind and seek to challenge the legality of the adoption.5 Appellate courts in Texas have issued similar decisions.6 Only one of the many states that has considered this issue, North Carolina, has invalidated a final valid adoption.7

E. ART Parentage Order

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1 Embry v. Ryan, 11 So.3d 408 (Fla. Ct. App. 2009).
2 Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002).
3 Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007) (invalidating as unconstitutional 10 OKLA. STAT. § 7502-1.4, which stated: “this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction”).
4 Adar v. Smith, No. 09–30036, WL 1367493 (5th Cir. April 12, 2011) (en banc).
5 Schott v. Schott, 744 N.W.2d 85 (Iowa 2008).
7 Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010) (holding that a final second parent adoption by the same-sex partner of the biological mother was void).
Assisted Reproduction Technology (ART) is used to assist people who are unable to bear children or who do not want to undergo a pregnancy to build or grow their families. Recent developments in ART have provided new and unique reproduction opportunities to infertile couples resulting in the genetic and gestational mothers of a child, and the legal mother of a child to not necessarily be the same person. ART includes the use of egg donors, sperm donors, embryo donations and creating an embryo that is genetically related to one or both of the Intended parents. Medical professionals use processes such as artificial insemination (AI) or in vitro fertilization (IVF) to assist a biological mother, surrogate or a gestational carrier become pregnant. ART is used to assist heterosexual married couples, heterosexual unmarried couples, single parents (male and female), same sex male or same sex female couples.

Birth Orders or Parentage Orders are, in some states, creatures of statute and in other jurisdictions are based on the equitable powers of the court. A parentage order confirms the persons who are the legally recognized parents. With a parentage order no one is divested of rights but instead legal presumptions are rebutted and/or confirmed – the presumption that the woman who gives birth is the mother is rebutted and the biological parent is the legal parent. When a donor is used, the court is generally determining parentage based on who created the embryo and intends to parent the child.

The birth order is usually obtained prior to the child being born. The court order will determine legal parentage for the child and will also direct the hospital and/or state department of vital records to place the intended parents' names on the birth certificate of the child that the gestational carrier delivers. These steps are often started when the gestational carrier is about four months pregnant to ensure that there is enough time to obtain a birth order before the child is born. In the event that the child is born before the pre-birth order is obtained, the court will issue a post-birth order to accomplish the same thing. In these cases the Petition generally must have affidavits from the medical doctors, copies of donor or gestational carrier agreements, and other paperwork which will vary by state and even Court in order for the names of the intended parents to appear on the birth certificate.

In many states, non-biological and non-adoptive parents who are recognized by their state law as legal parents also have the option of obtaining a parentage judgment. This is sometimes called a “parentage action,” “maternity action,” “paternity action,” or action under the state’s Uniform Parentage Act, known as a “UPA action.” It is extremely important for non-biological parents to get a parentage judgment or adoption to ensure that their parental rights will be respected by the federal government and when they travel to other states. A birth certificate does not necessarily make one a legal parent – only an adoption or parentage judgment can ensure that parental rights will be respected.

Parentage statutes can also be used to establish parentage when a child is born to a couple that is recognized as married or in a civil union or comprehensive domestic partnership in their state. Transgender parents who are not biological parents can also obtain parentage judgments for children born to them and their spouse or partner if they are legally married or in a civil union or comprehensive domestic partnership.

- Same-sex couples may currently marry in Massachusetts, California, Maryland,

- Although they do not currently allow same-sex couples to marry, New Mexico has indicated that they will recognize marriages between same-sex couples validly entered into in other jurisdictions.
- Civil unions are recognized in Delaware, Hawaii, Illinois, New Jersey, New York, Vermont.
- Comprehensive domestic partnerships are available in California, the District of Columbia, Nevada, Oregon, and Washington.

In some states, where a female same-sex couple plans together to conceive and raise a child using a medical procedure to become pregnant, or where a male same-sex couple uses a surrogate to conceive and bear a child, the intended parents can petition the court to declare the non-biological parent to be a legal parent to the child. For example, in California, the Supreme Court of California has held that the same-sex partner of a biological parent can be a legal parent when the couple deliberately brings a child into the world through the use of assisted reproduction, regardless of the couple’s gender or marital status. A Court of Appeals in Oregon has also held that a woman who consents to her partner’s insemination can be a legal parent under the Uniform Parentage Act.

Some states, including Delaware, Maine, New Jersey, Pennsylvania, and Washington, have found that a non-biological and non-adoptive parent can have all of the rights and responsibilities of parentage based on the following factors: her acceptance of the responsibilities of parentage, living with the child, the legal parent’s fostering a parent-child relationship between the child and not non-biological and non-adoptive parent, and the existence of a bonded parent-child relationship.

F. Domestication of Birth Order

In some situations an attorney might need to domesticate an order from another state to have it enforced in the state where the child is being born. This would arise in cases where the intended parents and gestational carrier reside in separate states and the laws where the intended parents live might be more favorable but the out of state hospital or vital records office will not abide by an out of state order. By domesticating it, the attorney is making it, to some degree, a court ordered recognized by the gestational carrier’s home state.

G. Maryland Law and Assisted Reproduction Technology.

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8 Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005) (holding that the same-sex partner of a biological parent can be a presumed parent under California Family Code § 7611(d) where she receives the child into her home and holds the child out as her own). See also, Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005).
The Maryland Code provides a basis of authority for this Court to recognize the legal, parental rights prior to the birth of the children when artificial insemination is involved. Specifically, the Maryland Code provides that “a child conceived by artificial insemination” within a marriage is presumed to be “the legitimate child of both of them for all purposes.” Estates and Trusts Article §1-206(b). Moreover, the law provides a means by which the resulting child enjoys a presumption of legitimacy under the law and all the corresponding rights of inheritance with respect to both Intended Parents regardless of the legality of their marriage in Maryland:

A child born or conceived during a marriage is presumed to be the legitimate child of both spouses. . . [A] child born at any time after his parents have participated in a marriage ceremony with each other, even if the marriage is invalid, is presumed to be the legitimate child of both parents. Estates and Trusts Article §1-206(a).

In these cases the husband’s consent is presumed. Other than this statute, there are no statutes governing assisted reproduction technology in Maryland. In 2000 an Attorney General’s opinion was issued which served as a guideline for how the courts might rule in a surrogacy case but did not carry the force of law. That Attorney General’s opinion (“AG’s Opinion”) suggested that traditional surrogacy contracts that include a fee to the birth mother would run afoul of the statutes that prohibit the sale of a child or the payment of a fee for the relinquishment of custody of a child. These statutes have been upheld in Maryland. Specifically, in State v. Rankles, 326 Md. 384, 605 A.2d 111 (1992) (holding that Article 27, §35E was not limited to payments connected with an adoption, but also included the relinquishment of custody of a child for money); In re Adoption No. 9979, 323 Md. 39, 591 A.2d 468 (1991) (holding that FL § 5-327 barred payments made by the adopting parents directly to the birth mother to cover the cost of maternity clothing; and Stambaugh v. Child Support Enforcement Admin., 323 Md. 106, 591 A.2d 501 (1991) (holding that an agreement between a divorced couple under which the ex-

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10 Estates and Trusts § 1-206. Legitimate child.

(a) Marriage of parents. - A child born or conceived during a marriage is presumed to be the legitimate child of both spouses. Except as provided in § 1-207, a child born at any time after his parents have participated in a marriage ceremony with each other, even if the marriage is invalid, is presumed to be the legitimate child of both parents.
(b) Artificial insemination. - A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them. Consent of the husband is presumed. [An. Code 1957, art. 93, § 1-206; 1974, ch. 11, § 2.]

11 Maryland Code (2002, 2006 Supp.) sec. 3-603 Sale of a Minor Prohibited

(a) A person may not sell, barter, or trade or offer to sell, barter, or trade, a minor for money, property, or anything else of value.
(b) A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $10,000 or both for each violation.

Maryland Family Law Code Sec. 5-3B-32 provides:
Prohibited Payments. “Prohibited act”
(a) Except as otherwise provided by law, a person may not charge or receive, from or for a parent or prospective adoptive parent, any compensation for a service in connection with
   (1) placement of an individual to live with a preadoptive family; or
   (2) an agreement for custody in contemplation of adoption.
(b) This section does not prohibit payment, by an interested person, of a reasonable and customary charge or fee for adoption counseling, hospital, legal or medical services.
   “Duty of State’s Attorney
(c) Each State’s Attorney shall enforce this section.
   “Penalties
(d) A person who violates any provision of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $100 or imprisonment not exceeding 3 months or both, for each offense.”
husband consented to the adoption of the couple's children by the wife's new spouse in exchange for the waiver of child support that was in arrears was void as contrary to public policy under both FL § 5-327 and Article 27, § 35E). However, each of these cases evolved in the context of an adoption of a minor child and did not involve assisted reproduction technology or a surrogate.

The AG’s Opinion distinguished gestational surrogacy, however, noting that in many of these cases one or both intended parents is a biological parent therefore an adoption would be unnecessary. Moreover, since biological parents have the presumed right to custody, Maryland FL § 203, there would be a strong argument that payments under the agreement were not for the purchase of custody of the child. 85 OAG 438 at n.22 (2000).

On May 16, 2007, the Maryland Court of Appeals issued the first reported decision in Maryland in a surrogacy related case. In In re Roberto D.B. 399 Md. 267 (2007), the Maryland Court of Appeals, in reviewing the different types of surrogacy that are available, noted that the gestational surrogacy context can involve anonymous sperm and egg donors with the result that the child has no genetic relation to the gestational carrier or to the intended parents. This appears to be an acknowledgement by the Maryland Court of Appeals that such cases not only exist, but should in fact be considered as they were in Buzzanca v. Buzzanca, 61 Cal App 4th 1410, 72 Cal. Rptr.2d 280 (Cal. Ct. App. 1998), where the Intended Parents rights were upheld.

The question before the court was whether a gestational carrier had the right to have her name removed from the birth certificates of twin children she carried for an intended father, leaving only a single father’s name and no mother on the birth certificate. The court ruled that she did have that right, based on Maryland’s Equal Protection Law. In essence, the court ruled that a woman may assert or disprove maternity under the same statute that men are permitted to assert or disprove paternity.

H. Paternity Statute and Equal Protection

The Roberto Court found that any action by the State, which imposes a burden on, or grants a benefit to one sex and not to the other, without a substantial basis, violates the Maryland Equal Rights Amendment. The Maryland paternity statute, §§ 5-1001 et. seq. of the Family Law Article outlines a procedure pursuant to which the State can establish paternity and thereby hold alleged fathers responsible for parental duties. The statute also provides a means for alleged fathers to disprove paternity, including through evidence supplied by a blood test or genetic test. The Court noted that the statute, as written, does not afford the same rights to women because it does not take into account all of the options provided in the current world made possible by Assisted Reproductive Technology.

Given that the Maryland’s Equal Rights Amendment forbids granting more rights to one sex than the other, the Court found that the paternity statute must be construed to apply equally both to males and females. To find otherwise would effectively require the State to force unwanted and unintended legal, parental status on a woman despite her lack of a genetic connection. Specifically, a woman must be allowed to disprove maternity by the same means by which a man can disprove paternity, and the State must issue birth certificates that reflect this finding.
I. Persuasive Authority

California courts have addressed this very issue, finding that the intended parents of a child conceived from the egg and the sperm of anonymous donors and carried to term by a gestational surrogate are, in law, the legal parents of the child. Buzzanca v. Buzzanca, 61 Cal App 4th 1410, 72 Cal. Rptr.2d 280 (Cal. Ct. App. 1998). In Buzzanca, a married couple entered into an agreement with a surrogate to have an embryo created for them from anonymously donated eggs and sperm implanted into her uterus through IVF, and who would then carry the child thus “conceived” to term for them. Following the IVF process (donation of the genetic material, fertilization, transfer of embryos, and implantation) and pregnancy, the intended parents divorced, and the question of who are the child’s parents went to trial (the intended father attempting to claim no legal obligation to the child because there was no genetic tie to him). The issue before the trial court was, “who are the lawful parents of the child?” The trial court concluded that the child had no lawful legal parents because: 1) the surrogate and her husband stated they were not the biological parents; 2) the intended mother could not be the child’s mother because she had neither contributed the egg nor given birth to the child; and 3) the intended father could not be the child’s father because he had not contributed the sperm and therefore had no biological relationship with the child. The appellate court reversed, holding that the intended parents were the child’s lawful parents, stating that the child “would never have been born had not the Intended Parents both agreed to have a fertilized egg implanted in surrogate.” Id. at 1412. The Court went on to state: The same rule which makes a husband the lawful father of a child born because of his consent to artificial insemination should be applied here12 – by the same parity of reasoning that guided our Supreme Court in the first surrogacy case, Johnson v. Calvert 5 Cal 4th 84 (1993) - to both husband and wife. Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by the intended parents. The only difference is that in this case – unlike in artificial insemination – there is no reason to distinguish between husband and wife. Id. at 1413.

In the case noted by the Buzzanca Court, Johnson v. Calvert, the Court held that a gestational surrogate had no parental rights to a child born to her pursuant to an agreement where she carried to term a child created from the eggs of the intended mother and the sperm of the intended father. The Court further held that the husband and wife are the lawful parents because they had consented to a medical procedure that was intended to result in the birth of “their” child. The Court also noted that the same would hold true had an egg donor been utilized. Johnson v. Calvert 5 Cal 4th 84, 19 Cal Rptr 2d 494 (1993).

12 Maryland has this same rule in the Estates and Trusts code under § 1-206. Legitimate child.
(a) Marriage of parents. - A child born or conceived during a marriage is presumed to be the legitimate child of both spouses. Except as provided in § 1-207, a child born at any time after his parents have participated in a marriage ceremony with each other, even if the marriage is invalid, is presumed to be the legitimate child of both parents. (b) Artificial insemination. - A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed. [An. Code 1957, art. 93, § 1-206; 1974, ch. 11, § 2.]
In both the California cases, the Court relied on the intent of parties as determinative. That is, the intent of the parties to procreate the child – to bring about the birth of a child that the intended mother and intended father intended to raise as their own, and thus are found to be the legal parents of the child.

Tennessee relied on California’s intent test in In Re C.K.G. No. M 2003-1320-COA-R3-JV (Tenn App 2004), noting that any finding based simply on genetics will result in three children having no mother. This was a surrogacy case that involved a gestational carrier, an intended father that was the sperm donor and an intended mother that was not the egg donor – the couple utilized an anonymous egg donor that had donated her eggs specifically to the intended parents as a couple. The couple split up after the pregnancy and birth of triplets, and the father attempted to have the intended mother declared to have no parental rights because of the fact of that an egg donor was used to create the children. The Court found that if the intended mother was not found to be the legal mother, the children would have no legal mother. The Court stated that there was “no authority in this or any state that favors the result of the children having no mother.” Id. Citing Buzzanca with regard to the establishment of paternity statute, the Court noted that “[i]t would be lunatic for the Legislature to declare that establishing paternity is a compelling state interest yet conclude that establishing maternity is not. The obvious reason the Legislature did not include the explicit parallel statement on ‘maternity’ is that the issue almost never arises except for extraordinary cases involving artificial reproduction.” In Re Marriage of Buzzanca at 1423. The Tennessee case went on to hold that the same was equally applicable in Tennessee, and applied the Buzzanca intent test to uphold the intended mother’s rights as the legal mother. The Court stated that the surrogacy agreement was explicit in expressly providing that the intended mother was the mother. Moreover, the Court stated that “in situations such as this, when no one else has or can make a claim to be the mother of the children, the agreement between the parties takes on an important role in determining” who is the mother. In Re C.K.G. No. M 2003-1320-COA-R3-JV (Tenn App 6/22/2004).

J. Genetic Material Donation

Genetic material donation has become an integral part of the management of infertility and has become an entire area of specialty law. Sperm, oocyte and pre-embryo donation are medical and technical successful procedures, undertaken to deliberately procure the creation of a child. The practice of genetic material donation raises ethical, legal, religious and social issues. State laws governing egg donation and embryo transfer vary. The majority of the existing state laws are usually limited to assigning parentage to the man who is the intended father and partner of the woman who is inseminated. Almost all apply to married couples, and specifically relieve donors of any parental rights or obligations. Some require that a physician be involved, and most require consent by the husband (usually written).

In sperm donation, the intended mother is inseminated with sperm from a donor (who usually remains anonymous). The majority of states that have enacted statutes concerning artificial insemination state that the husband of a married woman bears all rights and obligations of paternity as to any child conceived by artificial insemination, whether the sperm used was his own or a donor's. See, e.g., Ala.Code § 26-17-21(a) (1992) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural

Some statutes specify that a woman who has donated an egg or a couple who has donated an embryo are not the legal parents of any resulting child. However, other states recognize the woman who gives birth to a child conceived through ART as that child's legal mother. See the New York case McDonald v. McDonald, where the husband attempted to claim his children were illegitimate and that he should be granted sole custody as the only genetic and natural parent (where donor eggs were utilized to achieve pregnancies in his wife). His claim was rejected by the court, the court finding that the couple’s intention to jointly have and to rear the children made the recipient woman the natural mother of the children and the court granted custody to her just as if she were the genetic mother. In addition, the Ohio case Ezzone v. Ezzone which demonstrates ways in which limited available legal precedent is used by a court. In this case, the divorcing husband argued that because his wife’s sister donated the eggs, the wife was not the natural mother but only an aunt and step-mother. He attempted to elevate himself to a stronger claim to the children as the only genetic parent. In a state without egg donor laws, the husband attempted to rely on another case in which the court allowed genetic parents to have their names placed on the birth certificate where a gestational carrier carried their genetic child (as was intended by all the parties). The husband tried to argue that a genetic role was more important than gestational one. The court ruled against him analogizing the situation to a sperm donation and finding an even stronger connection for a woman in a donation case such as the one that they were reviewing because she gestated the child that was the result of the donated gamete. The court concluded that to treat a woman differently than a man who used donor gametes would violate state and federal equal protection laws.

Embryo transfer, sometimes referred to as embryo donation or adoption, occurs when intended parents make use of a cryo-preserved embryo that was donated by another couple. The donated embryo(s) may be transferred to the intended mother or to a gestational carrier.

K. Summary

LGBT families have additional legal steps to secure their parental status for their children and when you complicate this with immigration issues, it often requires both an experienced
immigration and an experienced adoption attorney. Adoption continues to be the golden standard because we have a long history in this country and internationally with recognition and enforcement of final decrees of adoption.
Policy Memorandum

SUBJECT: Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes

Purpose
This policy memorandum (PM) amends the Adjudicator’s Field Manual (AFM) to provide guidance on whether an “adoption” is valid for immigration purposes.

Scope
Unless specifically exempted herein, this PM applies to and is binding on all U.S. Citizenship and Immigration Services (USCIS) employees.

Authority
INA sections 101(b)(1)(E), (F), and (G)

Background
The INA has three distinct ways an adopted child may be considered, for immigration purposes, to be the child of his or her adoptive parent(s):

- INA section 101(b)(1)(E), which applies to adopted children if certain requirements are met, including where the parent or parents have two years of legal custody and joint residence;
- INA section 101(b)(1)(F), which applies to children coming to the United States as “orphans” from countries that have not ratified the Hague Adoption Convention, if they have been adopted, or are coming to the United States to be adopted, by U.S. citizen(s); and
- INA section 101(b)(1)(G), which applies to children coming to the United States who have been adopted, or are coming to the United States to be adopted, by U.S. citizen(s) under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention), signed at The Hague on May 29, 1993.

The adopted child of a U.S. citizen(s) may qualify for naturalization under INA section 320 or section 322, if the child meets the requirements under INA sections 101(b)(1)(E), (F), or (G).

Also, the adopted child who meets the requirements of INA section 101(b)(1)(E) may qualify as the adoptive parent’s child for purposes of “accompanying or following to join” the parent,
whether as a preference immigrant, refugee, or asylee. See INA sections 203(d), 207(c)(2)(A) and 208(b)(3)(A).
The INA does not define “adoption.” Consistent with the decisions of the Board of Immigration Appeals an “adoption” can be the basis for immigrant benefits only if it:

1. Terminates the legal parent-child relationship between the child and any prior parent(s); and
2. Creates a permanent legal parent-child relationship between the child and the adopter.

Policy
For immigration purposes under the INA, an adoption must satisfy these three essential elements: the order must:

1. Be valid under the law of the country or place granting the adoption; and
2. Create a legal permanent parent-child relationship between a child and someone who is not already the child’s legal parent; and
3. Terminate the legal parent-child relationship with the prior legal parent(s).

These requirements apply to every benefit request based on an “adopted child” relationship under INA section 101(b)(1)(E), including, but not limited to:

- Form I-130;
- Form I-730;
- Form N-600;
- Form N-600K; or
- A claim to eligibility for an immigrant or nonimmigrant visa or classification as a derivative under INA section 203(d).

These requirements also apply in orphan cases under INA section 101(b)(1)(F) as well as Hague Adoption Convention cases under INA section 101(b)(1)(G), if the child has already been adopted abroad.

A child “coming to the United States for adoption,” also may qualify as an orphan or as a Hague Convention adoptee. For this reason, an adoption that does not satisfy the three essential elements noted above may nonetheless establish that the prospective adoptive parents have legal custody to bring the child to the United States for adoption under INA section 101(b)(1)(F) or INA section 101(b)(1)(G).

This guidance applies to both domestic and intercountry adoptions of non-U.S. citizen children, as well as all adoption-related immigration benefits.
Implementation
USCIS officers will determine the validity of adoptions according to this PM, including the
guidance in the AFM amendments adopted through this PM.

