

USCIS GIVES DE FACTO ACCEPTANCE TO EMERGING VIEW OF CSPA PROVISIONS IN INA §203(h)(3)

by David Froman*

On February 8, 2011, the U.S. Citizenship and Immigration Services (USCIS) reopened on service motion and reversed its earlier denial of the applicant's I-765 renewal application it had denied on November 4, 2010, only three weeks after filing. The sole basis of the I-765 denial had been USCIS's June 29, 2009, denial of the applicant's I-485 adjustment of status application that had been pending for nearly two years, on the ground that the applicant—a derivative beneficiary of an employment-based, third-preference category principal—no longer qualified as a “child” under the Child Status Protection Act (CSPA).¹ This I-765 reopening and approval gave tacit recognition to USCIS's prior legal error in denying the I-485 and to the judicial assessment—based on the authorities listed below—that the I-485 applicant was protected by the CSPA.

The officer who originated the I-485 denial, ostensibly because the applicant had “aged out,” failed to offer any analysis or to discuss the application of the relevant statute, Immigration and Nationality Act (INA) §203(h)(3).² This provision of the CSPA protects the status of derivative children who “age out” by turning 21 prior to the availability of immigrant visas in their principal aliens' preference categories.³ We unsuccessfully attempted to persuade the service to reopen the denial on its own motion owing to legal error. Apparently unrelated to the I-485 denial, USCIS issued a Notice to Appear (NTA) on August 16, 2010, on the alleged basis of the applicant's having overstayed his student status as of October 2008.⁴ Never mind that

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¹ Child Status Protection Act, Pub. L. No. 107-20, 116 Stat. 927 (2002).

² Decision Letter from F. Gerard Heinauer, Director, Nebraska Service Center, to applicant (June 29, 2009) (on file with author).

³ INA §203(h) provides the context for subsection (h)(3) (emphasis added):

(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)(2)(A) 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.

⁴ Notice to Appear, Form I-862 (Aug. 16, 2010) (on file with author).

since August 2007, the applicant had been “pending adjustment,” a lawful status recognized by the attorney general.⁵ Or that USCIS had received during the year preceding the NTA ample and repeated notices of its legal error in peremptorily denying the applicant’s I-485 while he and his family were awaiting the availability of immigrant visas. Now there was a removal action to contend with, too.

Since USCIS had failed to produce a satisfactory explanation of its denial action, and had totally ignored the most recent request for supervisory review and USCIS motion, we took the opportunity to present the issue to the immigration judge in the form of a Motion to Reinstate I-485. We included the calculations required by INA §203(h)(1), which resulted in an age in excess of 21.⁶ Then we explained how a combination of INA §203(h)(3), which preserves priority dates for derivative children over 21; INA §203(d), giving derivatives the same status as the principal alien;⁷ and 9 FAM 40.1 n.7, regulating “following-to-join” cases,⁸ combine to make the applicant eligible to follow the principal alien despite his age. The regulation places no time limit on when the child can follow; moreover, it makes exception for those over 21 who “qualify for the benefits of the Child Status Protection Act.”

Subsection 203(h)(3) preserves “the original priority date issued upon receipt of the original petition” for *all* who fall within its scope. Subsection (2) clearly describes two types of petitions governed by the statute: *original* petitions under the second family preference and *derivative* beneficiaries of family, employment or diversity visa lottery petitions for or by their parents. In the family case, the application of §203(h)(3) is well-established: children pass from F2A to F2B and thence to other possible preference categories they may automatically qualify for, such as F1 or F3. Such movement may also be possible for some family derivatives,

⁵ See, e.g., Treatment of Adjustment Applications for Purposes of Determining Unlawful Presence Under INA §212(a)(9)(B), 00 State 102272 (May 30, 2000), published on AILA InfoNet at Doc. No. 00060201 (posted June 2, 2000) (“In general, aliens who have a pending application to adjust status to permanent residence under INA §245 are considered in a period of authorized stay for purposes of INA §212(a)(9)(B)”)

⁶ We checked first to see if the applicant had “sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability.” As both he and his parents had filed their I-485’s within six weeks of initial eligibility, he cleared the initial hurdle. Next, we calculated his age for purposes of the definition of “child”:

Age of Applicant on July 1, 2007 (initial eligibility date) under §203(h)(1)(A): 22 years 103 days

Number of days I-140 petition was pending: 200 days

Age determined under §203(h)(1)(B): 21 years 268 days

Since this calculation yielded an age in excess of 21 years, the analysis next considered §203(h)(3).

⁷ Under INA §203(d), “subsection (d)” cited in each paragraph of §203(h), *supra* note 3:

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of §101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join the spouse or parent.

⁸ The Note (emphasis added) provides:

The term “following to join,” as used in . . . INA §203(d), permits an alien to obtain a[n] . . . immigrant visa (IV) and the priority date of the principal alien as long as the alien following to join has the required relationship with the principal alien. There is no statutory time period during which the following to join alien must apply for a visa and seek admission into the United States. However, if the principal has died or lost status, or the relationship between the principal and derivative has been terminated, there is no longer a basis to following to join. As an example, a person would no longer qualify as a child “following to join” upon reaching the age of 21 years (*unless they qualify for the benefits of the Child Status Protection Act*) or by entering into a marriage. There is no requirement that the “following to join” alien must take up residence with the principal alien in order to qualify for the visa. (See 9 FAM 42.42 N11.) The term “following to join,” also applies to a spouse or child following to join a principal alien who has adjusted status in the United States.