Accordingly, the Chapters 21.4, 21.5, 21.6, 21.10, and 71.1; of the AFM (Update AD12-10) are
revised as follows:

1. Chapter 21.4(d)(5) of the AFM is revised:

   a. In chapter 21.4(d)(5)(B), by adding one sentence to the end of the first paragraph; and
   b. In chapter 21.5(d)(5)(F) by adding a seventh paragraph at the end of the second Note.

The revisions read as follows:

21.4 Petition by Citizen or Lawful Permanent Resident for a Child, Son or Daughter.

****

(d) Adjudicative Issues Pertaining to Relationship Between Petitioner and Beneficiary.

****

(5) Child Adopted While Under the Age of 16.

****

(B) Relationship Through Adoption. The regulations incorporate the definitions for both legal custody and joint residence in paragraphs (vii)(A), (vii)(B), and (vii)(C) of 8 CFR 204.2(d)(2). You need to be aware of these regulations and their applicability. See also Chapter 21.15 of this AFM for specific information about immigration benefits based on adoption.

* * * * *

(F) Child from a Hague Adoption Convention Country.

* * * * *

Note

* * * * *

Note
It is preferable for the petitioner to obtain the written statement from the Central Authority of the other Hague Adoption Convention country before obtaining an adoption order in the United States. However, the written statement, even after the fact, would serve to resolve any doubt about whether adoption court had jurisdiction to act on the adoption petition at the time when the court first did so. For this reason, USCIS will also accept an amended adoption order, if the amended adoption order reflects the Central Authority’s written statement. This amended order will be, sufficient to establish that the child was no longer habitually resident in the other Convention country at the time of the adoption. The written statement must be included with the amended order.

2. Chapter 21.5(d)(5)(A)(ii) of the AFM is revised to read as follows:

21.5 Petition for an Orphan.

****
(d) Adjudication of Form I-600.

****
(5) Evidence That the Child Has Been Adopted Abroad or Is Coming to the United States to Be Adopted.

****
(A) If the Child Was Adopted Abroad.

(ii) See Chapter 21.15 of this AFM for information on what qualifies as an “adoption” for immigration purposes. As noted in that chapter, guardianships, “simple adoptions,” or Kafala adoptions in countries that follow traditional Islamic law might not qualify. But because an “orphan” can be brought to the United States for adoption, instead of being adopted abroad, a guardianship, Kafala order, or other custody order might establish that the prospective adoptive parents “have…secured custody of the child,” as specified in 8 CFR 204.3(d)(1)(iv)(B)(1). The document giving legal custody must be valid under the law of the country in which it was obtained. Depending on the governing law, the custody document may be either a court order or an administrative act. Provided the legal custody is for emigration and adoption, in accordance with the laws of the foreign-sending country, and all other requirements are met, the evidence could support approval of the Form I-600 as an IR-4, rather than an IR-3.
3. Chapter 21.6(a) of the AFM is revised by adding after the second paragraph the following new paragraph:

21.6 Petition for a Hague Convention Adoptee

(a) Application of the Hague Convention.

On November 16, 2007, * * *

The Hague Adoption Convention . . .

See Chapter 21.15 of this AFM, for information on what qualifies as an “adoption” for immigration purposes. As noted in that chapter, guardianships, “simple adoptions,” or Kafala adoptions in countries that follow traditional Islamic law might not qualify. But because a Hague Convention adoptee can be brought to the United States for adoption, instead of being adopted abroad, a guardianship, Kafala order, or other custody order might qualify as a “decree or administrative order…giving custody of the child,” 8 CFR 204.313(h)(1)(ii)(A). The document giving legal custody must be valid under the law of the country in which it was obtained. Depending on the governing law, the custody document may be either a court order or an administrative act. Provided the legal custody is for purposes of emigration and adoption, in accordance with the laws of the foreign-sending country, and all other requirements are met, the evidence could support approval of the Form I-800 as an IH-4, rather than an IH-3 case.

* * * * *

4. Chapter 21.10(d) of the AFM is revised by:

a. Revising the “Note” under the bullet captioned “Time at Which Relationship was Created”; and
b. Adding a new bullet at the end.

The revisions read as follows:

21.10 Refugee / Asylee Relative Petitions.

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(d) General Adjudication Issues.

* * * * *
A child might qualify as the child of the principal refugee or asylee even if the petitioner is not the birth father or birth mother as a matter of fact. For example, the petitioner may have been married to the child’s mother when the child was born, but may also have been in the United States continuously since prior to the earliest possible date of the child’s conception. First, the law of the place of birth of the child may conclusively establish that the mother’s husband is the legal birth father. Second, even if the law does not establish a legal parental relationship, when a child is born as the legal child of only one partner of a married couple, the child is considered the “step-child” of the other partner for immigration purposes. See Matter of Stultz, 15 I&N Dec. 362 (AG 1975). Because the child qualifies as the petitioner’s “step-child” under INA section 101(b)(1)(B), you do not need to decide if the child is the petitioner’s child under INA section 101(b)(1)(A), (C), or (D).

* * * *

- For Adopted Child(ren)- Effects of the Adoption – An adopted child, as defined in INA section 101(b)(1)(E), can be the beneficiary of a Form I-730. See Chapter 21.15 of this AFM for information on what qualifies as an “adoption” for immigration purposes.

5. Chapter 21.15 of the AFM is added to read as follows.

21.15 Adoption as a basis for immigration benefits

(a) General. If the requirements of INA section 101(b)(1)(E) have been met, a person adopted while under the age of 16 (or, in certain cases, under the age of 18) is the child, adult son or adult daughter of the adopting parent(s) – not the birth parent(s) – for immigration purposes. Similarly, the adopted person is the sibling of the adoptive parent’s other legal children, but not of the birth parent’s children. See Matter of Li, 20 I&N Dec. 700 (BIA 1993). The adoptive parent-child relationship is valid for all relevant immigration benefit requests under the INA, including, but not limited to:

- Form I-130 (whether filed for a child, adult son or daughter, or sibling);
- Form I-730;
- Form N-600;
- Form N-600K; or
- A claim to eligibility for an immigrant visa as a derivative under INA section 203(d).

The validity of an adoption is relevant to adjudication of both the Form I-600 (orphan petition) and the Form I-800 (Hague Adoption Convention petition). Although both orphans and Hague Convention adoptees often come to the United States after they are adopted overseas, both INA sections 101(b)(1)(F) and (G) allow children to come to the United States before they are actually adopted. Chapters 21.5 and 21.6 of this AFM
state that an adoption that does not actually qualify as an adoption for immigration purposes may nonetheless establish guardianship for emigration and adoption under the laws of the sending country. Such a guardianship may support approval of a Form I-600 or Form I-800 for a child coming to the United States to be adopted, provided all other requirements are met.

(b) Validity and essential legal elements of an adoption. Though the INA does not define “adopted” or “adoption,” BIA precedent establishes that an adoption must create “a legal status comparable to that of a natural legitimate child” between the adopted and the adopter. *Matter of Mozeb*, 15 I&N Dec. 430 (BIA 1975). Thus, it does not matter what name anyone gives to a claimed adoption. For immigration purposes, what matters is whether or not the order that is claimed to be an adoption meets these essential legal elements:

- It is valid under the law of the country or place granting the order; and
- It creates a legal permanent parent-child relationship between a child and someone who is not already the child’s legal parent; and
- It terminates the legal parent-child relationship with the prior legal parent(s).

Note, however, that the law in some jurisdictions allows a step-parent to adopt the children of his or her spouse, if the legal parent-child relationship with the other legal/biological parent has been terminated by death or legal action. In this situation, it is enough to meet the third essential element of “adoption” for the parent-child relationship to be terminated as to the prior parent who is not the spouse of the adopting step-parent. The continuing legal parent-child relationship between the child and the adopting step-parent’s spouse does not preclude recognition of the adoption. The legal custody and joint residence requirements of INA section 101(b)(1)(E), however, must be met by the adoptive step-parent before the individual can be considered the adopting step-parent’s child under section 101(b)(1)(E).

A step-parent does not actually need to adopt his or her step-child in order for a Form I-130 or Form I-730 to be approved. If the parent and step-parent married before the child’s 18th birthday, the step-parent/step-child relationship can be a basis for approving a Form I-130 or a Form I-730. See INA section 101(b)(1)(B). An adoption that meets the age, custody and residence requirements of INA section 101(b)(1)(E) would be needed, however, before the individual could be the adopting step-parent’s “child” for purposes of naturalization under INA section 320 or INA section 322.

The mere fact of ongoing contact with the birth parents (as in “open adoptions”) does not mean that the legal parent-child relationship with the prior legal parent(s) was not terminated. The adoptive parents, rather than the prior parents, must be exercising full parental authority over the child as a result of the adoption.

(c) Determining the validity and effect of a foreign “adoption.” The law of the country of adoption determines the validity of the adoption. See *Matter of T-*, 6 I&N Dec. 634.
Generally speaking, you should accept the adoption decree at face value. The validity of the adoption under the relevant law does not establish, however, that the child was adopted “while under the age of sixteen” (or 18, as appropriate) for purposes of INA section 101(b)(1)(E). To meet the age requirement, the court or administrative body must have actually granted the adoption before the adoptee’s 16th (or 18th) birthday. See Matter of Cariaga, 15 I&N Dec. 716 (BIA 1976); cf. Mathews v. USCIS, 2012 WL 555665 (11th Cir. 2012). District court decisions refusing to defer to Matter of Cariaga are not binding precedents. Matter of K- S-, 20 I&N Dec. 715 (BIA 1992). USCIS adjudicators are legally obligated to follow Matter of Cariaga. 8 CFR 1003.1(g).

You may properly question the validity of the adoption; moreover, if there is credible and probative evidence that:

- The adoption was flawed in its execution, such as when the court (or other official body) granting the adoption appears to have lacked jurisdiction over the adoption, or when the prior parents did not consent to the adoption or were not given proper notice of the termination of parental rights; or

- The adoption was granted due to official corruption or the use of fraud or material misrepresentation.

Not recognizing an adoption in one of these situations may be consistent with legal principles generally observed by courts in the United States with respect to foreign country judgments. See Restatement (Third) Foreign Relations Law of the United States sections 482(2)(a), (b) and (c). If there is credible and probative evidence that the adoption may be invalid for one of these reasons, the burden will fall on the petitioner to establish that the adoption is still valid under the foreign law.

You must consult closely with USCIS counsel, through appropriate channels, before deciding not to recognize a foreign adoption that appears on its face to be valid.

(1) Adoption as judicial or administrative act. One issue clearly governed by foreign law is what official act constitutes an adoption in another country. In many countries, as in the United States, adoption is a judicial process. Thus, the evidence of the adoption is a court order. In other countries, adoption is an administrative, not a judicial, process. For example, in South Korea, adoption is accomplished by adding the adopted child to one’s Family Registry. See Matter of Cho, 16 I&N Dec. 188 (BIA 1977). In 2003, Cambodia informed other countries through a diplomatic note that Cambodian courts do not have jurisdiction to grant adoption to non-Cambodians. Cambodian adoptions are completed through an administrative process. Finally, as noted in paragraph (c)(4) of this chapter, in some countries, a legal adoption can be accomplished according to legal custom, without a court or administrative order.
(2) **Whether adoption actually exists in a given country.** Another issue governed by the foreign law is whether or not a legal parent-child relationship can be created by adoption.

(A) In countries that follow traditional Islamic law, “adoption” in the sense required for immigration purposes does not exist. See, *Matter of Mozeb*, supra; and *Matter of Ashree, Ahmed and Ahmed*, 14 I&N Dec. 305 (BIA 1973). Therefore, a *Kafala* order issued by a country that follows traditional Islamic law will not qualify as an adoption.

(B) In some multi-ethnic or multi-religious countries, the personal status laws for each ethnic or religious group governs adoptions. In such countries, different bodies of law govern adoption for different children, even within the same neighborhood. An adoption valid for immigration purposes may not be available for a Muslim child under Islamic family law, but may be available for the child next door under Jewish or Christian family law.

(C) India is an example of a country with complex multiple adoption laws. Traditionally, under the 1956 Hindu Adoption and Maintenance Act, adoption by adoption deed is available in India (other than in the state of Jammu and Kashmir) only to Hindus, Buddhists, Jains, and Sikhs, and others subject to Hindu family law or custom. For others, the 1890 Guardians and Wards Act apply (other than in Jammu and Kashmir). But the Guardians and Wards Act does not provide for adoption for those not subject to Hindu family law or custom, only guardianship. Thus, a court order under the Guardians and Wards Act is not valid as an adoption for immigration purposes. Effective August 22, 2006, however, India amended the Juvenile Justice Act of 2000. Adoptions under the Juvenile Justice Act permanently separate children from their prior parents and make them the “legitimate child” of the adoptive parents. Courts in India now have authority to grant adoption for any child who has been “abandoned” “orphaned” or “surrendered”. The Juvenile Justice Act is now effective throughout India, except for Jammu and Kashmir. In light of these amendments, if a court in India (other than a court in Jammu and Kashmir), on or after August 22, 2006, grants an adoption *under the Juvenile Justice Act*, USCIS accepts the adoption as valid, regardless of the religion of the adoptive parents or of the child.

Note that to be valid for immigration purposes, the adoption must be:

- For children found to be abandoned, orphaned, or surrendered;
- Made by a court acting under the Juvenile Justice Act, as amended;
- After August 22 2006; and
The amended Juvenile Justice Act did not repeal either the Hindu Adoption and Maintenance Act or the Guardians and Wards Act. Adoption by adoption deed under the Hindu Adoption and Maintenance Act is still limited to individuals governed by Hindu law or custom. An order under the Guardians and Wards Act is still guardianship, not adoption.

Also, the 1956 Hindu Adoption and Maintenance Act, the 1890 Guardians and Wards Act, and the Juvenile Justice Act are not in force in the State of Jammu and Kashmir. Jammu and Kashmir has its own family laws. As noted in chapter 21.5(e), a person seeking a benefit based on an adoption in Jammu and Kashmir must show that it is valid for immigration purposes.

(3) Simple adoption. Some countries have a type of adoption commonly called “simple adoption,” in addition to another type that may be called “full” or “plenary” or “perfect” adoption. Whether “simple adoption” is valid for immigration purposes depends on the foreign law. For example, in Matter of Kong, 15 I&N Dec. 224 (BIA 1975), and 14 I&N Dec. 649 (BIA 1974) and Matter of Chang, 14 I&N Dec. 720 (BIA 1974) the BIA held that “Appatitha,” a form of simple adoption in Burma, did not create a legal parent/child relationship. However, if a simple adoption does create a permanent legal parent/child relationship, it might be valid for immigration purposes (if it otherwise satisfies the three essential elements noted in chapter 21.15(b)). Matter of Chin, 12 I&N Dec. 240 (BIA 1967).

The French Civil Code is one example of simple adoption. It states that simple adoption gives the adoptive parent “all the rights of parental authority.” Thus, although the child may still have some inheritance rights through the family of origin, the child is, legally, the child of the adoptive parents not the birth parents. Similarly, in Guinea (Conakry), simple adoption gives the adoptive parent(s) all parental authority over the child. Guinea (Conakry) Code L’Enfant, art. 123.

Even if a “simple adoption” might be more easily terminated than a “full” adoption, that alone does not mean the simple adoption does not create a “permanent” relationship. For example, article 359 of the French Civil Code says plenary adoption is “irrevocable,” while article 370 allows for revocation of simple adoption. But simple adoption can only be revoked “[w]here serious reasons so justify.” Even the legal parent-child relationship created by birth can be terminated for serious reasons. Moreover, the adoptive parent cannot seek revocation of simple adoption unless the adoptee is over 15 years old. Similarly, in Guinea (Conakry), simple adoption can only be terminated for “grave reasons,” and the parent cannot request termination while the child is under 13 years old. Guinea (Conakry) Code L’Enfant, art. 129. These are examples of simple adoptions that can be deemed “permanent,” since they cannot be terminated by the adoptive parent while the child is still very young, or simply at the adoptive parent’s request.
To summarize, a USCIS adjudicator can find that a “simple adoption” is valid for immigration purposes if the simple adoption meets the three essential elements noted in Chapter 21.15(b):

- It creates a legal permanent parent-child relationship between a child and someone who is not already the child’s legal parent; and
  - The parent-child relationship cannot be terminated for other than “serious” or “grave” reasons; and
- It terminates the legal parent-child relationship with the prior legal parent; and
- It does the above, under the law of the country (or political subdivision) granting the simple adoption.

(4) Customary adoption. As noted, the law of the place of adoption governs the validity of an adoption. In some countries, “customary” adoption may exist instead of, or in addition to, adoption through a judicial or administrative procedure. If a customary adoption terminates the legal parent-child relationship with the prior parents, and creates a legal parent-child relationship with the adoptive parent under local law, then that customary adoption is valid for immigration purposes. See Matter of Lee, 16 I&N Dec. 511 (BIA 1978). As with any other case involving questions of foreign law, the petitioner must show that the foreign law actually creates a valid adoption for immigration purposes. See Matter of Annang, 14 I&N Dec. 502 (BIA 1973). As the Board has recognized with respect to customary divorce, see Matter of Kodwo, 24 I&N Dec. 479 (BIA 2008), the petitioner would need to establish that the customary adoption:

- Creates a legal permanent parent-child relationship between a child and someone who is not already the child’s legal parent; and
- Terminates the legal parent-child relationship with the prior legal parent; and
- Complies with the requirements of the relevant customary law and is legally recognized in the country or place the adoption occurs.

(5) Hague Adoption Convention adoptions not involving the United States. Many countries other than the United States are parties to the Hague Adoption Convention. An adjudicator may encounter a request for an immigration benefit in which it is claimed that an individual habitually resident in one Hague Adoption Convention country, other than the United States, adopted a child habitually resident in another Hague Adoption Convention country, other than the United States. If properly certified as specified in Article 23 of the Hague Adoption Convention, the claimed adoption would be entitled to recognition by the United States. But whether this adoption would form the basis for immigration benefits under United States law is determined solely as provided for in the immigration laws of the United States. Thus, for purposes of a Form I-130, I-730, N-600, N-600K, or an “accompanying for following to join” claim, the adoption would support approval only
if the adoption met the age, custody and residence requirements of INA section 101(b)(1)(E).

Similarly, a Form I-800 could be approved only if the Secretary of State certified under INA section 204(d)(2) that the adoption complied with the Hague Adoption Convention.

(d) Effect of legal termination of an adoption. As with the adoption itself, local foreign law governs the validity of a termination of an adoption. However, even if a termination is legally valid, it will not adversely impact any immigration benefits already granted while an adoption was in effect. See Matter of Xiu Hong Li, 21 I&N Dec. 13 (BIA 1995). Moreover, termination of an adoption does not necessarily mean that the legal parent-child relationship has actually been restored with the birth parent(s). As the Board noted in Xiu Hong Li, “We do not assume that natural relationships are automatically reestablished solely by virtue of the fact that an adoption has been lawfully terminated.” See Matter of Xiu Hong Li at 18. Therefore, even if no immigration benefits flowed from the adoption, the evidence must show that the legal relationship to the prior parent(s) is re-established according to law in order for that relationship to form the basis for granting a benefit under the INA.

(e) Getting evidence about the foreign adoption law. In proceedings under the INA, foreign law is a question of fact to be proved by evidence. See Matter of Annang, 14 I&N Dec. 502 (BIA 1973). If the evidence of record does not clearly show that an adoption creates a permanent legal parent-child relationship, the USCIS officer will issue a request for evidence (RFE) asking for a copy of the relevant laws, with properly certified English translations. The officer can also request information, or a formal opinion, about the foreign law, from the Library of Congress, through appropriate channels.

Information about the Library of Congress is on USCIS Connect. Work within your office’s local policy and guidelines to request an opinion from the Library of Congress.

The Department of State has information on adoptions and country-specific information on their adoptions webpage and their visa reciprocity tables. An adjudicator can also request assistance, through appropriate USCIS and National Visa Center channels, and from U.S. consular posts or USCIS field offices abroad.

Another resource for information is the CIA World Factbook.

Before denying a petition or application based on information about the other country’s adoption law that the petitioner or applicant may not be aware of, the officer will provide the petitioner or applicant with notice and an opportunity to respond, as specified in 8 CFR 103.2(b)(16).
6. Chapter 71.1(d)(3)(A) of the AFM is revised to read as follows:

Chapter 71 Citizenship.

****
(d) “Derivation” of U.S. Citizenship.

****

(3) Other Persons Eligible for Certificates of Citizenship. (Revised 8/15/2008; AD08-14)

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(A) Persons Eligible to File the Application for Citizenship under INA section 322.

(i) General. The United States citizen parent with legal and physical custody of a birth or adopted child files the Form N-600K on behalf of the child. The child must be under 18 years old. Note that while a step-child may qualify as the step-parent’s “child” for purposes of immigration (or adjustment of status), a step-child does not qualify for naturalization under INA section 322. See INA section 101(c); 8 CFR 322; Appendix 71-7 and Chapter 71.1(b) of this AFM (Definition of Child for Naturalization and Citizenship). A child who immigrated as the step-child of a citizen can acquire citizenship under INA section 322 only if

- The step-parent adopts the child; and
- The adoption meets the age, custody and residence requirements of INA section 101(b)(1)(E); and
- The child meets the requirements under INA section 322 when the application for citizenship under INA section 322 is adjudicated.

See Chapter 71.1(d)(3)(A)(2) of this AFM for information about the eligibility of adopted children.

As of November 2, 2002, a U.S. citizen grandparent or U.S. citizen legal guardian is eligible to apply for naturalization on behalf of a child under INA section 322 (amended by Pub. L. 107-273). If a U.S. citizen parent of a child who otherwise meets the eligibility requirements of INA section 322 has died, a U.S. citizen parent of the parent (that is, a grandparent) or a U.S. citizen legal guardian of the child may file the application for citizenship at any time within five years of the parent's death. These are the only times that
anyone other than the U.S. citizen parent can file an application for citizenship on behalf of a child under INA section 322. (See Appendix 71-8 of this AFM.) The qualifying U.S. citizen must file Form N-600K according to the form instructions. The adjudicator should send an appointment notice to the parent and child if the application appears approvable. If the child needs a visa to enter the United States, the parent should take the appointment notice to a U.S. Consulate or the consular section of a U.S. Embassy to get a nonimmigrant visa for the child. See Chapter 71.1(f) (Adjudicating the Application). For a child of a member of the Armed Forces, see paragraph below (“Exceptions for a Child of a Member of the Armed Forces”).

(ii) Adopted children. INA section 322 applies to an adopted child, if the child meets the requirements of INA sections 101(b)(1)(E), (F) or (G). See Chapter 21.15 of this AFM for information about how adoption relates to immigration benefits.

A child adopted while under the age of sixteen (or 18, as specified in INA section 101(b)(1)(E)(ii)) qualifies as the child of the adoptive parent if the adoptive parent has had legal custody of the child, and has resided with the child, for at least two years. See INA section 101(b)(1)(E)(i).

A child who is an orphan and adopted, as defined in INA section 101(b)(1)(F), must give evidence either of an approved Form I-600, Petition to Classify Orphan as an Immediate Relative, or of admission as an IR-3 or IR-4. If the child was admitted with a IR-4 visa, the prospective adoptive parents must adopt (or re-adopt) the child in the United States before the child’s 18th birthday in order for INA section 322 to apply. The two year custody and residence requirements of INA section 101(b)(1)(E) do not apply to orphan cases.

A Hague Convention child, as defined in INA section 101(b)(1)(G), must give evidence either of an approved Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative, or of admission as an IH-3 or IH-4. If the child was admitted with an IH-4 visa, the prospective adoptive parents must adopt the child in the United States before the child’s 18th birthday in order for INA section 322 to apply. The two year custody and residence requirements of INA section 101(b)(1)(E) do not apply to Convention adoption cases.

7. The AFM Transmittal Memorandum button is revised by adding a new entry, in numerical order, to read:

| AD12-10 | Chapters 21.4, Chapter 21.5, Chapter 21.6, Chapter 21.10, Chapter 21.15, and Chapter 71.1 | This PM adds new Chapter 21.15 and revises Chapters 21.4, 21.5, 21.6, 21.10 and 71.1 to provide guidance concern adoption as a basis for immigration and naturalization benefits. |
| 11/6/2012 | | |
Use
This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information
Questions regarding the guidance contained in this memorandum should be forwarded to the Field Operations Directorate; Refugee, Asylum and International Operations Directorate; or Service Center Operations Directorate, through appropriate channels.
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

[CIS No. 2453-08; DHS Docket No. USCIS-2008-0030]

RIN 1615-ZA70

Direct Mail Program for Submitting Form I-800A, Application for Determination of Suitability To Adopt a Child From a Convention Country, and Form I-800, Petition To Classify Convention Adoptee as an Immediate Relative

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS) is expanding its Direct Mail Program to include Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative, and Form I-800A, Application for Determination of Suitability to Adopt a Child from a Convention Country. Applicants must submit Forms I-800, I-800A, and all related supplements and forms to the USCIS Chicago Lockbox facility located in Illinois, for initial processing. Applicants were previously required to file at a USCIS field office with jurisdiction over their place of current residence. The Direct Mail Program allows USCIS to process applications more efficiently by eliminating duplicative work, maximizing staff productivity, and introducing better information management tools.


I. Background

A. What is The Hague Adoption Convention?

The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) signed at The Hague, The Netherlands, on May 29, 1993, is a treaty that strengthens protections for children, birth parents, and prospective adoptive parent(s). It establishes internationally agreed upon rules and procedures for adoptions between countries that have a treaty relationship under the Hague Adoption Convention. It provides a framework for member countries to work together to ensure that children...
are provided with permanent, loving homes, that adoptions take place in the best interests of a child, and that the abduction, sale and trafficking in children is prevented. The President signed the instrument of ratification for the Hague Adoption Convention on November 16, 2007, and the Hague Adoption Convention entered into force for the United States on April 1, 2008. 72 FR 71730.

B. What is the Direct Mail Program?

Under the Direct Mail program, applicants for certain immigration benefits mail the designated application or petition directly to a U.S. Citizenship and Immigration Services (USCIS) Service Center or Lockbox facility instead of submitting it to their local USCIS office. USCIS has discussed the purpose and strategy of the Direct Mail program in detail in previous rules and notices. (See 59 FR 33903, 59 FR 33985, 60 FR 22408, 61 FR 2266, 61 FR 56060, 62 FR 16607, 63 FR 891, 63 FR 929, 63 FR 13434, 63 FR 13878, 63 FR 18628, 63 FR 50584, 63 FR 8688, 63 FR 8689, 64 FR 67323, 69 FR 3380, 69 FR 4210, 70 FR 30768, 72 FR 3402).

C. Which Hague Adoption Convention forms are affected by the Direct Mail Program?

You must now submit the following forms through the Direct Mail Program:

Form I-800A, Application for Determination of Suitability to Adopt a Child from a Convention Country.

Form I-800A Supplement 1, Listing of Adult Member of the Household.

Form I-800A Supplement 2, Consent to Disclose Information.

Form I-800A Supplement 3, Request for Action on Approved Form I-800A.

Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative.

Form I-800 Supplement 1, Consent to Disclose Information. Interested individuals may find detailed information and eligibility requirements for Form I-800A and I-800 and their supplements and forms at the USCIS Web site: http://www.uscis.gov.

D. Does this notice affect any other Hague related forms that I may submit along with those listed above?

Yes, it affects Form I-601, Application for Waiver of Grounds of Inadmissibility, Form I-864 and Form I-864EZ, Affidavit of Support under section 213A of the Act, or Form I-864W, Intending Immigrant's Affidavit of Support Exemption, when filed in connection with a Hague Adoption Convention case. When submitted with a Form I-800 these forms must be filed beginning on September 25, 2008 with the USCIS Chicago Lockbox facility address listed below.

II. Explanation of Changes

A. Does this notice make any changes relating to the eligibility of a prospective adoptive parent's suitability to adopt a child from a convention country or changes to the eligibility of a convention adoptee to be classified as an immediate relative?

No. This Notice only changes the filing location for these applications. These forms, previously filed at USCIS offices world-wide, will now be filed under the Direct Mail Program at the USCIS Chicago Lockbox facility for initial processing.

B. Should I file Forms I-600A and/or I-600 under the new Direct Mail Program?

No. If you reside in the United States continue to file Form I-600A, Application for Advance Processing of
Orphan Petition and Form I-600, Petition to Classify Orphan as an Immediate Relative, with the local USCIS office with jurisdiction over your place of residence. If you live outside the United States, you should consult the nearest American consulate or embassy for the overseas or stateside USCIS office designated to act on the application.

C. Will USCIS change the form instructions to Forms I-800A and I-800?

Yes. USCIS is currently amending the filing locations on the instructions to Forms I-800A and I-800, as well as the procedures listed on the USCIS Web site to reflect the new filing address.

D. If I live outside of the United States, can I file the Forms I-800A or I-800 at a USCIS overseas office, or an American consulate or embassy?

No. You must file Forms I-800A and I-800 at the USCIS Chicago Lockbox facility. Although 8 CFR 204.308(b) provides that Form I-800 may be filed at the visa-issuing post when permitted in the form’s instructions, centralized processing affords more efficiency for both USCIS and prospective adoptive parents. Accordingly, you will need to file the Form I-800 at the USCIS Chicago Lockbox facility for centralized processing. USCIS will no longer permit filing the form elsewhere.

E. To what address should I mail Forms I-800A, I-800, and related supplements and forms?

Beginning on September 25, 2008, you must file Forms I-800A, I-800 and their supplements with all supporting documentation to the following address:

U.S. Citizenship and Immigration Services,
P.O. Box 805695,
Chicago, IL 60680-4118.

If you are also filing Hague related Forms I-601, I-864, I-864EZ, or I-864W with Form I-800, you must also send these forms to the above Lockbox address.

F. What will happen to incorrectly filed Forms I-800A, I-800, and related supplements and forms covered by this notice?

USCIS will forward forms filed incorrectly to the USCIS Chicago Lockbox facility address ONLY for the first 30 days following the effective date of this notice, including the filing of Hague related Forms I-601, I-864, I-864EZ, or I-864W, which are covered by this notice.

After the 30-day transition period, USCIS will return any Form I-800 or I-800A, and related supplements and forms, mailed to a USCIS office other than the USCIS Chicago Lockbox facility address to the applicant with an explanation directing the applicant to mail the application directly to the USCIS Chicago Lockbox facility address for processing.

G. Will the fees change with this notice?

No. The application fees will remain the same as provided on the form instructions for Forms I-800A and I-800.

H. Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements. The Office of Management and Budget (OMB) previously approved the use of these information collections. The OMB control numbers for Forms I-800 and I-800A are contained in 8 CFR 299.5, Display of control numbers. USCIS will provide the Office of Management and Budget (OMB) with a copy of the amended form and OMB 83C (Correction Worksheet) through the automated Regulatory Office Combined Information System (ROCIS).

Jonathan R. Scharfen,
Acting Director, U.S. Citizenship and Immigration Services.

[FR Doc. E8-19723 Filed 8-25-08; 8:45 am]
BILLING CODE 9111-97-P
DEPARTMENT OF STATE

Deposit of Instrument of Ratification by the United States of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: On December 12, 2007, the United States deposited its instrument of ratification for the Hague Convention on Protection of Children and Co-operation with Respect to Intercountry Adoption (the Convention). In accordance with the terms of the Convention, the Convention will enter into force with respect to the United States on April 1, 2008.


FOR FURTHER INFORMATION CONTACT: Miki Stebbing at 202-736-9086. Hearing or speech-impaired persons may use the Telecommunications Devices for the Deaf (TDD) by contacting the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Convention is a multilateral treaty that provides a framework for the adoption of children habitually resident in one country that is a party to the Convention by persons habitually resident in another country that is also a party to the Convention. The Convention establishes procedures to be followed in these intercountry adoption cases and imposes safeguards to protect the best interests of children. When the Convention enters into force for the United States, it will apply to the United States as both a country of origin (in outgoing adoption cases, i.e., where children are emigrating from the United States to a foreign country) and a receiving country (in incoming adoption cases, i.e., where children are immigrating to the United States from a foreign country).

The implementing legislation for the Convention is the IAA. Under the Convention, the IAA, and the final rule
on accreditation, 22 CFR part 96, all agencies and persons providing adoption services in Convention cases must be accredited, temporarily accredited, approved, supervised or exempt in order to provide adoption services in Convention cases. By the terms of the IAA, Convention cases are adoption cases initiated in the child's country of residence with the filing of the appropriate application (the application for advance processing of an orphan petition or petition to classify an orphan as an immediate relative in the United States) on or after April 1.

Maura Harty,
Assistant Secretary, Bureau of Consular Affairs, Department of State.

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Intercountry Adoptions

USCIS has received many questions related to the new Hague intercountry adoption process and the orphan adoption process since the implementation of the Hague Adoption Convention on April 1, 2008.

Hague and Orphan Adoptions

Q: I obtained a full and final adoption of a child in a Hague Convention Country prior to April 1, 2008, but did not file a Form I-600A or Form I-600 prior to April 1, 2008. May I still file the Form I-600A or Form I-600?
A: Yes, a Form I-600A, (Application for Advance Processing of Orphan Petition) or Form I-600, (Petition to Classify Orphan as an Immediate Relative) may be filed on or after April 1, 2008, in this situation. The definitions for “Convention adoptee” and “Convention adoption” in 8 CFR 204.301 state that an intercountry adoption is subject to the Hague Convention and the Hague Convention adoption rules only if the adoption occurs on or after April 1, 2008. The USCIS Hague interim rule, therefore, does not apply to a case in which the adoption was already completed before April 1, 2008. Therefore, a Form I-600A or I-600 may be filed after April 1, 2008, if the adoption was completed before April 1, 2008. If the prospective adoptive parents are suitable as adoptive parents and the child qualifies as an orphan, the Forms I-600A and I-600 may be approved and the child may immigrate under section 101(b)(1)(F) of the Immigration and Nationality Act (INA).

Q: I obtained temporary or legal custody of a child in a Hague Convention country prior to April 1, 2008 and I plan to adopt the child on or after April 1, 2008. May I still seek a Hague Convention adoption? What forms do I file?
A: The Hague Adoption Convention and the USCIS Hague interim Rule apply to any adoption, on or after April 1, 2008, of a child from a Hague Convention country unless a Form I-600A or Form I-600 was filed before April 1, 2008. However, the Hague interim rule requires denial of a Form I-800 (Petition to Classify Convention Adoptee as an Immediate Relative) if the prospective adoptive parents adopted the child, or acquired custody for purposes of adoption, before the provisional approval of the Form I-800. This provision, however, was not in force before April 1, 2008. Therefore, a prospective adoptive parent who obtained custody before this date would not have been under any obligation to defer the acquisition of custody. If it can be established that the prospective adoptive parents obtained custody for purposes of adoption before April 1, 2008, USCIS will not deny the Form I-800 based solely on the basis of legal custody which was obtained before a Form I-800 had been provisionally approved, since the Hague Convention was not in force at the time of the grant of custody.

Q: I obtained legal custody of a child in a Hague Convention country for purposes of emigration and adoption after April 1, 2008, but before the provisional approval of Form I-800. May I still seek a Hague Convention adoption?
A: The Hague Adoption Convention and USCIS Hague interim rule provides that a Form I-800 cannot generally be provisionally approved if the prospective adoptive parents adopted a child or obtained custody for purposes of emigration and adoption before the provisional approval of a Form I-800. In these circumstances, for prospective adoptive parents to file Form I-800 and be eligible for a provisional approval, they will typically need to show that a legal custody order was voided, vacated, annulled, or otherwise terminated. The Form I-800 may generally be approved only if a new adoption or custody order

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is granted after the first custody order was voided, annulled, or otherwise terminated, and after USCIS has provisionally approved Form I-800.

Q: I adopted or obtained custody of a child for emigration and adoption after April 1, 2008, but before the provisional approval of Form I-800, and I cannot void or vacate the adoption or custody order. May I still seek a Hague Convention adoption?

A: Adopting or obtaining custody of a child before provisional approval of a Form I-800 is not consistent with the principles of the Hague Adoption Convention, and may complicate the adjudication of the child’s Form I-800. A cardinal principle of the Hague Adoption Convention is that a child’s eligibility to immigrate to the prospective adoptive parent’s country should be resolved before completion of the proposed adoption. The purpose of this principle is to minimize the risk that a child will not be able to join his or her prospective adoptive family in their home country. As clearly stated in the instructions to Forms I-800A and Form I-800, and in 8 CFR 204.309(b)(2), prospective adoptive parents are cautioned not to accept a proposed adoption placement, or complete an adoption that is subject to the Convention, until after USCIS has provisionally approved the Form I-800 and the Department of State has issued the Article 5 notice under 22 CFR 42.24(i).

The prospective adoptive parent should make every effort, under the law of the sending country, to have the premature adoption or custody order voided, vacated, annulled, or otherwise terminated, before filing the Form I-800. If the prospective adoptive parent presents evidence from the Central Authority of the country of the child’s habitual residence establishing that the law of that country does not permit the adoption to be voided, vacated, annulled, or otherwise terminated, USCIS will notify the prospective adoptive parent of any additional evidence that may need to be presented in order to support provision of the Form I-800. Prospective adoptive parents should keep in mind that, in at least some cases, adopting the child before provisional approval of the Form I-800 may require USCIS to determine that the adoption does not comply with the Convention and, consequently, cannot be the basis for approval of a Form I-800.

Q: May I foster a child from a Hague Convention country prior to the I-800A approval?

A: Typically, accepting a foster care arrangement before completing the Hague Adoption Convention process would not be consistent with the general purpose of the Convention, which promotes placing the child in the care of prospective adoptive parents only if both the sending country and the receiving country have determined that an intercountry adoption is permitted. Whether a foster care arrangement would actually be contrary to the Hague Adoption Convention and regulations, however, will have to be reviewed on a case-by-case basis. Note that, even if a foster care arrangement is not “custody for purposes of emigration and adoption,” as defined in 8 CFR 204.301, the steps taken to obtain a foster care arrangement may well involve “contact” with the child’s birth parent(s) or other caregivers. Article 29 of the Convention and 8 CFR 204.309(b)(2) restricts the ability to have contact with the birth parent(s) or other caregivers.

USCIS strongly recommends that prospective adoptive parent(s) apply for intercountry adoption through the Hague Adoption Convention process by using Forms I-800A and I-800, and obtaining approval of their Form I-800A, Application for Determination of Suitability to Adopt a Child from a Convention Country, and a provisional approval of their Form I-800, before assuming responsibility for providing foster care for a child. Carefully following the Hague Adoption Convention process serves the child’s best interest by ensuring that all of the steps designed for protection of the child are completed before placement.

If there is an emergency that appears to warrant taking responsibility for a child before the filing and approval of Forms I-800A and I-800, the prospective adoptive parent(s) should work through the Central
Authority of the sending country to arrange foster care, to ensure that any contact with the child, the birth parent(s), or other caregivers that occurs in this process, is permissible under the Hague Adoption Convention and the USCIS Hague interim rule.

Q: May a prospective adoptive parent with an approved, grandfathered I-600A indicating that they intend to adopt from a non-Hague country change to a Hague Convention Country and still continue an orphan adoption?

A: Yes. The Hague interim rule allows prospective adoptive parent(s) who filed an I-600A or I-600 prior to April 1, 2008, to be grandfathered under U.S. law. Included in this grandfathering provision is the ability for a prospective adoptive parent to change his/her Form I-600A approval from a non-Hague Convention country to a Hague Convention country, as long as the Form I-600A was filed prior to April 1, 2008, and continues to be valid at the time the request for change of overseas site notification is submitted. For a prospective adoptive parent who filed Form I-600A before April 1, 2008, but did not designate a specific country at the time of filing Form I-600A, he/she may designate a Convention country at a later time.

PLEASE NOTE: It is important that families who filed an I-600A prior to April 1, 2008 and desire to change to a Hague Convention country understand that while their case is grandfathered under U.S. law, this does not mean that the other Hague Convention country must permit the adoption to take place under U.S. orphan regulations. The other country could require that the case proceed as a Hague adoption, which would require the filing of Forms I-800A and I-800.

Q: May a prospective adoptive parent with an approved I-600A, who filed after April 1, 2008 indicating that they intend to adopt from a non-Hague Convention country, change to a Hague Convention country and still continue with an orphan adoption?

A: No. A prospective adoptive parent with an approved I-600A, who filed after April 1, 2008 indicating that they intend to adopt from a non-Hague Convention country may not change to a Hague Convention country. If the prospective adoptive parent wants to adopt from a Hague Convention country, forms I-800A and I-800 must be filed.

Q: My I-600A was filed before April 1, 2008 (implementation of Hague Convention). Is it possible to extend the I-600A approval?

A: Yes. An approved I-600A is valid for 18 months. A prospective adoptive parent may request a one-time, no-charge extension of your I-600A. To request this extension, submit a request in writing for an extension of your approved I-600A to the USCIS office that approved your I-600A. There is no specific form to fill out – simply submit a written request for a one-time, no-charge extension of your valid, approved Form I-600A. An updated or amended home study must accompany this request. Apply prior to 90 days before the expiration of the I-600A. If your request for extension is approved, your I-600A approval will be extended 18 months from the expiration date of the original I-600A.

Q: If my request for an extension of my I-600A approval is granted, when will the new extension expire – as of the expiration date of the original approval or the date of the decision to extend it?

A: The new approval will be effective as of the expiration date of the original approval, rather than the date of the decision to extend the approval. For example, if the original approval expired January 1, 2008, the extension will expire July 1, 2009.

Q: What will the immigrant visa classification be for Convention Adoptees?

A: Upon final approval of the I-800 petition, a child may be issued an IH-3, IH-4, or B-2 visa. An IH-3 is a Hague Convention Child adopted abroad and who automatically acquires U.S. citizenship upon entry to the U.S. An IH-4 is a Hague Convention Child coming to be adopted in the U.S. IH-4 children do not
automatically acquire U.S. citizenship, but are lawful permanent residents until the adoption is full and final. Children entering as a B-2 temporary visitor for pleasure are admitted under Section 322 interview, naturalization, and then depart the country.

Q: Will USCIS provide me with documentation of my child’s citizenship (IH-3)?  
A: Yes. USCIS will issue a Certificate of Citizenship from our Buffalo District Office within 45 days of receipt of the visa packet.

Q: Will USCIS provide me with proof of my child’s lawful permanent resident status (IH-4)?  
A: Yes. USCIS will issue a lawful permanent resident card, Form I-551 within days of receipt of the visa packet.

National Benefits Center (NBC) Processing of Hague Adoptions

Q: Which USCIS office adjudicates and approves Forms I-800A and I-800?  
A: The NBC is the only USCIS office that fully adjudicates forms I-800A and I-800 to completion.

Q: How long does it take for a USCIS field office to send Forms I-800A, I-800, and other required documents to NBC?  
A: USCIS field offices generally mail forms I-800A, I-800, and other required documents within 24 hrs of receipt.

Q: Are forms I-800A being forwarded from NBC to the National Visa Center (NVC), or are I-800As going directly from NBC to an overseas Embassy/Consulate?  
A: Approved I-800A applications are sent from the NBC to the NVC.

Q: What is the NBC’s timeframe for processing I-800A applications?  
A: Cases are targeted for completion within 90 days of receipt. Cases that are properly filed and submitted with complete home studies may be processed without delay.