The cross-reference, 9 FAM 42.42 N11, “Derivative Status for Spouse or Child,” (emphasis added) provides in part as follows:

a. A spouse or child acquired prior to the principal alien’s admission to the United States or the alien’s adjustment to legal permanent resident (LPR) status, or a child born of a marriage, which existed prior to the principal alien’s admission, or adjustment, who is following-to-join the principal alien, should be accorded derivative status under INA §203(d). *No second preference petition is required.*

Although technically not regulations, as agency interpretations, the FAM notes provide detailed practical guidance in implementing statutes and regulatory provisions.

such as children of unmarried children or unmarried sons and daughters. However, since employment and diversity visa beneficiaries have no such mobility among various preference categories (or countries, for diversity derivatives), when their petitions “shall automatically be converted to the appropriate category,” they remain in the *same* category.

Habit and familiar perceptions, however, have obscured this analysis:

Applying the CSPA to immediate relative applications, where the under-21 status is perpetuated indefinitely, and to family preference applications, where derivative beneficiaries may automatically convert to various categories based on their age or changed status of the petitioner, has blinded us to the third scheme established by statute, that for non-converting derivatives of family, business, and diversity visa petitions, who turned 21 while awaiting processing or visa availability. INA §203(d) accords these derivatives the “same status and the same order of consideration” for visa availability as their principal alien parent or spouse and specifically contemplates that they may be “following-to-join the spouse or parent.” We are familiar with this procedure for derivative spouses. Now a combination of statutes and regulations permit the same procedure for adult sons and daughters of permanent residents who would formerly have “aged out.” The State Department’s “following-to-join” regulation quoted above specifically allows for over-21 derivatives whose status is protected by the CSPA. And §203(h)(3) preserves that status for over-21 beneficiaries under §203(d), that is, for non-converting derivative beneficiaries of family based (in categories F1, F2B, F3, and F4), employment-based, and diversity visa petitions.⁹ Final confirmation comes from the FAM provision cited in the “following-to-join” regulation and emphasized above: “No second preference petition is required” for derivatives following to join under INA §203(d).¹⁰

Subsection 203(h)(3) specifically provides for derivatives whose age exceeds 21. This means that the applicant here “qualifie[d] for benefits.” For when following-to-join, “automatic conversion” becomes unnecessary, because the “appropriate category” remains the same as that of the principal alien for those “following-to-join” as derivatives in each of the categories enumerated in §203(h)(2)(B). Therefore, we argued that by treating the applicant as an “aged out” child, the USCIS committed clear legal error. We urged the court to reinstate the I-485 at its earliest opportunity to correct this wrong. Fifteen days after receipt of the Motion to Reinstate, the immigration judge granted it on November 9, 2010.

Immediately, we sent a copy of the judge’s order to USCIS to convince USCIS that it had erroneously denied the I-485 and to request that it reopen and approve the I-765 it had rushed to deny. Subsequent inquiry over the next two months revealed that the service moved the I-485 back to *pending* status on its public database, but no action was forthcoming on the I-765. Finally, through repeated follow-ups to “Service requests” made via the USCIS Customer Service line, a supervisory review occurred: the I-765 application was reopened on USCIS motion and approved on February 8, 2011.

⁹ Following this view, the “conversion” language of §203(h)(3) applies only to §204(a)(2)(A) family beneficiaries, where a well-established statutory automatic conversion scheme already exists. Where no statutory conversion scheme exists, the derivative beneficiary remains eligible in the original preference category with the original priority date. Conversion “to the appropriate category” does *not* mean that if no other category exists to convert to then the beneficiary gets knocked out of the original category. However, this scenario appears to summarize current USCIS thinking on this point. The *original* category for certain family and *all* employment and diversity derivatives always remains the “*appropriate category*” for them. That cannot be taken away simply because service officers are more accustomed to dealing with the family preference automatic conversion scheme.

¹⁰ D. Froman, “Properly Applying INA §203(h),” *supra* note 4 at 1148 (n.12 renumbered to 10 and modified). Despite the quoted FAM provisions, the Department of State has insisted that over-21 derivatives need a new F2B preference petition filed by the principal alien once the principal immigrates. *Id.* at 1148–49. Curiously, this approach has persisted even in the wake of *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), which specifically rejected according the “the same order of consideration,” that is, priority date, to a follow-on F2B petition for an “aged out” F4 derivative. *Wang* poses formidable barriers to the conventional approach to over-21, derivative immigration. Proceeding from flawed premises, applying inapplicable references, and filtering them through faulty logic, the Board obfuscated rather than elucidated the application of INA §203(h). *Id.* at 1149–52. Proper application of §203(h)(3), as presented here, avoids the infirmities of the *Wang* decision altogether.

An apparent lack of sufficient USCIS documentation and training concerning proper application of the over-21 provisions of the CSPA, INA §203(h)(3), unnecessarily caused the applicant more than a year and-a-half of worry and uncertainty, including employment difficulties, potential removal, and the expense of defending himself against all these eventualities. Had information concerning the simplicity of applying this statute been readily available to USCIS officers and the public, this unfortunate detour would not have occurred. To remedy this deficiency, the accompanying **Child Status Protection Act (CSPA) INA §203(h) Flow Chart** maps the application of the CSPA to cases subject to INA §203(h). Using this flow chart will help those concerned with the application of this statute to visualize the structure that governs the flow of cases falling within its ambit. One sincerely hopes that the availability of this resource will promote more uniform application of this statute governing the continued eligibility of derivative, over-21 beneficiaries to immigrate with or following-to-join their principals.

CHILD STATUS PROTECTION ACT (CSPA) INA §203(h) FLOW CHART