Q: What is the NBC’s intended timeframe for processing I-800 petitions?  
A: All cases are targeted for completion within 90 days of receipt. Cases that are properly filed and submitted with a complete Hague Convention Article 16 report on the child, may be processed without delay.

Q: How will adoption agencies and the general public be notified when the direct mail program is implemented for the receipt of forms I-800A and I-800? When do you anticipate it will be operational?  
A: On August 26, 2008 USCIS issued an Update announcing the expansion of USCIS’ Direct Mail program to include Forms I-800A and I-800. Beginning on September 25, 2008, applicants must submit Forms I-800, I-800A, and all related supplements and forms to the USCIS Chicago Lockbox facility for initial processing, using the following address:  
U.S. Citizenship and Immigration Services  
P.O. Box 805695  
Chicago, IL 60680-4118

If you are filing Hague-related Forms I-601, Application for Waiver of Ground of Inadmissibility; I-864, Affidavit of Support Under Section 213A of the Act; I-864EZ, Affidavit of Support Under Section 213A of the Act; or I-864W, Intending Immigrant’s Affidavit of Support Exemption; with Form I-800, you must also send these forms to the Lockbox address. For more information on this processing change, please visit www.uscis.gov/pressroom.
**Q:** What is the procedure for expeditious processing of Special Needs children?

**A:** At this time, a significant majority of all pending cases are for special needs children. While there is no procedure for expeditious processing, all cases are targeted for completion within 90 days of receipt. Cases that are properly filed and submitted with complete home studies may be processed without delay.

**Hague Adoptions - Home Study**

**Q:** If the home study agency/preparer is conducting two home studies at the same time (e.g., domestic and China), does this have to be stated in the home study?

**A:** Yes. In this situation we may consider the additional home study as a prior home study. Consistent with regulatory requirements the home study preparer should:

1. Identify the agency involved in each prior or terminated home study
2. State when the prior home study process began
3. Include the date the prior home study was completed
4. Explain whether the prior home study recommended for or against finding the applicant or additional adult member of the household suitable for adoption, foster care, or other custodial care of a child. If a prior home study was terminated without completion, the current home study must indicate when the prior home study began, the date of termination, and the reason for the termination.

If the other home study has not yet been completed, please note that in the home study.

**Q:** If I receive a raise at work, am I required to submit a home study amendment?

**A:** No. However, if your income decreases a home study amendment is required.

**Q:** How much time can lapse between the visit to the home and the completion of the home study? (Some home studies may take longer if there is difficulty in obtaining child abuse clearances from another country, especially for military cases.)

**A:** At least one home visit must be completed during the course of the home study process. The home study must not be more than 6 months old at the time it is submitted to USCIS. There is no requirement regarding the timeliness of when, during the home study process, the home visit must occur.

**Q:** What if the home study preparer is not able to determine whether a foreign country has a child abuse registry, in order to conduct the child abuse registry checks overseas?

**A:** The purpose of 8 CFR 204.311(i) is to ensure that USCIS has access to any readily available evidence that may relate to the applicant’s suitability as an adoptive parent. There is no obligation, of course, to provide information that simply is not available. If a country does not have a child abuse registry, it is enough for the home study preparer to make this fact clear in the home study.

USCIS has sought to determine which countries, other than the United States, maintain “child abuse registries” in the sense intended in the regulation. As this information becomes available with respect to a particular country, USCIS will make the information available. Until such time as USCIS is able to verify that a particular country does have such a child abuse registry, USCIS will find that a home study complies with this requirement in 8 CFR 204.311(i) if the home study preparer states in the home study that the home study preparer has consulted the Central Authority of the foreign country (if it is a Hague Adoption Convention country) or other competent authority (for a country that is not a Hague Adoption Convention country) and has determined, based on this consultation, that the foreign country does not have a child abuse registry.
Q: Are home study preparers required to list each state in which a child abuse registry was checked, or should the documented checks be included in the home study?
A: The home study preparer must ensure that a check of the applicant and of each additional adult household member has been made with available child abuse registries in any State or foreign country that the applicant, or any additional adult member of the household, has resided in since that person's 18th birthday. The home study must include results of the checks conducted, including when no record was found to exist, that the State or foreign country will not release information to the home study preparer or anyone in the household, or that the State or foreign country does not have a child abuse registry.

Q: Two questions arise from paragraph (2) of the definition of “adult member of the household” in 8 CFR 204.301:
1. When must a home study preparer include in the home study an assessment of a household member who “has not yet reached his or her 18th birthday?”
2. When must a home study preparer include in the home study an assessment of someone “who does not actually live at the same residence but whose presence in the residence is relevant to the issue of suitability to adopt?”
A: The home study preparer is never required, under the USCIS rule, to include an assessment of these persons as an adult member of the household, unless USCIS specifically asks the home study preparer to do so. As a matter of routine practice, the home study preparer needs only to assess the prospective adoptive parents and any other adult members of the household, as defined in paragraph (1) of the definition of “adult member of the household.”

In a given case, the home study preparer may be aware of facts about another person that, in the home study preparer’s considered professional judgment, could be relevant to the issue of the applicant(s) suitability to adopt. For example, a child who is not yet 18 could have a criminal history, or a history of drug or alcohol abuse. In such cases, if it is apparent that this person’s history could impact the applicant’s suitability to adopt, it may be prudent for the home study preparer to include this information in the home study and provide an appropriate recommendation. Similarly, if the home study preparer’s reasoned professional judgment is that there is some other person who does not live with the applicant(s) “whose presence in the home is relevant to the issue of suitability to adopt,” such as an extended family member who spends a lot of time at the applicant’s residence, it would be prudent to include information about this person in the home study, so that USCIS can make an informed decision on the case. The USCIS adjudicator reviewing such a home study would then be able to determine whether to request an additional Form I-800A, Supplement 1, with the applicable biometrics fee. Once USCIS determines that an I-800A, Supplement 1 is necessary for another person, Supplement 1 will be sent to the prospective adoptive parent with instructions for that other person and the prospective adoptive parent to complete and submit Supplement 1 to USCIS. The person then must be evaluated by the home study preparer to ensure that the home study addresses the requirements of 8 CFR 204.311 for that person.

However, the home study preparer may limit his or her assessment to the prospective adoptive parents as defined in paragraph (1) of the definition, and need not include anyone else unless USCIS asks for this additional evaluation.

Adoptions under section 101(b)(1)(E) - children from Hague countries

Q. If a child from a Hague Convention country is already in the United States, can the child be deemed to be “habitually resident” in the United States, so that the child can be adopted without complying with the Hague Adoption Convention and the USCIS Hague interim rule?
A: Under 8 CFR 204.2(d)(2)(vii)(F), a child who is present in the United States, but whose habitual residence was in a Hague Convention country other than the United States immediately before the child
came to the United States, is still deemed to be habitually resident in the other Hague Convention country for purposes of the filing and approval of a visa petition based on the child’s adoption by a citizen who is habitually resident in the United States. Thus, USCIS will presume that the child’s adoption and immigration are governed by the Hague Adoption Convention, the IAA, and 8 CFR 204 subpart C.

Since a child described in 8 CFR 204.2(d)(2)(vii)(F), is still deemed to be habitually resident in the other Hague Convention country, a U.S. citizen who is habitually resident in the United States and who wants to adopt a child from a Hague Convention country must, generally, follow the Hague Adoption Convention process, even if the child is already in the United States. 8 CFR 204.309(b)(4) specifically provides that a Form I-800A and Form I-800 can be filed, even if the child is in the United States, if the other Hague Convention country is willing to complete the Hague Adoption Convention process with respect to the child.

In most cases, adoption under the Hague Adoption Convention would be in the child’s best interests, even if the child is present in the United States. The child may be able to immigrate and, under section 320(a), acquire citizenship by automatic naturalization, as a direct result of the adoption under the Hague Adoption Convention. If the child is adopted without compliance with the Hague Adoption Convention, the parent must have legal custody of the child and live with the child for 2 years before the child can acquire permanent residence as the child of the U.S. citizen adoptive parent, as defined under section 101(b)(1)(E) of the Act.

There may be situations, however, when the adopting parent is not able to complete a Hague Adoption Convention adoption, because the Central Authority of the child’s country has determined that, from its perspective, the Hague Adoption Convention no longer applies to the child. The purpose of 8 CFR 204.2(d)(2)(vii)(F) is to prevent the circumvention of the Hague Adoption Convention process. Thus, USCIS has determined that 8 CFR 204.2(d)(2)(vii)(F) must be read in light of the Hague Adoption Convention regulations in subpart C of 8 CFR part 204. If, under subpart C, there is a sufficient basis for saying that the Hague Adoption Convention and the implementing regulations no longer apply to a child who came to the United States from another Hague Convention country, then USCIS can conclude that 8 CFR 204.2(d)(2)(vii)(F) no longer applies.

The governing regulation, 8 CFR 204.303(b), provides the principles for determining whether the child is habitually resident in a country other than the country of citizenship. This regulation does not explicitly apply to children in the United States, but USCIS has determined that it can be interpreted to permit a finding that a child who, under 8 CFR 204.2(d)(2)(vii)(F), is presumed to be habitually resident in another Hague Convention country can be found to no longer be habitually resident in that country, but to be habitually resident, now, in the United States. USCIS will determine that 8 CFR 204.2(d)(2)(vii)(F) no longer precludes approval of a Form I-130 if the adoption order that is submitted with the Form I-130 expressly states that the Central Authority of the other Hague Convention country has filed with the court a written statement indicating that the Central Authority is aware of the child’s presence in the United States, and of the proposed adoption, and that the Central Authority has determined that the child is not habitually resident in that country. A copy of the written statement from the Central Authority must also be submitted with the Form I-130 and the adoption order.

If the adoption order shows that the Central Authority of the other Hague Convention country had determined that the child was no longer habitually resident in that other Hague Convention country, USCIS will accept that determination and, if all the other requirements of section 101(b)(1)(E) of the Act are met, the Form I-130 may be approved.

*For inquiries on adoptions from Hague Convention countries, please call 1-877-424-8374
USCIS Update

Oct. 14, 2008

USCIS ANNOUNCES ADOPTION POLICY FOR HAGUE TRANSITION CASES
Grandfathered Form I-600A Affected

WASHINGTON – U.S. Citizenship and Immigration Services (USCIS) announced today that prospective adoptive parents already in the process of adopting a child from a country that has implemented the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) who filed a Form I-600A, Application for Advance Processing of Orphan Petition, prior to April 1, 2008, and who have received the one time no-charge extension, may file one additional Form I-600A, and continue to proceed with their intercountry adoption through the “orphan” process. The new Form I-600A must be filed before the current approval expires, and only if the prospective adoptive parents have not yet filed the corresponding Form I-600, Petition to Classify Orphan as an Immediate Relative.

U.S. law and regulations allow individuals who began the intercountry adoption process by filing Form I-600A or Form I-600, before April 1, 2008, to continue using these pre-Hague Adoption Convention forms and procedures even if they are adopting a child from a Hague Adoption Convention country. However, depending on the time that it takes prospective adoptive parents to be matched with a child and file Form I-600, the approval of the I-600A might expire before the prospective adoptive parents are able to file Form I-600. By allowing the filing of one new Form I-600A prior to the expiration of the current approved Form I-600A, USCIS is allowing prospective adoptive parents who have been grandfathered into the pre-Hague Adoption Convention process to continue to proceed under this “orphan” process, provided the child’s home country agrees.

If the Form I-600A is no longer valid, prospective adoptive parents must file a Form I-800A, Application for Determination of Suitability to Adopt a Child from a Convention Country, with a home study which meets all of the requirements for a Hague Adoption Convention home study. Once a Form I-800A is approved, the Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative may be filed on behalf of the prospective adoptive child.

For more information on intercountry adoption, please visit the USCIS website at www.uscis.gov.

– USCIS –
Questions & Answers

Q: Why is USCIS issuing this announcement now?
A: USCIS is issuing this announcement now as a precaution to prospective adoptive parents with approved Forms I-600A so they understand what options are available to them if their approvals are due to expire, and they have not yet filed a Form I-600. This guidance is important for prospective adoptive parents who are pursuing an adoption from another Hague Convention country.

Q: My Form I-600A was filed before April 1, 2008 (Implementation of Hague Convention). Is it possible to extend the Form I-600A approval?
A: Yes. An approved Form I-600A is valid for 18 months. If no Form I-600 has been filed, a prospective adoptive parent may request a one-time, no-charge extension of an approved Form I-600A. To request this extension, submit a written request for an extension of your approved I-600A to the USCIS office that approved your Form I-600A. There is no specific form to fill out. An updated home study needs to be submitted with the written request for a one-time, no-charge extension of your valid, approved Form I-600A. Submit the request no earlier than 90 days before the expiration of the I-600A, but before the approval expires. If your request for an extension is approved, the validity of the Form I-600A will be extended 18 months from the expiration date of the original approved Form I-600A.

Q: I have already received a one-time, no-charge extension of my Form I-600A for an adoption from a Hague Convention country. My extension is due to expire and I have not filed a Form I-600 (because I'm waiting to be matched with a child). Is my Form I-600A considered “grandfathered” and can I re-file Form I-600A or am I now required to file Form I-800A?
A: DHS regulations allow only one “extension” of the approval of a Form I-600A. If that extension is also scheduled to expire, the only alternative is to file a new Form I-600A, with a new filing fee. Generally, a Form I-600A may not be filed after April 1, 2008, for the adoption of a child from a Hague Convention country. Under 8 CFR 204.300(b), however, a case may continue as an orphan case if a Form I-600A was filed before April 1, 2008. USCIS interprets this provision as permitting prospective adoptive parents whose Form I-600A approval is still in effect, but is about to expire, to file a new Form I-600A, as long as they file the new Form I-600A before the current approval expires.

A new Form I-600A that is filed after April 1, 2008, will be considered “grandfathered” only if:

(a) the new Form I-600A is filed before expiration of a previous Form I-600A AND
(b) the previous Form I-600A that is about to expire was itself filed before April 1, 2008; AND
(c) no Form I-600 has been filed on the basis of the previous Form I-600A.

Q: I have an approved Form I-600A, filed prior to April 1, 2008, indicating that I intend to adopt from a Hague Convention country, but the approval has expired and I did not obtain an extension. May I file a new Form I-600A?
A: No.

AILA InfoNet Doc. No. 08101472. (Posted 10/14/08)
AILA-DC CHAPTER
FALL 2013 CLE CONFERENCE 223
As previously stated, a new Form I-600A that is filed after April 1, 2008, will be considered “grandfathered” only if:

(a) the new Form I-600A is filed before expiration of a previous Form I-600A AND
(b) the previous Form I-600A that is about to expire was itself filed before April 1, 2008; AND
(c) no Form I-600 has been filed on the basis of the previous Form I-600A.

For any Form I-600A approval that was due to expire after April 1, 2008, the prospective adoptive parents had the right under DHS regulations to obtain one extension of the approval. If they did not choose to do so, and the Form I-600A that was filed before April 1, 2008, has expired, there is no longer any valid Form I-600A that could form the basis of “grandfathering” a new Form I-600A.

If the Form I-600A approval is no longer valid, the prospective adoptive parents will have to file a Form I-800A with a home study which meets all of the requirements for a Hague Adoption Convention home study. Once a Form I-800A is approved, the Form I-800 may be filed on behalf of the prospective adoptive child.

Q: Can I extend or “grandfather” my Form I-600A approval if I have already filed the corresponding Form I-600?
A: No. The Form I-600A approval is valid only for the number of adoptions for which you were approved before April 1, 2008. If, before April 1, 2008, you were approved for two adoptions, then you can only file two Forms I-600 based on the extended or grandfathered Form I-600A. Once the total number of Forms I-600 have been filed, no further extensions or grandfathering of the Form I-600A are permitted.

Q: Does “grandfathering” my Form I-600A mean that I will definitely be able to complete an adoption under the pre-Hague orphan process, rather than the Hague Adoption Convention process?
A: Not necessarily. Grandfathering a Form I-600A means that you will be permitted to use the orphan process, provided the child’s home country agrees. However, the child’s home country may have its own rules for determining whether the Hague Adoption Convention process must be followed.

Q: Does this policy affect the rules of other countries?
A: No. This guidance pertains only to the U.S. transition case rules. It does not address what the country of the prospective adoptive child’s origin may consider to be an appropriate application for its own intercountry adoption processes. Prospective adoptive parents remain subject to the requirements of the child’s country of origin to successfully complete an intercountry adoption under the Hague Adoption Convention.

Q: Can you give some examples of how the “grandfathering” interpretation works?
A: Yes, please see below.

- EXAMPLE: Form I-600A was approved, with the approval expiring on August 1, 2008. The applicant requested and obtained a one-time extension, with the new approval period expiring February 1, 2010. In January 2010, they still have not filed a Form I-600. On February 1, 2010, they file a new Form I-600A. The “grandfathering” of the original Form I-600A will be extended...
to the new Form I-600A, since it was filed before the approval of the original Form I-600A expired.

- **EXAMPLE:** Form I-600A was approved, with the approval expiring on August 1, 2008. The applicant requested and obtained a one-time extension, with the new approval period expiring February 1, 2010. In January 2010, they still have not filed a Form I-600. On February 1, 2010, they file a new Form I-600A. The “grandfathering” of the original Form I-600A will be extended to include the new Form I-600A, since it was filed before the approval of the original Form I-600A expired. The new Form I-600A is approved, with the approval (after one extension) expiring March 10, 2013. On March 10, 2013, the applicant files yet another Form I-600A. This third Form I-600A is not grandfathered, since, although the expiring Form I-600A was grandfathered because the first Form I-600A was grandfathered, the expiring Form I-600A was actually filed after April 1, 2008.

- **EXAMPLE:** Form I-600A was approved, with the approval expiring on August 1, 2008. The applicant requested and obtained a one-time extension, with the new approval period expiring February 1, 2010. In January 2010, they still have not filed a Form I-600. However, they do not file a new Form I-600A until February 2, 2010. The “grandfathering” of the original Form I-600A does not extend to the new Form I-600A, since it was filed after the approval of the original Form I-600A expired.

- **EXAMPLE:** Form I-600A was approved, with the approval expiring on August 1, 2008. The applicant did not seek an extension. On September 1, 2008, the applicant files a new Form I-600A. This new Form I-600A is not grandfathered, since it was filed after April 1, 2008, and after the approval of the original Form I-600A expired.

- **EXAMPLE:** Form I-600A was approved for one child, with the approval expiring on August 1, 2008. One Form I-600 was filed on July 31, 2008. Since the Form I-600 was filed, no further extension of the Form I-600A approval is permitted. Also, since the Form I-600 was filed, a new Form I-600A for an additional child, or a reopening and re-approval for more than one child, would not be “grandfathered.”

- **EXAMPLE:** Form I-600A was approved for two children, with the approval expiring on August 1, 2008. One Form I-600 was filed before August 1, 2008, and the applicant requested and obtained an extension of the approval. The extension expires February 1, 2010. The applicant then files a Form I-600 for an additional child. The Form I-600 is “grandfathered,” since it is based on a “grandfathered” Form I-600A for more than one child. No additional children may be adopted from a Hague Adoption Convention country based on the Form I-600A, however. To adopt a third or subsequent child, the Hague Adoption Convention process will apply.
THE CHILD STATUS PROTECTION ACT
SAFEGUARDING ELIGIBILITY FOR CHILD CLIENTS
by Margaret Hobbins

Immigration law defines “child” as an unmarried son or daughter under the age of 21. Fitting this definition is critical for children who are the principal beneficiaries of an immigrant visa petition filed by a parent, or are derivative beneficiaries on a parent’s immigrant visa petition. Before the Child Status Protection Act (CSPA) went into effect in 2002, children who turned 21 before their visas were issued were out of luck – they “aged out” of their eligibility to immigrate. The CSPA amended the Immigration and Nationality Act with a number of provisions to protect children from such a loss.

The CSPA does not protect everyone – children can still age out depending on a variety of factors, including lengthy visa wait times. This is why a basic understanding of which children are protected and how the law works is so important in a family-based immigration law practice. Familiarity with the CSPA will help practitioner’s flag high-risk cases and put child clients in the best possible position to retain their “child” status under immigration law.

I. Immediate Relative – Child of a U.S. Citizen

Children of U.S. citizens who are unmarried and under the age of 21 are considered “immediate relatives.” There is no wait time for visa availability for this family-based immigration category. **The CSPA freezes the age of an immediate relative child beneficiary on the date that the I-130 petition is filed.**\(^1\) As long as the beneficiary is under the age of 21 at the time the petition is filed, the beneficiary will remain eligible to immigrate as an immediate relative regardless of whether he or she turns 21 before an immigrant visa is issued. If, however, the child beneficiary marries after the petition is filed and before issuance of the visa, he or she will lose eligibility and be placed in the family-based third preference category (FB-3).

So what happens when a lawful permanent resident (LPR) petitioner naturalizes while an immigrant visa petition is pending on behalf of their child? **With child beneficiaries in the family-based second preference category (FB-2A), the beneficiary’s age freezes at the time of the parent’s naturalization.**\(^2\) If the beneficiary is under the age of 21 and still unmarried at the time of the parent’s naturalization, he or she will be considered an immediate relative.

It’s clear that marriage forces otherwise eligible children of U.S. citizens out of the immediate relative category. So what happens if the beneficiary divorces? **If a U.S. citizen parent files a petition for their married son or daughter in the family-based third preference category (FB-3), and the son or daughter divorces, then the beneficiary’s age freezes at the time of the divorce.** If the beneficiary is under the age of 21 at the time of the divorce, then he or she will be considered an immediate relative, so long as there is no subsequent marriage prior to visa issuance.

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\(^1\) INA §201(f)(1).
\(^2\) INA §201(f)(2).
II. Child of a Permanent Resident or Derivative Beneficiary of a Family, Employment, or Diversity Petition

For children who are the principal beneficiaries of a petition filed by an LPR parent or the derivative beneficiaries of a family, employment, or diversity petition, the CSPA provides limited protection. The law calculates the beneficiary’s “CSPA age” as follows:

- **Determine the age of the beneficiary when the immigrant visa became available.**
- **Subtract the amount of time that the petition was pending.**
- **The beneficiary must have sought to acquire permanent residency within one year of visa availability.**

3  INA §203(h)(1)
5  AFM 21.2 (e)(1)(ii)(B).

The State Department and USCIS have elaborated on the meaning of these three steps over the last decade.

**a. When Does the Immigrant Visa Becomes Available?**

The date that the visa becomes available depends on whether the visa category is current. If the category is current, then the visa becomes available on the date that the immigrant visa petition is approved. If the category is oversubscribed, then the visa becomes available when the beneficiary’s priority date is current. This is the first day of the month of the Department of State Visa Bulletin that indicates the beneficiary’s priority date is current. In other words, if the November 2013 visa bulletin shows that the beneficiary’s priority date is current, then the visa is available on November 1, 2013.

**b. How Long Was the Petition Pending?**

The amount of time that the visa petition is pending for CSPA purposes is the period between the receipt date of a properly filed petition and the approval date. This includes any period of administrative review. The pending period does not include the amount of time that the beneficiary waited for visa availability. Essentially, Congress is only allowing the beneficiaries to deduct the complete adjudication time of the petition, nothing else.
c. What Does “Sought to Acquire” Mean?

There is no CSPA protection for a child beneficiary if the final step is not completed – the beneficiary must have “sought to acquire” permanent residency within one year of visa availability. So what does “sought to acquire” really mean? This term means pursuing the immigrant visa through consular processing or applying for adjustment of status if the beneficiary is in the United States. For adjustment of status, this typically requires filing the Form I-485 with U.S. Citizenship and Immigration Services (USCIS). For consular processing, this generally means one of two things: (1) submitting a completed DS-230 for the child beneficiary and having the submission recorded in the immigrant visa system; or (2) filing a Form I-824, or taking another “concrete step” toward permanent residency, for a following-to-join case.

III. Benefits for Children Who Age-Out – Priority Date Retention and Conversions

a. Retention of Priority Dates and Automatic Conversion

The CSPA includes provisions for children who age-out in spite of the laws protections. The first important provision involves the retention of original priority dates and automatic conversion to the appropriate preference category. Section 203(h)(3) of the INA states that if a child beneficiary’s age is determined to be over 21 then “the alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.” For example, if an LPR files a petition for his or her child in the FB-2A category and the child ages-out in spite of the CSPA, the child beneficiary will automatically convert to the FB-2B category and will retain his or her original priority date.

The ability to retain a priority date becomes less clear when the petitioner changes. For example, with a child derivative beneficiary of a family-based fourth preference category petition, the petitioner is the derivative beneficiary’s aunt/uncle. If the derivative child beneficiary ages out, and the child’s newly permanent resident parent files a subsequent immigrant visa petition on the child’s behalf, it is unsettled as to whether the beneficiary can retain their parent’s original priority date. The Board of Immigration Appeals (BIA or the Board) considered this issue in Matter of Wang and declined to extend CSPA benefits in this scenario. The Board held that there is no automatic conversion once the derivative beneficiary ages out, as the derivative beneficiary is the niece/nephew of a U.S. citizen and no preference category exists for this relationship. With no automatic conversion, the Board declined to

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7 INA §203(h)(1)
10 INA §203(h)(3).
12 Id. at 39.
allow the derivative beneficiary to retain the old priority date for a visa petition later filed by the (now) lawful permanent resident parent.

Unlike the Second Circuit, which upheld the Board’s conclusion in Matter of Wang, the Fifth and Ninth Circuits have disagreed with the BIA’s interpretation of section 203(h)(3) of the INA.13 The Supreme Court has now granted cert in the nationwide class action suit from the Ninth Circuit, Mayorkas v. Cuellar de Osorio.14 Final resolution of this split of authority will hopefully come when the Supreme Court issues their decision.

**b. Opt-Out Provisions**

The CSPA also contains a provision that allows unmarried adult sons and daughters whose LPR parents naturalized after filing a visa petition on their behalf to “opt-out” of automatically converting to the family-based first preference category.15 Because the wait time for the FB-2B category (unmarried adult sons and daughters of LPRs) can be shorter than the FB-1 category (unmarried adult sons and daughters of U.S. citizens), the beneficiary may elect to remain in their initial category, in spite of their parent’s naturalization, and retain their priority date. The opt-out request must be made in writing to the USCIS District Office having jurisdiction over the beneficiary’s residency.16

**IV. Practitioner Tips on Preventing Child Clients from Aging Out**

**a. Tracking Ages of Child Clients and Counseling Parents**

At the outset of client representation, it is critical to understand who you are representing. Determining the ages of your clients’ children and the ages of all potential derivative beneficiaries is an important start. With any child clients, practitioners should provide their best estimate of the timeline of the case, including any potential delays such as lengthy visa wait times, administrative processing, or any other anticipated bureaucratic hurdles. Practitioners should remain aware of their child clients’ ages to prevent an age-out crisis, or to know when to take immediate action if an age-out becomes imminent.

Practitioners should also impart to parents that their children turning 21 is legally significant, and could mean the end of the child’s eligibility to immigrate. The CSPA has many complications, but providing a rudimentary outline of how the law can assist the child client will be instrumental in preventing a needless age-out. U.S. citizen clients who are unsure of when to move forward with family-based petitions for their children may be spurred into action after

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13 Li v. Renaud, 654 F.3d 376 (2d Cir. 2011); Khalid v. Holder, 655 F.3d 363 (5th Cir. 2011); De Osorio v. Mayorkas, 695 F. 3d 1003 (9th Cir. 2012), cert. granted, 81 USLW 3430, 81 USLW 3696, 81 USLW 3702 (U.S. Jun 24, 2013) (No. 12-930).
14 De Osorio v. Mayorkas, 695 F. 3d 1003 (9th Cir. 2012), cert. granted, 81 USLW 3430, 81 USLW 3696, 81 USLW 3702 (U.S. Jun 24, 2013) (No. 12-930).
15 INA §204(k).
learning that their child’s age will freeze upon filing the I-130 petition. Additionally, LPR parents should understand that a child beneficiary must apply for permanent residence within one year of visa availability in order to benefit from the CSPA.

b. Working with Consulates and USCIS to Prevent an Age-Out

As previously stated, not every child is covered by the CSPA. For example, a child of a permanent resident who misses the one-year deadline for seeking to acquire permanent residence will not receive the benefits of the CSPA. If a child client who is not covered by the CSPA is close to aging-out, it is critical to communicate this fact to the relevant agency. Consular and USCIS officers may not understand the inapplicability of the CSPA to a particular child’s case and offer mistaken assurances that there is no need to rush. Practitioners can never rely on these assurances and must make their own assessment by studying the CSPA and the relevant facts. Potential age-outs require urgent requests to USCIS, the National Visa Center, and/or the consulate for expediting the child’s case adjudication to protect their eligibility. Of course, an ounce of prevention is worth a pound of cure. The best way to prevent an age-out crisis is to track the ages of clients and to understand the CSPA’s application to the facts of the case.

V. Conclusion and Additional Resources

The CSPA has protected countless children from losing the ability to immigrate with their families to the United States. While the CSPA can be complex, its basic formulas for straightforward family-based cases are quite accessible. Having a fundamental understanding of the CSPA and the importance of tracking child beneficiaries’ ages will put clients in the best possible position.

<table>
<thead>
<tr>
<th>Immediate Relative</th>
<th>Preference Classification for Permanent Residence or Derivative</th>
</tr>
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<tbody>
<tr>
<td>Petition filed by a U.S. citizen parent for his or her child: the beneficiary’s age “freezes” on the date of filing.</td>
<td>The CSPA freezes the child’s age on the date of visa availability and subtracts the amount of time the visa petition was pending.</td>
</tr>
<tr>
<td>Petition filed by a permanent resident parent who naturalizes before the beneficiary turns 21, the beneficiary’s age “freezes” on the date of naturalization.</td>
<td>The child must seek to acquire permanent residency within one year of visa availability.</td>
</tr>
</tbody>
</table>

Agency Guidance:

1. Adjudicator’s Field Manual at 21.2(e).

17 INA §203(h).
3. DOS Cable, 03-State-15049 (Jan. 17, 2003), published on AILA InfoNet at Doc. No. 03020550.

Statutory Sources:

2. INA § 201(f).
3. INA § 203(h).
4. INA § 204(k).

Other:

DOS Cable on Child Status Protection Act

Cite as "AILA InfoNet Doc. No. 02090940 (posted Sep. 9, 2002)"

UNCLAS STATE 163054

VISAS-

E.O. 12958: N/A
TAGS: CVIS
SUBJECT: CHILD STATUS PROTECTION ACT OF 2002: ALDAC #1

REF: A) P.L. 107-208 OF AUGUST 6, 2002, H.R. 1209 B) STATE 123775

1. Summary: This cable provides the text of a new law, the "Child Status Protection Act of 2002", signed into law by the President on AUGUST 6, 2002 and effective on that date. It also provides initial interpretative guidance regarding it, as well as procedures to be used to implement it. The new law radically changes the process for determining whether a child has "aged out" for the purpose of the issuance of visas and the adjustment of status of aliens in most immigrant categories. End summary.

2. The text of the law is as follows:

"SECTION 1. SHORT TITLE.
This Act may be cited as the `Child Status Protection Act'. SEC. 2. USE OF AGE ON PETITION FILING DATE, PARENT'S NATURALIZATION DATE, OR MARRIAGE TERMINATION DATE, IN DETERMINING STATUS AS IMMEDIATE RELATIVE. Section 201 of the Immigration and Nationality Act (8 U.S.C. 1151) is amended by adding at the end the following:
`(f) RULES FOR DETERMINING WHETHER CERTAIN ALIENS ARE IMMEDIATE RELATIVES-

`(1) AGE ON PETITION FILING DATE- Except as provided in paragraphs (2) and (3), for purposes of subsection (b)(2)(A)(i), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using the age of the alien on the date on which the petition is filed with the Attorney General under section 204 to classify the alien as an immediate relative under subsection (b)(2)(A)(i).

`(2) AGE ON PARENT'S NATURALIZATION DATE- In the case of a petition under section 204 initially filed for an alien child's classification as a family-sponsored immigrant under section 203(a)(2)(A), based on the child's parent being lawfully admitted for permanent residence, if the petition is later converted, due to the naturalization of the parent, to a petition to classify the alien as an immediate relative under subsection (b)(2)(A)(i), the determination described in paragraph (1) shall be made using the age of the alien on the date of the parent's naturalization.

`(3) AGE ON MARRIAGE TERMINATION DATE- In the case of a petition under section 204 initially filed for an alien's classification as a family-sponsored immigrant under section 203(a)(3), based on the alien's being a married son or daughter of a citizen, if the petition is later converted, due to the legal termination of the alien's marriage, to a petition to classify the alien as an immediate relative under subsection (b)(2)(A)(i) or as an unmarried son or daughter of a citizen under section 203(a)(1), the determination described in paragraph (1) shall be made using the age of the alien on the date of the termination of the marriage.'.

SEC. 3. TREATMENT OF CERTAIN UNMARRIED SONS AND DAUGHTERS SEEKING STATUS AS FAMILY-SPONSORED, EMPLOYMENT-BASED, AND DIVERSITY IMMIGRANTS. Section 203 of the Immigration and Nationality Act (8 U.S.C. 1153) is
amended by adding at the end the following:

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(h) RULES FOR DETERMINING WHETHER CERTAIN ALIENS ARE CHILDREN-
  `(1) IN GENERAL- For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies
  the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using--
    `(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or,
    in the case of subsection (d), the date on which an immigrant visa number became available for the alien's
    parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent
    residence within one year of such availability; reduced by
    `(B) the number of days in the period during which the applicable petition described in paragraph (2) was
    pending.

  `(2) PETITIONS DESCRIBED- The petition described in this paragraph is--
    `(A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for
    classification of an alien child under subsection (a)(2)(A); or
    `(B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under
    section 204 for classification of the alien's parent under subsection (a), (b), or (c).

  `(3) RETENTION OF PRIORITY DATE- If the age of an alien is determined under paragraph (1) to be 21 years of
  age or older for the purposes of subsections (a)(4) and (d), the alien's petition shall automatically be converted
  to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original
  petition.'

SEC. 4. USE OF AGE ON PARENT’S APPLICATION FILING DATE IN DETERMINING ELIGIBILITY FOR ASYLUM.
Section 208(b)(3) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(3)) is amended to read as follows:

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  `(3) TREATMENT OF SPOUSE AND CHILDREN-
    `(A) IN GENERAL- A spouse or child (as defined in section 101(b)(1) (A), (B), (C), (D), or (E)) of an alien who is
    granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted
    the same status as the alien if accompanying, or following to join, such alien.
    `(B) CONTINUED CLASSIFICATION OF CERTAIN ALIENS AS CHILDREN- An unmarried alien who seeks to
    accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of
    age on the date on which such parent applied for asylum under this section, shall continue to be classified as a
    child for purposes of this paragraph and section 209(b)(2), if the alien attained 21 years of age after such
    application was filed but while it was pending.'

SEC. 5. USE OF AGE ON PARENT’S APPLICATION FILING DATE IN DETERMINING ELIGIBILITY FOR ADMISSION AS
REFUGEE. Section 207(c)(2) of the Immigration and Nationality Act (8 U.S.C. 1157(c)(2)) is amended--
(1) by striking `(2)' and inserting `(2)(A)'; and (2) by adding at the end the following:

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  `(B) An unmarried alien who seeks to accompany, or follow to join, a parent granted admission as a refugee
  under this subsection, and who was under 21 years of age on the date on which such parent applied for
  refugee status under this section, shall continue to be classified as a child for purposes of this paragraph, if the
  alien attained 21 years of age after such application was filed but while it was pending.'

SEC. 6. TREATMENT OF CLASSIFICATION PETITIONS FOR UNMARRIED SONS AND DAUGHTERS OF NATURALIZED CITIZENS.
Section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) is amended by adding at the end the following:

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  `(k) PROCEDURES FOR UNMARRIED SONS AND DAUGHTERS OF CITIZENS-
    `(1) 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).
    `(2) 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.

'(3) 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.

'(4) CLARIFICATION- This subsection shall apply to a petition if it is properly filed, regardless of whether it was approved or not before such naturalization.'

SEC. 7. IMMIGRATION BENEFITS FOR CERTAIN ALIEN CHILDREN NOT AFFECTED. Section 204(a)(1)(D) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(D)) is amended by adding at the end the following new clause:

'(iii) Nothing in the amendments made by the Child Status Protection Act shall be construed to limit or deny any right or benefit provided under this subparagraph.'

SEC. 8. EFFECTIVE DATE.
The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to any alien who is a derivative beneficiary or any other beneficiary of--

(1) a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) approved before such date but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition;

(2) a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) pending on or after such date; or

(3) an application pending before the Department of Justice or the Department of State on or after such date."

INTERPRETATION
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3. The intent of this legislation (CSPA) is to preserve child status for certain alien children beneficiaries who age-out, and particularly with respect to section 3, age-out because of delays in processing. Age-out benefits are extended to applicants who should be processed as Immediate Relative children (IR-2, IR-3, IR-4) (note that although IR-3s and IR-4s are technically covered by the new law, application in those cases would appear to be very rare) and applicants who should be processed as Second Preference children (F2-A), but who attain the age of 21 before their cases are finalized, as well as derivative beneficiary children in all preference categories and DV cases.

4. The law also provides relief for F2B applicants in cases where the petitioner has naturalized and the applicant would be disadvantaged by a conversion to F1 status due to a less favorable F1 cut-off date. (This particular provision is only of interest to natives of those few countries (e.g., the Philippines) where the F1 cut-off date is earlier than the F2B cut-off date).

5. The CSPA also provides age-out relief for children of asylees and refugees, but these sections will not be addressed in this cable since interpretations regarding them must come from INS.

6. Because the language in some sections of the CSPA is extremely complicated, especially section 3, there may be refinements in interpretation with additional guidance to follow, as needed. To the extent possible, automated systems will be reworked to implement the new rules, but necessary adjustments likely will not be completed in the immediate future. Any new procedures or processes to be used in these cases will be the subject of future cables as they are developed.
Section 2- Immediate Relatives

7. Section 2 establishes rules for determining whether certain aliens are Immediate Relatives. Under the new rules, consular officers will use the age of the beneficiary on the date of filing the Form I-130, Petition for Alien Relative, to determine whether the applicant qualifies as an IR-2, IR-3 or IR-4. For example, if a Form I-130 is filed for a child of an Amcit when the child is under 21, the child will permanently qualify as a child as long as he/she does not marry.

8. Section 2 also amends the Act to allow the age of an alien child who is a Second Preference beneficiary but whose parent/s naturalizes and whose petition is converted to Immediate Relative classification, to be considered the age on the date of naturalization. Consular officers will now use the child’s age on the date of the parent’s naturalization to determine whether the child will be eligible for Immediate Relative status. For example, if a LPR files a Form I-130 for a 17 year-old son and then naturalizes when the son is 20, the son will remain eligible for a visa as an IR-2, even if the son has attained the age of 22 on the date of visa application. The applicant should submit evidence of his parent’s naturalization (a bona fide copy of the naturalization certificate) to establish eligibility for age-out relief under this provision of the CSPA.

9. Section 2 also amends the Act to allow third preference married children of Amcits to use the age on the date of the termination of a marriage when applying for a visa. If the alien is under 21 at the time of the termination of his/her marriage, then his/her petition will convert to IR-2. If the alien is 21 or older on the date his/her marriage is terminated, an F-3 will convert to F-1 status. For example, if the 19 year-old married son of an Amcit petitioner obtains a divorce before attaining 21, as long as he remains unmarried, the son will be classifiable as an IR-2, even if he does not apply for a visa until age 23.

10. Aliens who qualify as a K-4 child are eligible for child status protection under this section if a separate immediate relative petition has been filed in their name and they are accompanying a K-3 parent.

Section 3-Preference and DV Categories

11. Section 3 of the CSPA applies to:
   -- F2A principal applicants;
   -- derivative applicants in all family- and employment-based preference categories; and
   -- derivative applicants in DV cases.

12. This section provides relief from age-out by establishing the alien’s age as of the date a visa becomes available for the alien (or the alien's parent), minus the number of days that the petition was pending. Only those aliens who seek to acquire the status of an alien lawfully admitted for permanent residence within one year of visa availability are eligible for relief under this section. For this section, visa availability is defined to require both a current priority date and an approved petition. The number of days a petition has been pending is calculated from the date the petition was filed to the date the petition is adjudicated. "Seeks to acquire the status of an LPR" will be defined to mean apply for an immigrant visa, i.e., the date of visa application.

13. Advisory Opinions. Because the interpretation of Section 3 is the subject of ongoing discussions with the Service, the Department requests that, until advised otherwise, posts seek an Advisory Opinion from CA/VO/L/A on cases that fall within this section of the CSPA.

14. The Department’s initial interpretation of this section can be illustrated by the following two examples.
If an LPR parent filed an I-130 in 1998 when his son/daughter was 20 and the visa became available today and the I-130 was never adjudicated until today, the beneficiary's "age" when determining preference category would be equal to the age of the alien on the date the priority date became current (24 years) minus the period the petition was pending adjudication (4 years), which would mean the alien's age would be deemed to be 20. The alien, however, would only benefit from this special treatment if s/he applies for a visa within one year of the visa becoming available. Even though the beneficiary in this example is chronologically age 24 today (the date on which his visa becomes available) by applying the formula in section 3, he is only 20 because his chronological age on the date his visa becomes available has been reduced by the number of days his petition has been pending (4 years).

If, however, this same Form I-130 had been adjudicated in 2000, the beneficiary's "age" would be 22 when determining preference category. Although the beneficiary is chronologically 24 (his age on the date his visa becomes available), his petition was only pending for 2 years, so only two years are deducted from his age at the time the priority date became current, making the alien 22.

15. DV Applicants. Section 3 also applies to derivative DV applicants. Because the DV process differs substantially from the preference process, however, treatment of DV derivatives will also be somewhat different. For the purpose of calculating the period during which the "petition is pending", VO has decided to use the period between the first day of the DV mail-in application period for the program year in which the principal alien has qualified and the date on the letter notifying the principal applicant that his/her application has been selected (congratulatory letter). That period will be subtracted from the derivative alien's age on the date the visa becomes available to the principal alien. The date the visa becomes available will be the first day on which the Department determines the principal alien's selection number becomes eligible for visa processing.

16. V Applicants. While subject to revision, the Department interprets V visa applicants as ineligible for child status protection under this section.

17. Application to Pending cases. The age-out protections of the CSPA apply to the following three classes cases:
-- cases where the petition or visa application was filed on or after the date of enactment (August 6, 2002);
-- cases where the petition was filed prior to August 6, 2002 but was still pending (i.e., not yet approved) on that date; and
-- certain cases where the petition was approved prior to August 6, 2002, but only if a final determination has not been made on the beneficiary's (including derivative beneficiary's) application for a visa or adjustment of status prior to that date. At present, VO is interpreting this to mean that an alien whose IV application was denied prior to August 6 because s/he aged out or was otherwise found ineligible cannot benefit from Section 3. However, for this purpose a 221(g) denial will not be considered a final determination. Therefore, an alien whose application was filed prior to August 6, but was refused on 221(g) grounds will receive the benefit of Section 3 so long as the application was otherwise pending on August 6. Under this interpretation, beneficiaries (and derivative beneficiaries) of petitions approved prior to August 6, 2002 who never applied for a visa prior to August 6 because they had aged out will receive no benefit from Section 3 and cannot apply afterward in order to receive a benefit. (Note that these are preliminary interpretations and could change after further interagency discussions). DV applicants applying on or after August 6 or whose cases were pending on that date will receive the benefit of Section 3.

18. Applicability of Section 424 of the USA Patriot Act. The 45 day age-out protection afforded by section 424 will continue to apply to all relevant cases. Where both are available to an applicant, the more generous benefit should be applied to the alien's case.
19. Section 6 of the CSPA addresses the problem encountered by Philippine F2-B applicants whose parents naturalize. Automatic conversion from F2B to F1 at the time of their parent's naturalization disadvantages these beneficiaries because the cutoff date for Philippine F1s is earlier than the cutoff date for Philippine F2Bs. Although this section continues to allow for the automatic conversion of preference categories when a parent naturalizes, it also permits the son/daughter beneficiary to make a request to the Attorney General that such conversion not occur. At this time, it is not known how this request to the Attorney General will be made or what formalities will be required.

20. The following will illustrate what a beneficiary would consider before deciding whether to opt-out of an automatic conversion from second to first preference:

-- Assume that for August 2002, the F2B cutoff date for French unmarried sons and daughters of LPRs is December 8, 1993 and the F1 cutoff date for French unmarried sons and daughters of Amcits is July 1, 1996. Thus, if a LPR files a Form I-130 for his 14-year old, unmarried French son and then naturalizes, the son's immigrant category would automatically convert from the second preference to the first preference. In this example, this would work to the advantage of the beneficiary and he would likely not request that the automatic conversion be prevented in his case.

-- In the cases involving Filipino unmarried sons or daughters, the outcome of automatic conversion from second to first preference is very different. For example, for August 2002, the F2 cutoff date for Filipino unmarried sons and daughters of LPRs is December 3, 1993, but the F1 cutoff date for Filipino unmarried sons and daughters of Amcits is November 1, 1989. In this instance, the son would likely request that the automatic conversion from second to first preference not occur.

IMPLEMENTATION
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21. As with the 45-day age-out cases described in ref B, there will not be any short-term fix made to the IV system for processing these visas. Currently, the IV system locks cases for children who become 21 years old and converts age-out cases to an adult son or daughter category on an applicant's twenty-first birthday. Posts will therefore manually issue by typewriter any case that might qualify under the Child Status Protection Act, as the system will not adjust to allow consular processing for these cases. The Department is studying changes to the IV software that will allow the system to be used to issue these visas. The following are instructions on how to issue IVs manually for these cases: Use NIV to do the requisite CLASS namecheck. Print out the namecheck results. Retain one copy of the namecheck at post and insert a second copy into the IV packet normally produced for IV applicants; the adjudicating consular officer should initial both copies of the namecheck results. Type all the information normally required on a blank OF- 155F form. Add the notation: P.L. 107-208, Child Status Protection Act to IVs issued under this act. Use the space on the OF-155A directly under Immigrant Visa and Alien Registration at the top center of the form. For K-4 beneficiaries, the MRV should be similarly annotated.

22. To avoid problems for these applicants at POEs, posts will include a memorandum as follows and place the memo on top of the manually issued IV foil: (begin text of memo)

To: INS Inspector, POE From: US Embassy/Consulate (Name)
Date: Subject: Child Status Protection Act, Age-outs. This visa was issued manually due to the constraints of the Child Status Protection Act, and information will not appear in IV DataShare. If you have any questions,
please contact the originating U.S. Embassy or Consulate or the INS Forensic Document Lab. (end text of memo to INS). 23. Posts must report all manual issuances under the Child Status Protection Act to the Department before the issued visa foil is given to the applicant. For all IVs manually issued under Section 424, post should send an e-mail to the CA Support Desk and ask that a ticket be opened to make a change in post’s database. Provide name and DOB of applicant, visa class, case number, A-number (IV foil number), date of issuance, date of expiration, foreign state chargeability, and USERID of authorizing/adjudicating officer.

24. In order to avoid unnecessary work for posts and to minimize the possibility of issuances not making it into the database in a timely fashion, visas should be issued to expire after the actual 21st birthday only when the applicant has either already reached his or her 21st birthday or post believes that the applicant will likely not be able to enter the U.S. prior to turning 21.

25. In order to ensure that applicants do not lose a benefit to which they are legally entitled, in cases where posts issue visas expiring on the actual 21st birthday to applicants who can benefit from the Child Status Protection Act, the applicants should be provided with a letter or other written statement informing them that, should they be unable to enter U.S. prior to turning 21, they are entitled to issuance of a new visa with a later expiration date. In such cases posts should issue a replacement visa without charging the applicant for the new visa. Details of the replacement visa should be reported to the CA Support Desk as per instructions in reftel. The letter provided to the applicant should include the following language:

"Eligibility in the immigrant visa category under which your visa has been issued would normally terminate on your 21st birthday. The visa you are being issued today allows you to enter the United States only until the day prior to your 21st birthday. However, under the provisions of the Child Status Protection Act you can continue to qualify for immigration benefits past your 21st birthday. If for any reason you are unable to enter the United States with your immigrant visa prior to turning 21, this office can issue you a replacement visa valid for a limited additional period past your 21st birthday. If you find that you will be unable to travel prior to your 21st birthday, please contact this office prior to your 21st birthday by (post should insert contact information here) so that we can issue you a replacement visa."

26. NVC will attempt to determine if it is holding "age-out" cases that meet the criteria of the CSPA and should now be forwarded to post. Posts should also make every effort to identify files held at post which include applicants who can benefit from the CSPA, in particular:

--Cases in which post denied a visa on or after August 6 because an applicant aged out;
--Cases pending final adjudication from which derivative beneficiaries have been excluded because they turned 21.
--Cases pending at post which have been reclassified from IR-2 to F-1 or from F-2A to F-2B because an applicant turned 21.

27. Minimize considered.
POWELL
DOS Issues Revised Cable on Child Status Protection Act

Cite as "AILA InfoNet Doc. No. 03020550 (posted Feb. 5, 2003)"

R 170109Z JAN 03
FM SECSTATE WASHDC
TO ALL DIPLOMATIC AND CONSULAR POSTS
SPECIAL EMBASSY PROGRAM
AMEMBASSY DUSHANBE
AMEMBASSY KHARTOUM
AMEMBASSY KABUL
AMEMBASSY CARACAS

UNCLAS STATE 015049

VISAS - INFORM CONSULS

E.O. 12958: N/A
TAGS: CVIS
SUBJECT: CHILD STATUS PROTECTION ACT: ALDAC #2

REF: (A) 02 STATE 163054  (B) 02 STATE 123775

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SUMMARY
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1. This cable reiterates/clarifies the main points of the Child Status Protection Act of 2000 ("CSPA"), limits the mandatory advisory opinion requirement to a narrow class of cases, and announces revisions to certain important aspects of the preliminary guidance set forth in reftel.

2. Posts should note that the CSPA requires a three-step process:
   -- First, determine whether the CSPA applies. Under the revised guidance, the CSPA may apply to any case involving a petition approved on or after August 6, 2002. The CSPA may also apply to certain cases involving petitions approved before August 6, 2002, but only if either:
     (a) the alien aged out on or after August 6, 2002, or
     (b) the alien aged out before that date but had applied for a visa before aging out and was refused under 221(g).
   If the petition was approved before August 6, 2002 and the alien aged out before that date and failed to apply before aging out (or applied after aging out and was denied on that basis), then the CSPA would not apply. If the alien applied before August 6, 2002 and was refused on any ground other than 221(g), the case must be submitted for
an advisory opinion.
-- Second, if the CSPA applies to the case, then
calculate the alien's age under the CSPA.
-- Third, in Section 3 (preference and DV) cases, verify
that the alien sought LPR status within one year of visa
availability. Under the revised guidance, this generally
means that the applicant must submit the completed DS-230,
part 1 (instead of having to file a visa application)
within one year of a visa becoming available. However, if
the principal applicant adjusted to LPR status in the U.S.
and the derivative seeks a visa to follow to join, then
the law shall be interpreted to require generally that the
principal have filed a Form I-824 for the derivative
within one year of a visa becoming available.

3. Posts should also note the following:
-- Under the revised guidance, K-4 applicants (like V
applicants) cannot benefit from the CSPA.
-- Aliens who would convert to IR-2 status from F1 as a
result of the CSPA may opt out of that conversion, which
would allow them to bring in children as F1 derivatives.

END SUMMARY

How to Approach a Potential CSPA Case

4. Ref A Aldac has generated numerous queries, and
Department has reconsidered some of its preliminary
guidance. Accordingly, Department is providing further
clarification of the CSPA rules.

5. Depending on the visa category, there are two or three
basic steps to approaching a CSPA case:
-- First, apply the rules in Section 8 of the CSPA to
determine whether the CSPA applies to the case. (See
paras 6-11 below.)
-- Second, if the CSPA applies, calculate the alien's
age, using the age formula in either CSPA Section 2 (for
unmarried offspring of Amcit petitioners) or CSPA Section
3 (for preference and DV cases). (See paras 12-14.)
-- Third, if the case is a Section 3 (preference or DV)
case, verify that the alien has sought LPR status within
one year of visa availability. (See paras 15-25.)

Step One: Does the CSPA Apply to the Case?

6. The CSPA went into effect on August 6, 2002. The law
applies to immigrant visa cases initiated after that date
but has a somewhat more limited applicability to cases
that were already in progress on the day the law went into effect. CSPA Section 8 defines which cases are covered by the CSPA. As stated in paragraph 17 of Ref A, Section 8 provides that the CSPA applies to cases where either:

- the petition was filed after 8-6-02; or
- the petition was filed before 8-6-02 and was still pending (i.e., not yet approved) on that date; or
- the petition was approved before 8-6-02, but only if a final determination had not been made on the beneficiary’s application before that date.

7. Most of the cases posts are likely to see in the first few years, at least in the family-based preference category, are cases in the third group -- in which the petition was approved before 8-6-02. It is important that as a threshold matter, posts closely examine such cases to determine whether the CSPA would even apply to the case.

8. Paragraph 17 of Ref A advised that on a preliminary basis, Department would interpret CSPA Section 8 to mean that beneficiaries whose petitions had been approved prior to 8-6-02 could not benefit from the CSPA unless the beneficiary actually filed an immigrant visa application before 8-6-02 and no "final determination" had been made on that application. This preliminary interpretation has since been refined. Under the revised interpretation, if the petition was approved before 8-6-02, then the CSPA will not apply unless either:

(a) the alien aged out on or after 8-6-02, or
(b) the alien aged out before 8-6-02 but, prior to aging out, had applied for an immigrant visa and was refused under 221(g).

9. If the petition was approved before 8-6-02 and the alien aged out before that date and either failed to apply for a visa or applied after aging out and was refused on that ground, then the CSPA would not apply. If the alien applied before August 6, 2002 and was refused on some other ground besides age-out or 221(g) grounds but that refusal ground has been overcome/waived (such as an overcome 212(a)(1), 212(a)(4), 212(a)(5) refusal, or a 212(a) refusal that was subsequently waived), then the case should be submitted to CA/VO/L/A for an advisory opinion. (If the alien was refused on a ground that has not been overcome or waived, then the alien could not qualify for a visa anyway, regardless of whether the alien's age would be under 21 under the CSPA, and therefore there would be no need to submit an AO request on the CSPA issue.)

10. NOTE: In determining whether an alien aged out before or after August 6, 2002, post should keep in mind
that the special 45-day Patriot Act rules discussed in Ref B Aldac still apply. Under those rules, if the alien is the beneficiary of a petition filed before Sep. 11, 2001, the alien remains eligible for child status for 45 days after turning 21. For example, an alien who turned 21 on August 5, 2002, but who was the beneficiary of a petition filed before Sep. 11, 2001, would not actually age out until 45 days after the alien's 21st birthday, i.e., on September 19, 2002. Therefore, even though the alien in this example turned 21 before the CSPA went into effect on August 6, 2002, the alien did not age out until after that date, and therefore the CSPA would apply to that alien's case, regardless of whether or not the alien had filed an immigrant visa application before August 6, 2002.

11. Posts should note that whether the alien aged out before or after 8-6-02, and whether the alien applied for a visa before 8-6-02, are only relevant if the petition was approved before 8-6-02. If the petition was approved on or after 8-6-02, then the CSPA may be applied to the case, even if the alien aged out before 8-6-02 or even if the alien did not apply for a visa before 8-6-02.

Step Two: Assuming the CSPA Applies, Does the Alien's Age Come Out to Be Under 21, Using the CSPA Formulas?

12. The following is a simplified summary of how to calculate the alien's age in cases where the CSPA has been found to apply:

CSPA Section 2 Cases:

-- For IR-2/3/4: Age is determined using the age the alien had on the date the petition was filed. (As noted in reftel, the CSPA would very rarely be of practical use in IR-3/-4 orphan cases.)

-- For F2 Principal Cases Where the Petitioner Naturalizes and the Applicant Could Convert to Either IR-2 or F1: Age is determined using the age the alien had on the date the petitioner naturalized.

-- For F3 Principal Cases Where the Applicant Divorces and the Applicant Could Convert to Either IR-2 or F1: Age is determined using the age the alien had on the date of the divorce.

CSPA Section 3 Cases:

-- For Principals in F2A Cases, and For Derivatives in Preference and DV cases: Age is determined by taking the
age of the alien on the date that a visa first became available (i.e., the date on which the priority date became current and the petition was approved, whichever came later) and subtracting the time it took to adjudicate the petition (time from petition filing to petition approval).

-- Department recognizes that this is a somewhat complicated formula. To assist posts in applying the formula, a worksheet for calculating the alien's CSPA age in Section 3 preference cases is appended at the end of this AILAC. (Paragraph 15 of Ref A contains the special rules for calculating the age of derivatives in DV cases. Posts are reminded that DV visas cannot be issued after the end of the fiscal year, regardless of whether a derivative might benefit from age-out protection under the CSPA.)

13. If posts need to determine the date on which a particular priority date first fell within the cut-off date for purposes of determining what the alien's age was on the date the case became current, posts should refer to their monthly Visa Bulletin files, or may access this information through the CCD - go to http://CADATA.CA.STATE.GOV, then go to the "Public" tab and scroll down to the "IV Cutoff Dates by Visa Class" and enter a post code and a time period. If post's records or this on-line site do not have the necessary information, posts may contact CA/VO/F/I for further assistance on historical movement of cut-off dates.

14. It is important to note that once it is determined that CSPA applies and the alien's age is determined, the alien's age does not change. The alien retains the same age throughout the pendency of the case. (While the CSPA may prevent the alien's age from changing, the alien must of course still meet the other criteria for "child" status, including being unmarried, and therefore if the alien marries, the alien will lose "child" status, even though the alien's age, for immigration purposes, may be under 21 as a result of the CSPA.)

Step 3 (For Preference and DV Cases Only): Did the Alien "Seek LPR Status" (i.e., Submit the DS-230, Part I) Within One Year of Visa Availability?

15. As noted in Ref A, preference and DV applicants cannot benefit from the special age-out rules in the recently enacted CSPA unless, in the words of the statute, they have "sought to acquire the status of an alien
lawfully admitted for permanent residence" within one year of a visa becoming available. (As explained in Ref A, a visa number is considered to become available when the petition has been approved and the priority date is current, whichever comes later.)

16. Paragraph 12 of Ref A stated that for the purposes of this rule, an applicant would be considered to have "sought to acquire [LPR] status" on the date of the visa application, meaning that a preference or DV applicant could not benefit from the CSPA unless the alien filed a visa application within one year of a visa becoming available. However, concerns have since surfaced that difficulties experienced by the applicant in obtaining or adequately completing required documents or government delays in scheduling appointments for applications may prevent an applicant from applying for an immigrant visa within one year of visa availability, thereby causing the alien to be denied the benefits of CSPA age-out protection through no fault of his/her own.

17. To address this concern, Department has reconsidered its preliminary interpretation and has decided that, in cases where the principal applicant's case goes through visa processing rather than adjustment of status, a better interpretation would be to measure the date on which the applicant first seeks to acquire LPR status as the date on which the applicant submits the completed DS-230, Part I. Therefore, if a preference or DV visa applicant submits the DS-230, Part I within one year of visa availability, then the applicant would be eligible for CSPA benefits, assuming the CSPA otherwise applies to the case. (Note: In older cases that pre-date the creation and use of the DS-230 Part I, posts may look to predecessor versions of or precursors to the DS-230 Part I, such as the OF-230 Part I or the old OF-179 Biographic Data Sheet for Visa Purposes.)

18. Section 3 expressly requires that the alien seeking CSPA benefits take the necessary steps to seek LPR status within the one-year time frame. In cases involving derivatives, it is not enough that the principal may have taken the required steps within the one-year time frame -- the derivative him/herself must have taken those steps (or the principal must have taken the required step specifically for the derivative, acting as the derivative's agent). Therefore, if the applicant seeking CSPA benefits is a derivative, then the determining factor is the submission of a completed DS-230, Part I, that specifically covers the derivative. The submission of a DS-230 Part I that covers the principal will not serve to
19. Similarly, derivative applicants seeking to follow to join a principal who was already issued a visa are required to establish that a DS-230 Part I was sent specifically for them (not for the principal) within one year of visa availability. In cases where no record of the case exists at post, it would be the applicant's burden to establish that this requirement was satisfied. The principal alien's A file at INS may contain some documentation relevant to this issue (e.g., an OF-169 signed by the principal applicant but expressly listing the derivative's name as one of the family members intending to immigrate). It would be the alien's burden to present such evidence.

20. If it has been established that a DS-230 Part I was specifically submitted for an alien seeking CSPA benefits, posts must then verify that the Form was submitted within one year of visa availability. To determine the date on which the alien submitted Part I of the DS-230, post may normally refer to the "OF-230 P1 Received" date recorded in the IV system. If a DS-230 Part I was in fact submitted for the alien seeking LPR benefits and the submission date in the IV system is less than a year after visa availability, then the alien normally will have satisfied the requirements of Section 3 and may benefit from the CSPA, absent evidence that the response date related only to the principal and that the DS-230 Part I for the derivative was submitted at some later time subsequent to the principal's response to Packet III. On the other hand, if the DS-230 Part I response date is more than a year after visa availability, then the alien normally would not be eligible for Section 3 CSPA benefits, unless the alien can show that he/she actually made the submission at an earlier date that was within one year of visa availability.

21. Since Packet III (now referred to as the Instruction Package for Immigrant Visa Applicants) is sent out when the priority date falls within the qualifying date, there will be cases when the applicant actually submits the DS-230, Part I before the priority date is current, i.e., before a visa has even become available. Any case in which the applicant's DS-230, Part I is received before the priority date is current would necessarily meet the requirement that the alien seek LPR status within one year of a visa number becoming available.

22. The requirement that the preference or DV applicant submit the DS-230, Part I within one year of visa availability shall apply only in cases where the principal
applicant was processed for a visa at a consular post abroad. If the principal applicant adjusted status in the U.S. and a derivative is applying for a visa abroad to follow-to-join, then the date on which the derivative will be considered to have sought LPR status for purposes of satisfying CSPA Section 3 will generally be the date on which the principal (acting as the derivative beneficiary’s agent) filed the Form I-824 that is used to process the derivative’s following to join application. Therefore, in cases involving a derivative seeking to follow to join a principal who adjusted in the U.S., the derivative can benefit from the CSPA if the principal filed a Form I-824 for the beneficiary within one year of a visa becoming available (i.e., within one year of the case becoming current or petition approval, whichever is later). The instructions to Form I-485 (the adjustment application) advise aliens adjusting status in the U.S. who have derivatives abroad to file a Form I-824 for such derivatives, and the I-485 Form indicates that that Form I-824 can be filed simultaneously with the Form I-485 adjustment application. Therefore, the date on which the I-824 is filed may be the same date that the principal filed the I-485 adjustment application.

23. As there are other ways to initiate a following-to-join case besides the filing of an I-824, it may be possible for a derivative alien to satisfy the one-year time limit for seeking LPR status in other ways. If posts encounter cases involving derivatives following to join an adjusted principal who have not had an I-824 filed on their behalf within the required time frame but who have taken some other concrete step to obtain LPR status for themselves within the one year time frame, posts should submit such cases to the Department (CA/VO/L/A) for an advisory opinion.

24. Posts should keep in mind that the mere fact that an alien satisfies the requirement of seeking LPR status within one year of visa availability does not mean the alien has not aged out. Rather, it simply means that the alien is potentially eligible for CSPA treatment. Posts must also verify that the CSPA applies to the case (see paras 6-11 above), and, that the alien’s CSPA age equivalent is under 21 (see paras 12-14 above).

25. Posts are also reminded that the CSPA requirement that the alien seek LPR status within one year of a visa becoming available applies only to preference and DV cases. (It has little practical effect in DV cases, given the requirement that DV cases be processed within one fiscal year.) The requirement does not apply to IR
applicants, and therefore the date that an IR applicant submits the DS-230, Part I, is not relevant to CSPA applicability.

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Mandatory Advisory Opinion No Longer Required, Except in Limited Cases

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26. Paragraph 13 of Ref A instructed posts to seek advisory opinions from CA/VO/L/A in all cases that fall within section 3 of the CSPA. The Department is changing this policy. Because the guidance in this Aldac is sufficiently detailed for posts to process these cases, advisory opinions are no longer required in CSPA cases, except as noted in paras 9 and 23 above. Other than in the narrow classes of cases referred to in those paragraphs, posts may accord CSPA benefits in any case in which the conoff finds the alien eligible for such benefits, according to the guidance provided above, without the need for an advisory opinion.

27. However, if post has any questions about the applicability of the CSPA in a particular case, Department (CA/VO/L/A) welcomes voluntary advisory opinion requests. Any such requests must have, at a minimum, the following information:
   -- the alien's date of birth;
   -- the immigrant visa category;
   -- whether the alien is a principal or derivative;
   -- whether the petitioner naturalized and if so, the date of naturalization;
   -- the alien's marital status and, if ever married, the dates of marriage and dates of divorces;
   -- the date the petition was filed;
   -- the date the petition was approved;
   -- the date the priority date became current;
   -- the alien's age on the date that a visa became available (i.e., age on date of petition approval or on date priority date became current, whichever is later);
   -- the date the alien submitted the DS-230 Part I (or, in following to join adjustment cases, the date the adjusting principal filed the I-824);
   -- the date(s) the principal and relevant derivative alien applied for the IV;
   -- If any IV application(s) were made prior to the effective date of the CSPA, the outcome of the prior application(s).

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Correction to Example in Reftel

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28. Department would also like to clarify some confusion engendered by a typographical error in an example provided in the portion of Ref A relating to Section 6 of the CSPA, which addresses the problem currently encountered by Filipino applicants whose parents naturalize. Automatic conversion from F2B to F1 status can disadvantage an applicant in these circumstances due to the less favorable cut-off dates for Filipino F1s. To illustrate how automatic conversion usually benefits an applicant whose parent naturalizes, paragraph 20 of ref tel described a case involving a "14 year-old" unmarried French applicant. This, however, was a typographical error. The age that was supposed to be used in the example was 24, not 14. Section 6 would have no relevance to a case involving a 14 year old, since a 14 year old whose parent naturalizes would convert from F2A to IR-2, not F2B to F1, and the child's case would be current as a result of the conversion.

Can an Alien Opt Out of Section 2 CSPA Age-Out Benefits?

29. Some posts have noted that an IR-2 who aged out and converted to F1 and who now benefits from the special age out rules in Section 2 of the CSPA may prefer not to convert back to IR-2 category. Specifically, F1 aliens with children may prefer to remain F1s so that their children can accompany them to the U.S. as F1 derivatives. That would not be possible if the alien's case were converted to IR-2 because IR-2s cannot have derivatives.

30. Although there is an opt out provision in Section 6 of the CSPA for F2Bs who do not wish to convert to F1 upon the petitioner's naturalization, there is no express opt out provision in the CSPA for aliens who would prefer to remain F1s rather than converting to IR-2 under the special age-out protection rules in CSPA Section 2. However, in Department's view, such aliens may still be processed as F1s, but only if the alien's priority date falls within the F1 cut-off date.

CSPA Does Not Apply to Vs or to K-4s

31. Department has reconsidered the guidance in ref tel and has concluded that the CSPA would not, repeat, not apply to K-4 applicants. Although it may make practical sense to allow such aliens to benefit if an IR-2 petition has been filed on their behalf, under the literal language of the statute the CSPA applies only to the immigrant visa
categories specified in the statute and the law does not contain a provision allowing for application to K-4 or other nonimmigrant visa cases. Therefore, in Department's view, we do not have the discretion to apply the law to K-4s, absent a legislative amendment. As indicated in ref tel, the CSPA also does not apply to V visa applicants, even though they are also beneficiaries of an F2A petition. However, both Vs and K-4s can benefit from the CSPA at the time they ultimately apply for IR-2 or F2 immigrant visas.

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Cases at NVC
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32. As noted in ref tel, Department is working with NVC to identify cases at NVC that appear to meet the criteria for CSPA and which now should be forwarded to post as F1 cases that have converted back to IR-2 or F2B cases that have converted back to F2A. Per ref tel, posts should make a similar effort to identify cases that can benefit from the CSPA, such as cases where derivatives were recently denied or removed from cases as over-aged or petitions that had been converted to noncurrent F1 and F2B cases which may now be converted back to IR-2 or F2A cases again.

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Sample Worksheet for Calculating Age in Section 3 Cases
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33. The following is a sample worksheet that may be useful in calculating age in Section 3 cases (for principals in F2A cases, and for derivatives in all family-based and employment-based preference categories):

1. Alien's Date of Birth:
2. Date Petition Filed:
3. Date Petition Approved:
4. Length of Time Petition Pending (#3 minus #2):
5. Date Petition Became Current:
6. Date Visa Became Available (Later of #3 or #5):
7. Age of Alien on Date Visa Became Available (#6 minus #1):
8. Age for CSPA purpose: Age at time Visa Became Available minus Length of Time Petition Pending (#7 minus #4):

CAUTION: Only apply the Age in #8 if both:
1. The alien returned the completed DS-230, Part I, within one year of visa availability (or an I-824 was filed on the alien's behalf within that time frame, in cases involving a derivative following to join a principal
who adjusted in the U.S.); and

2. Either:
   (a) the petition was not yet approved on Aug 6, 2002, or
   (b) the petition was approved before that date but the alien seeking CSPA benefits either (i) aged out on or after that date or (ii) aged out before that date but, before aging out, applied for an immigrant visa and was refused under 221(g).

34. Minimize considered.

POWELL

NNNN
MEMORANDUM FOR REGIONAL DIRECTORS
DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER,
IMMIGRATION SERVICES
DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

FROM: Johnny N. Williams /s/
Executive Associate Commissioner
Office of Field Operations

SUBJECT: The Child Status Protection Act

Purpose

On August 6, 2002, President Bush signed into law the Child Status Protection Act (CSPA) (attached). This law amends the Immigration and Nationality Act (Act) by changing how an alien is determined to be a child for purposes of immigrant classification. This law changes who can be considered to be a child for the purpose of the issuance of visas by the Department of State and for purposes of adjustment of status of aliens by the Immigration and Naturalization Service (Service). The purpose of this memorandum is to provide preliminary guidance to Service officers concerning the amendments made to the Act by the CSPA. While this memorandum will provide examples of cases that may be effected by the CSPA, it is impossible to anticipate and address every possible scenario. As a note, the sections of the CSPA that address children of asylees and refugees will be addressed in a separate memorandum.

Immediate Relatives

Section 2 of the CSPA addresses the rules for determining whether certain aliens are immediate relatives. This section was enacted to prevent a child from “aging-out” due to Service processing delays. Specifically, the Service will now use the date of the filing of a Form I-130, Petition for Alien Relative, to determine the age of a beneficiary adjusting as the child of a United States citizen (USC). For example, if a Form I-130 is filed for the child of a USC when the child is 20, that child will remain eligible for adjustment as an IR-2 or as an IR-7, even if the adjustment does not occur until after the child turns 21, provided the child remains unmarried.

Section 2 of the CSPA also amends the Act to allow the children of individuals who
naturalize to remain classifiable as IR-2s or IR-7s if the parent naturalized while the child was under 21. The Service will now use the child’s age on the date of the parent’s naturalization to determine whether the child will be eligible for immediate relative status. For example, if a lawful permanent resident (LPR) files a Form I-130 for her 16-year old daughter and then naturalizes when the daughter is 20, that daughter will remain eligible for adjustment as an IR-2 or as an IR-7, even if the adjustment does not occur until after she turns 21.

Section 2 of the CSPA also amends the Act to allow married children of USCs to use their age on the date of the termination of their marriage when determining under which immigrant category to adjust. For example, if a USC files a Form I-130 for his 18-year old married son and that son subsequently obtains a divorce prior to turning 21, that son will be classifiable as an IR-2 or as an IR-7, even if the adjustment does not occur until after he turns 21.

Preference Categories

Section 3 of the CSPA addresses whether certain aliens will be able to adjust as children of LPRs even if they are no longer under the age of 21. This section is different from Section 2 of the CSPA in that the Service will not be looking at the Form I-130 receipt date to determine whether an individual over the age of 21 can continue to be classified as a child for immigration purposes. Rather, the beneficiary’s age will be locked in on the date that the priority date of the Form I-130 becomes current (which is the first day of the month that the priority date became current), less the number of days that the petition is pending, provided the beneficiary seeks to acquire the status of an LPR within one year of such availability. For example, if a Form I-130 was filed in 1998 when the child was 20, the priority date became available today, and the Form I-130 was not adjudicated until today, the beneficiary’s “age” when determining preference category would be 20 (the beneficiary is 24 today, but the petition was pending for the 4 years), provided the “child” applies for an immigrant visa or for adjustment of status within one year of the priority date becoming available. If, however, this same Form I-130 had been adjudicated in 2000, the beneficiary’s “age” when determining preference category would be 22 (the beneficiary is 24 today, but the petition was pending for only 2 years).

It is important to remember that section 3 of the CSPA requires that the beneficiary apply for adjustment of status or for an immigrant visa within one year of the date the priority date became available. Thus, if a Form I-130 was filed on behalf of the child of an LPR, the priority date became available 3 years ago when the beneficiary was still under 21, but that beneficiary did not apply for adjustment of status within one year of the priority date becoming available and has since turned 21, the provisions of the CSPA will not apply to this beneficiary.

Unmarried Sons and Daughters of Naturalized Citizens

Section 6 of the CSPA provides for the automatic transfer of preference categories when the parent of an unmarried son or daughter naturalizes, but also provides the unmarried son or
daughter the ability to request that such transfer not occur. Examples follow:

Example 1: For August 2002, the priority date for unmarried sons and daughters of LPRs is December 8, 1993 and the priority date for unmarried sons and daughters of USCs is July 1, 1996. Thus, if a LPR files a Form I-130 for his 24-year old, unmarried French son and then naturalizes, the son’s immigrant category would automatically transfer from the second preference to the first preference. This would be to the advantage of the beneficiary and he would most likely not prevent such automatic conversion.

Example 2: For August 2002, the priority date for Filipino unmarried sons and daughters of LPRs is December 8, 1993, but the priority date for Filipino unmarried sons and daughters of USCs is November 1, 1989. Thus, if a LPR files a Form I-130 for his 24-year old, unmarried Filipino son and then naturalizes, the son would most likely request that the automatic conversion to the first preference category not occur because a visa would become available to him sooner if he remained in the second preference category than if he converted to the first preference category. In this case, the son would continue to be considered a second preference immigrant.

Effective Date

The CSPA took effect on August 6, 2002. Thus, any petition that is currently pending with the Service is subject to the provisions of the new law. Also, any petition that has already been approved by the Service, but where no final action on the beneficiary’s application for adjustment of status or for an immigrant visa has been taken, is subject to the provisions of the new law.

Additional procedural guidance will be forthcoming shortly. Also, as previously noted, guidance for sections 4 and 5 of the CSPA addressing eligibility for asylee and refugee status will be addressed in a separate memorandum. Individuals with questions relating to the implementation of this memorandum at Service Centers should contact the Immigration Service Division at 202-514-4589. Questions relating to the implementation of this memorandum at District offices should be directed to the Immigration Services Division at 202-514-2982. Any questions relating to the policy of this memorandum should be directed to the Residence and Status Branch of the Office of Adjudications at 202-514-4754.

Attachment
U.S. Department of Justice
Immigration and Naturalization Service

HQADN 70/6.1.1

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

February 14, 2003

MEMORANDUM FOR REGIONAL DIRECTORS
DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER,
IMMIGRATION SERVICES DIVISION
ACTING DIRECTOR,
OFFICE OF INTERNATIONAL AFFAIRS

FROM: Johnny N. Williams /s/
Executive Associate Commissioner
Office of Field Operations

SUBJECT: The Child Status Protection Act – Memorandum Number 2

Purpose

On August 6, 2002, the President signed into law the Child Status Protection Act (CSPA), Public Law 107-208, 116 Stat. 927, which amends the Immigration and Nationality Act (Act) by permitting an applicant for certain benefits to retain classification as a “child” under the Act, even if he or she has reached the age of 21. On September 20, 2002, this office issued a memorandum providing preliminary guidance to Immigration and Naturalization Service (Service) officers concerning the amendments made to the Act by the CSPA. The purpose of this memorandum is to provide additional guidance to Service officers concerning this new law. As with the previous memorandum, while this memorandum will provide examples of cases that may be affected by the CSPA, it is impossible to anticipate and address every possible scenario. This memorandum should be read in conjunction with the September 20, 2002, memorandum (attached).

CSPA Coverage

In determining whether an alien’s situation is covered by the CSPA, begin the analysis by using section 8 of the CSPA. 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, 2002.1

1In determining whether an alien aged out before or after August 6, 2002, officers should keep in mind the special 45-day Patriot Act rules discussed in section 424 of the USA PATRIOT Act. Under this rule, if the alien is the beneficiary of a petition filed before Sep. 11, 2001, the alien remains eligible for child status for 45 days after
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. “Pending” for purposes of the visa petition means agency action on the petition, including an appeal or motion to reopen filed with the Administrative Appeals Office (AAO) or the Board of Immigration Appeals, if such appeal or motion was filed and/or pending on August 6, 2002. “Final determination” for purposes of the adjustment application means agency approval or denial issued by the Service or Executive Office for Immigration Review.

Inapplicability of the CSPA

Nonimmigrant visa (e.g. K or V)\(^2\), NACARA, HRIFA, Family Unity, and Special Immigrant Juvenile applicants and/or derivatives will not benefit from the provisions of the CSPA.

Immediate Relatives

Section 2 of the CSPA addresses eligibility for retaining classification as an immediate relative. The CSPA does not apply to an alien obtaining K2 or K4 visas or extensions. While nothing would necessarily prohibit an alien who once was a K4 from seeking to utilize the CSPA upon seeking adjustment, an alien who is a K2 cannot utilize the CSPA when seeking to adjust.

Preference Categories

Direct Beneficiaries

Section 3 of the CSPA addresses whether certain aliens will be able to adjust as a “child” of a lawful permanent resident (LPR) even if they are no longer under the age of 21. As discussed in the previous memorandum, the beneficiary’s “age” is to be calculated for CSPA purposes by first determining the age of the alien on the date that a visa number becomes available. The date that a visa number becomes available is the first day of the month of the Department of State (DOS) Visa Bulletin, which indicates availability of a visa for that

\(^2\) Under the literal language of the statute, the CSPA applies only to immigrant visa categories specified in the statute and the law does not contain a provision allowing for its application to V visa/status, K, or other nonimmigrant visa cases.
preference category. Of course, if upon approval of the Form I-130, Petition for Alien Relative, a visa number is already available according to the DOS Visa Bulletin, the date that a visa number becomes available is the approval date of the Form I-130. From that age, subtract the number of days that the Form I-130 was pending, provided the beneficiary files a Form I-485, Application to Register Permanent Residence or Adjust Status, based on the subject petition, within one year of such visa availability. The “period that a petition is pending” is the date that it is properly filed (receipt date) until the date an approval is issued on the petition.

**Derivative Beneficiaries – Family and Employment-Based**

In addition to the direct beneficiary family-based preference category examples provided in the previous memorandum and above, section 3 of the CSPA also applies to derivative beneficiaries in both family-based and employment-based preference categories. Just as with the case of the Form I-130, with an adjustment based upon an approved Form I-140, Immigrant Petition for Alien Worker, [and other immigrant petitions filed under section 204 of the Act for classification under sections 203(a), (b), or (c) of the Act], the beneficiary’s age is to be calculated by first determining the age of the alien on the date that a visa number becomes available. The date that a visa number becomes available is the approval date of the immigrant petition if, according to the DOS Visa Bulletin, a visa number was already available for that preference category on that date of approval. If, upon approval of the immigrant petition, a visa number was not available, then the date for determining age is to be the first day of the month of the DOS Visa Bulletin which indicates availability of a visa for that preference category. From that age, subtract the number of days that the petition was pending, provided the beneficiary files a Form I-485,\(^3\) based on the subject petition, within one year of such visa availability. The “period that a petition is pending” for the Form I-140 is the date that the Form I-140 is properly filed (receipt date and **not** priority date) until the date an approval is issued on the petition.

**Visa Availability Date Regression**

If a visa availability date regresses, and an alien has already filed a Form I-485 based on an approved Form I-130 or Form I-140, the Service should retain the Form I-485 and note the visa availability date at the time the Form I-485 was filed. Once the visa number again becomes available for that preference category, determine whether the beneficiary is a “child” using the visa availability date marked on the Form I-485. If, however, an alien has not filed a Form I-485 prior to the visa availability date regressing, and then files a Form I-485 when the visa availability date again becomes current, the alien’s “age” should be determined using the subsequent visa availability date.

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\(^3\) An alien may benefit from section 3 of the CSPA if the alien “sought to acquire” the status of an LPR within one year of visa number availability. The filing of the Form I-485 within one year of the immigration petition approval date (or visa becoming available subsequent to petition approval date, whichever is later) has been determined to meet that definition.
Diversity Visa (DV) Applicants

Section 3 of the CSPA also applies to derivative DV applicants. Because the DV application and adjudication process differs substantially from the application and adjudication process for preference categories, the treatment of DV derivatives will also be somewhat different. For the purpose of determining the period during which the “petition is pending,” Service officers should use the period between the first day of the DV mail-in application period for the program year in which the principal alien has qualified and the date on the letter notifying the principal alien that his/her application has been selected (the congratulatory letter). That period should then be subtracted from the derivative alien’s age on the date the visa became available to the principal alien.

Motions to Reopen and/or Reconsider

As discussed above, if a denial had been issued on an application for adjustment of status based on a petition for classification under section 204 prior to enactment of the CSPA, then the CSPA cannot benefit such alien. As such, it appears that no motion to reopen or reconsider could be granted based solely on an allegation that the alien is now eligible for CSPA consideration. In addition, it appears that no motion to reopen or reconsider could be granted where the motion was filed prior to enactment of the CSPA alleging solely a “due process / Service delay” argument where the alien was properly denied due to not being a child under the law at the time. While such motion may have been pending on August 6, 2002, such motion could not be granted where the alien was properly denied due to not being a child under the law at the time.

Expediting of Cases

The CSPA should dramatically reduce the amount of requests for expeditious adjudication of cases due to an impending age-out. For immediate relative adjustments, as the age is locked in on the date of filing, no expediting should ever be needed. However, given that preference category adjustments retain the possibility of aging out, it is suggested that any practices regarding expedites in existence prior to enactment of the CSPA be continued for preference category cases where the CSPA will not benefit the alien.4

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4 It appears that most preference category aliens will gain significant benefits from the CSPA. However situations could arise where an alien does not meet the section 3 requirements and be on the verge of turning 21. For example, an alien on whose behalf a Form I-140 was filed and approved a year and a half ago today files a Form I-485 and will soon turn 21. Such alien does not qualify for CSPA benefits and may age-out if not adjudicated before the alien’s 21st birthday.
Unmarried Sons and Daughters of Naturalized Citizens

As discussed in the September 20, 2002, memorandum, section 6 of the CSPA provides for the automatic transfer of preference categories when the parent of an unmarried son or daughter naturalizes, but also provides the unmarried son or daughter the ability to request that such transfer not occur. If an unmarried son or daughter does not want such automatic transfer of preference categories to occur upon his or her parent’s naturalization, the Service shall accept such request in the form of a letter signed by the beneficiary. If the beneficiary does make this written request to the Service, then the beneficiary’s eligibility for family-based immigration will be determined as if his or her parent had never naturalized.

Examples

If a Form I-140 was filed in 1998 when the derivative beneficiary was 20, the priority date became available at that time, the Form I-140 was not adjudicated until today, and a Form I-485 was filed one month after approval, the derivative beneficiary’s “age” for CSPA purposes would be 20 (the beneficiary is 24 today, but the Form I-140 was pending for 4 years). Thus, this derivative beneficiary would be able to retain classification as a child.

If a Form I-140 was filed in 1998 when the derivative beneficiary was 20, the Form I-140 was adjudicated in 2000, a visa number was available at the time of approval, and the Form I-485 was filed today, the derivative beneficiary’s “age” for CSPA purposes would be 20 (the beneficiary was 22 at the time the visa number became available, and the Form I-140 was pending for 2 years). This beneficiary, however, could not benefit from the provisions of the CSPA because (s)he did not file a Form I-485 within one year of visa availability. Thus, this derivative beneficiary would be unable to retain classification as a child.

If a Form I-130 was filed in 1998 when the derivative beneficiary was 20, the priority date became available at that time, the Form I-130 was not adjudicated until today, and a Form I-485 was filed nine months after petition approval, the derivative beneficiary’s “age” for CSPA purposes would be 20 (the beneficiary is 24 today, but the Form I-130 was pending for 4 years). Thus, this beneficiary would be able to retain classification as a child.

If a Form I-130 was filed in 1998 when the derivative beneficiary was 20, the Form I-130 was approved one year later, but the priority date did not become available until 2003, the derivative beneficiary’s “age” for CSPA purposes would be 24 (the beneficiary will be 25 at the time of visa availability, but the Form I-130 was pending for 1 year). Thus, this beneficiary would be unable to retain classification as a child.

If a Form I-140 was filed and denied in 1998 when the derivative beneficiary was 20; the petitioner filed a timely appeal with the AAO which, in 2003, sustains the appeal, remands the matter, and approves the petition (on grounds other than the new availability of the CSPA); the
alien files a Form I-485 six months later, then the derivative beneficiary’s “age” for CSPA purposes would be 20 (the beneficiary is 24 today, but the Form I-140 was pending for 4 years). Thus this beneficiary would be eligible to retain classification as a child.

If a Form I-130 was filed and denied in 1998 when the beneficiary was 20; the petitioner filed a timely motion to reopen; today the motion to reopen is granted (on grounds other than the new availability of the CSPA) and the petition is approved; the alien files a Form I-485 nine months later, then the beneficiary’s “age” for CSPA purposes would be 20 (the beneficiary is 24 today, but the Form I-130 was pending for 4 years). Thus, this beneficiary would be eligible to retain classification as a child.

Attachment
Questions and Answers

USCIS Guidance on the Applicability of the Child Status Protection Act (CSPA)

Introduction

The Child Status Protection Act (CSPA) amended the Immigration Nationality Act by changing how an alien is determined to be a child for purposes of immigrant classification. The Act permits an applicant for certain benefits to retain classification as a “child,” even if he or she has reached the age of 21.

Since its enactment on Aug. 6, 2002, USCIS provided several field guidance memoranda regarding the adjudication of immigration benefits in accordance with the CSPA. A memo issued April 30, 2008 made some substantive changes to how USCIS applies CSPA.

Questions and Answers

Q. What is Child Status Protection Act (CSPA)?
   A. A “child” is defined in the Act as an unmarried person under the age of 21. Prior to the enactment of the CSPA on August 6, 2002, anyone who turned 21 at any point prior to receiving permanent residence could not be considered a child for immigration purposes. This situation is described as “aging out.” Congress recognized that many people were aging out because of large backlogs and long processing times for visa petitions. CSPA is designed to protect an individual’s immigration classification as a child when the person aged out due to excessive processing times.

Q. How does CSPA work?

<table>
<thead>
<tr>
<th>If you are...</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate Relative of a Naturalized U.S. Citizen</td>
<td>Preference Classification for Permanent Residence or Derivative</td>
</tr>
<tr>
<td>The child’s age freezes at time the visa petition is filed (Form I-130). If a child becomes an immediate relative through the petitioner’s naturalization or the termination of the beneficiary’s marriage while the beneficiary is under 21, the child’s age freezes on the date such action occurred.</td>
<td>CSPA allows the time a visa petition was pending to be subtracted from an applicant for permanent residence’s biological age so that the applicant is not penalized for the time in which USCIS did not adjudicate the petition.</td>
</tr>
</tbody>
</table>

Q. What are the general requirements to benefit from CSPA?
   A. Several requirements must be met to be eligible for CSPA age out protection:
   - The child must have been the beneficiary (principal or derivative) of a pending or approved visa petition on or after August 2, 2002.
   - The child must not have had a final decision on an application for adjustment of status or an immigrant visa before the date of enactment of the CSPA.
   - The child must “seek to acquire” permanent residence within one year of a visa becoming available. USCIS interprets “seek to acquire” as having a Form I-824, Application for Action on
Q. Are people who did not file an application for permanent residence within one year of the visa becoming available still able to apply under CSPA?
A. Generally, no. However, because of the recent change in interpretation of the CSPA, USCIS will permit certain individuals to apply outside of this one year period.

Individuals that are eligible to apply for permanent residence under CSPA after one year of a visa becoming available include:
- Beneficiaries (or derivatives) of a visa petition that was approved prior to August 6, 2002 AND
- had not received a final decision on an application for permanent residence based on that visa petition prior to August 6, 2002 AND
- the visa became available on or after August 7, 2001 AND
- who met all of the other eligibility requirements for CSPA (see above)

Q. What can I do if I had an application for permanent residence that was denied because I aged out?
A. If you would have been eligible for CSPA protection under the revised guidance, you can file a Motion to Reopen/Reconsider with the office that denied the application with no fee if you meet the following requirements:
- you were the beneficiary of a visa petition that was approved prior to August 6, 2002 and filed for permanent residence after August 6, 2002 AND
- you would have been considered a child under CSPA requirements (see above) AND
- you applied for permanent residence within one year of visa availability AND
- your application was denied solely because you aged out

When an application is denied, the applicant receives a written decision that cites the section of law and describes why the alien is not eligible for the benefit. An application may be denied for one reason or for multiple reasons. If an application was denied for more than one reason including aging-out or for any reason other than for aging out, the alien is not eligible to file a motion to reopen under the new guidance.

Q. Is there a deadline to file under the new guidance?
A. No.
Memorandum

TO: Field Leadership

FROM: Donald Neufeld /s/
Acting Associate Director, Domestic Operations

SUBJECT: Revised Guidance for the Child Status Protection Act (CSPA)

AFM Update: Chapter 21.2(e) The Child Status Protection Act of 2002 (CSPA) (AD07-04)

1. Purpose

This guidance significantly modifies a prior interpretation of certain provisions of the CSPA. In particular, it changes how the agency interprets the statute to apply to aliens who aged out prior to the enactment date of the CSPA. It also permits those individuals who were ineligible under the prior policy to file a new application for permanent residence. Under certain circumstances, this guidance also permits those individuals who were previously denied for CSPA to file motions to reopen or reconsider without filing fee. It also explains what steps certain aliens who do not automatically benefit from the CSPA can take to protect their status as a child.

This guidance contained in the AFM update below replaces the following two memoranda:

- The Child Status Protection Act, issued September 20, 2002; and
- The Child Status Protection Act – Memorandum Number 2, issued February 14, 2003
This guidance does NOT affect:

- Form I-539 adjudications for V status; or
- The memorandum, Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under the Child Status Protection Act Section 6 and Form I-539 Adjudications for V Status, issued June 14, 2006

2. **Field Guidance and AFM Update**

Accordingly, AFM chapter 21.2(e) is revised in its entirety to read as follows:


The CSPA amended the Immigration and Nationality Act (Act) to permit an applicant for certain immigration benefits to retain classification as a child under the Act, even if he or she has reached the age of 21. The CSPA added section 201(f) for applicants seeking to qualify as Immediate Relatives and section 203(h) for applicants seeking to benefit under a preference category, including derivative beneficiaries.

(1) **CSPA Coverage**

(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.

(A) **Petition Initially Filed as Immediate Relative (IR) Child.** If an alien is seeking to adjust status on the basis of being the beneficiary of an approved petition for classification as an IR (or IR self-petitioner under VAWA) and the petition was initially filed for classification as an IR, then the alien’s age for CSPA purposes is the age of the alien on the date on which the petition for classification as an IR (or IR self-petitioner under VAWA) was filed. If the alien was under the age of 21 at the time a petition was filed on his or her behalf for classification as an IR (or IR self-petitioner under VAWA), the alien will not age out.
For an IR self-petitioner under VAWA, officers are to follow the guidance (except footnote 1 and 2 relating to the retroactivity of the CSPA) issued August 17, 2004 entitled Age-Out Protections Afforded Battered Children Pursuant to the Child Status Protection Act and the Victims of Trafficking and Violence Protection Act.

(B) Petition Initially Filed as Child of a Lawful Permanent Resident (LPR). If an alien is seeking to adjust status on the basis of being an immediate relative child, and the petition serving as the basis for the adjustment was first filed for classification as a family-sponsored immigrant based on the parent being a lawful permanent resident and the petition was later converted, due to the naturalization of the parent, to a petition to classify the alien as an IR, then the age of the alien on the date of the parent’s naturalization is the alien’s age for CSPA purposes. If the alien was under the age of 21 on the date of the petitioning parent’s naturalization, the alien will not age out.

(C) Petition Initially Filed as Married Son or Daughter of a U.S. Citizen (USC). If an alien is seeking to adjust as an immediate relative child, and the petition serving as the basis for such adjustment was first filed for classification as a married son or daughter of a U.S. citizen, but the petition was later converted, due to the legal termination of the alien’s marriage, to a petition to classify the alien as an immediate relative, then the age of the alien on the date of the termination of the marriage is the alien’s age for CSPA purposes. If the alien was under the age of 21 on the date of the termination of the marriage, the alien will not age out.

(ii) Adjustment Under a Preference Category. The beneficiary’s CSPA age is determined using the formula below. If the petition is approved and the priority date becomes current before the alien’s CSPA age reaches 21, then a one-year period begins during which the alien must apply for permanent residence in order for CSPA coverage to continue.

It does not matter if the alien aged out before or after the enactment date of the CSPA, so long as the petition is filed before the child reaches the age of 21 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.

(A) CSPA Age Formula. Determine the age of the alien on the date that a visa number becomes available. The date that a visa becomes available is the later of (a) the first day of the month of the Department of State (DOS) Visa Bulletin, which indicates availability of a visa for that preference category or (b) the petition approval date if a visa

www.uscis.gov
number is already available on the approval date. Subtract the number of days the petition was pending as described in paragraphs (B), (C) and (D) below. This is the alien beneficiary’s CSPA age. If the alien beneficiary’s CSPA age is under 21, he or she remains a child for purposes of the application for permanent residence provided the beneficiary properly applies for permanent residence, based on the subject petition, within one year of visa availability and notwithstanding the alien’s CSPA age on the date of adjudication of such application.

(B) **Direct Beneficiaries.** The number of days that a petition is pending is the number of days between the date that it is properly filed (receipt date) and the date an approval is issued on the petition, including any period of administrative review.

In the case of a petition where adjustment is sought as the child of an LPR (F2A) and it is determined that the age of the beneficiary is over the age of 21 for CSPA purposes, if the petitioner naturalizes then the petition is to be automatically converted to the appropriate first or third family preference category for that petitioner and beneficiary (so long as marriage occurred after the naturalization of the petitioner). The beneficiary will retain the priority date in this case.

(C) **Derivative Beneficiaries – Family and Employment-Based.** The number of days that a petition is pending is the number of days between the date that the petition is properly filed (Form I-140 is considered properly filed on the receipt date and not priority date) and the date an approval is issued on the petition, including any period of administrative review. If the petition was approved and the priority date becomes current before the child’s CSPA age reaches 21, the alien must, within one year of the visa availability date, apply for adjustment of status, an immigrant visa, or be the beneficiary of an I-824 in order for the CSPA coverage to continue.

**Note:** An alien may benefit from the CSPA if the alien “sought to acquire” the status of an LPR within one year of visa number availability. USCIS has determined that an alien has “sought to acquire” permanent residence if he or she files an application for adjustment of status or an immigrant visa, or is the beneficiary of an I-824 within one year of the immigration petition approval date (or visa becoming available subsequent to petition approval date, whichever is later). Adjudicators are reminded that an I-824 can be concurrently filed with Form I-485 Application To Register Permanent Residence or Adjust Status. A previously filed I-824 that was denied 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. USCIS has made this determination because the CSPA language requires the alien to have “sought to acquire” LPR status subsequent to visa availability, which is a product of visa petition approval. Consequently, neither a labor certification nor a visa petition will satisfy the “sought to acquire” LPR status requirement because these actions are an integral part of the visa petition approval process and will necessarily precede visa availability.

(D) **Derivative Diversity Visa (DV) Applicants.** For the purpose of determining the period during which the “petition is pending,” officers should use the period between the first day of the DV mail-in application period for the program year in which the principal alien has qualified and the date on the letter notifying the principal alien that his/her application has been selected (the congratulatory letter). That period should then be subtracted from the derivative alien’s age on the date the visa became available to the principal alien.

(2) **CSPA Coverage for Specific Aliens Not Covered Under Previous Guidance**

(i) **Limited CSPA Coverage for K4 Aliens.** The CSPA does not apply to aliens obtaining K2 or K4 nonimmigrant visas or extensions.

An alien in K4 status may utilize the CSPA upon seeking adjustment of status because a K4 alien seeks to adjust as an IR on the basis of an approved Form I-130, which is filed under section 204 of the Act. This is because the USC petitioner who filed the nonimmigrant visa petition on behalf of the K3 parent must file a Form I-130 on behalf of the K4 alien before the K4 seeks to adjust status pursuant to 8 CFR 245.1(i). This necessarily requires the existence of a parent-child relationship between the USC and the K4 alien. Accordingly, the CSPA should be applied to K4 applicants as described in paragraph 21.2(e)(1)(i).

(ii) **Limited CSPA Coverage Option for K2 Aliens.** An alien in K2 status does not have a visa petition filed on his or her behalf under section 204. Consequently, a K2 alien cannot utilize the CSPA when seeking to adjust status. Although not required, USCIS may accept a Form I-130 filed by the USC petitioner based on a parent-child relationship between the USC petitioner and the K2 alien (e.g. where the USC petitioner has married the K1 and K2 is not yet 18 years old). This will allow an alien who once was a K2 to adjust on the basis of a petition filed under section 204 of the Act and will allow him/her to utilize the CSPA when seeking to adjust status in some cases.

Exercising this option requires: (1) an existing parent-child relationship between the USC petitioner and the K2 alien, and (2) paying the requisite
fees associated with Forms I-130 and I-485, Application To Register Permanent Residence or Adjust Status. This guidance does not create a petitionable relationship for K2s or K4s where none exists.

(iii) CSPA coverage for preference aliens 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. An alien on behalf of whom a visa petition had been approved prior to August 6, 2002 and who filed an application for adjustment of status after August 6, 2002 may file a motion to reopen or reconsider without filing fee if: (a) the alien would have been considered under the age of 21 under applicable CSPA rules; (b) the alien applied for permanent residence within one year of visa availability; and (c) the alien received a denial solely because he or she aged out.

(iv) CSPA coverage for preference aliens who did not have an application for permanent residence pending on August 6, 2002 and did not subsequently apply for permanent residence. An alien whose visa became available (as defined in paragraph 21.2(e)(1)(ii)(A)) on or after August 7, 2001 who did not apply for permanent residence within one year of the petition approval and visa availability, but would have qualified for CSPA coverage had he or she applied but for prior policy guidance concerning the CSPA effective date, may apply for permanent residence.

(3) CSPA Section 6 Opting-Out Provisions. Beneficiaries of 2nd preference I-130 petitions that were automatically converted to family first preference upon the petitioning parent’s naturalization may exercise the “opt-out” provision of section 6 even if the petition in question was originally filed in the F2A category but has now converted to F2B. Aliens seeking to utilize this opt-out provision should file a request in writing with the District Office having jurisdiction over the beneficiary’s residence. Adjudicators do not need to determine the age of the alien when a section 6 opt-out request is received.

<link to section 6, 6-14-06>

(4) Visa Availability Date Regression. If a visa availability date regresses, and an alien has already filed a Form I-485 based on an approved Form I-130 or Form I-140, the officer should retain the Form I-485 and note the date a visa number first became available. Once the visa number again becomes available for that preference category, determine whether the beneficiary is a “child” under paragraph 21.2(e)(1)(ii) using the visa availability date marked on the Form I-485, as long as the I-485 was filed within one year of that visa availability date.

If, however, an alien did not file a Form I-485 prior to the visa availability date regressing, and then files a Form I-485 within one year of when the visa
availability date again becomes current, the alien’s CSPA age is determined using the subsequent visa availability date.

(5) **Inapplicability of the CSPA.** The CSPA applies only to those immigrant visas expressly specified in the statute. Nothing in the CSPA provides protection for nonimmigrant visas (e.g. K or V), NACARA, HRIFA, Family Unity, Cuban Adjustment Act, and Special Immigrant Juvenile applicants and/or derivatives not specifically provided in the CSPA. This list is not exhaustive.

3. **Contact Information**

Questions regarding the guidance contained in this memorandum should be directed to Fred Ongcapin, Domestic Operations Directorate and Andrew Perry, Office of Policy and Strategy through the appropriate supervisory channels.

4. **Use**

This memorandum is intended solely for the guidance of USCIS personnel in performing their duties relative to adjudications of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

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Appendix

The following examples reflect how the guidance would be applied to some specific scenarios.

a. Form I-129F was approved and the K1 entered the country with a K2 who was then 17. The marriage between the K1 and USC petitioner occurred within 90 days and before the child’s 18th birthday. The USC petitioner then files an I-130 on behalf of the K2 when the K2 is 20 years old. Consequently the K2 would be treated as if he or she is an immediate relative for CSPA purposes and his or her eligibility for permanent residence would be 20, the beneficiary’s age on the date the form I-130 was filed on his or her behalf. See Chapter 21.2(e)(1)(i).

b. An immigrant visa petition was filed when the beneficiary was under the age of 21 and approved before August 6, 2002. After August 6, 2002, the beneficiary filed Form I-485 within one year of visa availability. USCIS determined that the CSPA did not apply because no petition or application was pending on the August 6, 2002, and the alien received a denial solely because he or she aged out. Based on this new CSPA guidance, the applicant may be eligible for CSPA benefits. The alien may file a new application for adjustment of status today. USCIS will adjudicate the current Form I-485 as if it had been filed within one year of visa availability. See Chapter 21.2(e)(2)(iii).

c. An immigrant visa petition was filed when the beneficiary was under the age of 21 and subsequently approved. The beneficiary did not file Form I-485 within one year of visa availability because previous USCIS guidance indicated that they would not benefit from the CSPA. Based on this new CSPA guidance, the applicant may be eligible for CSPA benefits. The alien may file a Form I-485, and USCIS will adjudicate the Form I-485 as if it had been filed within one year of visa availability. See Chapter 21.2(e)(2)(iii), and (iv).

d. An immigrant visa petition (either a Form I-130 or a Form I-140) was filed in 2000 when the derivative beneficiary was 20. When the petition was filed, the priority date for the principal’s classification was current. The visa petition was not approved until 2007, and a Form I-485 was filed one month after approval. The derivative beneficiary’s “age” for CSPA purposes would be 20 (the beneficiary was 27 when the I-485 was filed, but the visa petition was pending for 7 years). This derivative beneficiary can benefit from the CSPA since he or she applied for permanent residence within one year of visa number availability. The visa availability date in this example is the immigration petition approval date. Thus, this derivative beneficiary would be able to retain classification as a child. See Chapter 21.2(e)(1)(ii)(A) and (C).
e. An immigrant visa petition (either a Form I-130 or a Form I-140) was filed in 2000 when the derivative beneficiary was 20. The visa petition is approved exactly one year later in 2001. A visa becomes available exactly 5 years later in 2005 and the principal files an I-485 immediately. The application is approved in 2007 and the beneficiary applies for adjustment of status one month after approval of the principal’s application. The derivative beneficiary’s “age” for CSPA purposes would be 24 (the beneficiary is 25 in 2005 when the visa became available, but the visa petition was pending for 1 year). Not only would this derivative beneficiary be considered over the age of 21, this beneficiary could not benefit from the provisions of the CSPA because he or she did not file a Form I-485 within one year of the principal’s visa becoming available. Thus, this derivative beneficiary would be unable to retain classification as a child. See Chapter 21.2(e)(1)(ii)(A) and (C).

f. An immigrant visa petition (either Form I-130 or Form I-140) was filed and denied in 2000 when the derivative beneficiary was 20. The petitioner filed a timely appeal with the AAO/BIA which, in 2006, sustained the appeal, remanded the matter, and directed the petition approved (on grounds other than the new availability of the CSPA). On the date of approval, visas are available for the principal’s classification. The principal and derivative beneficiaries each file a Form I-485 six months later. The derivative beneficiary’s “age” for CSPA purposes would be 20 (the beneficiary is 27 in 2007, but the Form I-140 was pending for 7 years). Thus this beneficiary would be eligible to retain classification as a child. See Chapter 21.2(e)(1)(ii)(A) and (C).

g. An immigrant visa petition (either Form I-130 or a Form I-140) was filed and denied in 2000 when the beneficiary was 20. The petitioner filed a timely motion to reopen, and, in 2007, the motion to reopen is granted (on grounds other than the new availability of the CSPA). The petition is then approved and a visa is available to the beneficiary on the date of approval, and the alien files a Form I-485 nine months later. The beneficiary’s “age” for CSPA purposes would be 20 (the beneficiary is 27 today, but the Form I-130 was pending for 7 years). Thus, this beneficiary would be eligible to retain classification as a child. See Chapter 21.2(e)(1)(ii)(A) and (B).
To: Overseas District Directors

From: Joe Cuddihy /s/
       Director, International Affairs
       U.S. Citizenship and Immigration Services

Date: March 23, 2004

Re: Section 6 of the Child Status Protection Act

I. Purpose

   On August 6, 2002, the President signed into law the Child Status Protection Act (CSPA), Public Law 107-208, 116 Stat. 927. Section 6 of the CSPA allows for unmarried sons or daughters of lawful permanent residents (LPRs) to remain classified as second preference aliens, even if the LPR parent naturalizes. The purpose of this memorandum is to provide guidance on adjudicating requests tendered pursuant to section 6 of the CSPA.

II. Background

   Section 6 of the CSPA provides for the automatic transfer of preference categories when the parent of an unmarried son or daughter naturalizes, but also provides the unmarried son or daughter the ability to request that such transfer not occur. There are certain instances when the visa availability dates are more current for the unmarried sons or daughters of LPRs than for the unmarried sons or daughters of United States citizens. In such instances, it would be to the advantage of the alien beneficiary to request that the automatic conversion to the first preference category not occur because a visa would become available sooner if the alien remained in the second preference category than if he converted to the first preference category. As of this date, the Department of State Visa Bulletin shows that visa availability in the first preference category is more current than for the second preference categories, except for beneficiaries from the Philippines. As such, it is anticipated that only beneficiaries from the Philippines will seek to take advantage of the CSPA and this memorandum will be written using our office in Manila as an example. Should future visa availability dates adjust such that other countries have more advantageous second preference category dates than first preference category dates, the guidance provided in this memorandum should be extended to those countries.

III. Guidance

   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 U.S. Citizenship and Immigration Services letterhead, of a decision on the beneficiary’s request to the beneficiary and to the Department of State’s visa issuance unit. If the beneficiary’s request is approved, then the beneficiary’s eligibility for family-based immigration will be determined as if his or her parent had never naturalized and they will remain a second preference alien.

It must be noted that section 6 of the CSPA applies only to “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).” Thus, this opt-out provision applies only to beneficiaries whose initial Form I-130, Petition for Alien Relative, was filed based on their being the unmarried son or daughter of an LPR. Therefore, if a Form I-130 was filed by an LPR on behalf of his or her child when the child was under 21 years of age, the child attained the age of 21, and then the parent naturalized, section 6 of the CSPA could not be utilized by this beneficiary.

IV. Further Information

It is expected that a more structured system for section 6 requests will be established with the publication of regulations implementing the provisions of the CSPA. Until then, the guidance provided in this memorandum shall be followed. U.S. Citizenship and Immigration Services personnel with questions regarding this memorandum should raise them through appropriate supervisory channels and contact Elizabeth N. Lee via electronic mail.