

## **Current Status of the Child Status Protection Act: Calculating Adjusted Age in the Age of Confusion**

**By Charles Wheeler**

The Child Status Protection Act (CSPA) will be celebrating its 21<sup>st</sup> birthday next month. But rather than fanfare and tributes, practitioners will likely display continued torment as they struggle with what should be a straightforward exercise: calculating a child's age to determine if they are still in the F-2A category or can still be classified as a derivative or if they have aged out.

Enacted on August 6, 2002, the law has always defied easy analysis. It has befuddled both the U.S. Citizenship and Immigration Services (USCIS) and the Department of State (DOS), which have failed to publish regulations or even formulate consistent interpretations. The Board of Immigration Appeals (BIA) has been forced to issue several precedent decisions. Practitioners have brought numerous federal court challenges—one progressing all the way up to the Supreme Court—to bring clarity, coherence, and a fair reading of Congress' intent. Unfortunately, these efforts have often brought the opposite result.

This article is an attempt to summarize the current state of the law regarding the CSPA and provide a step-by-step approach to performing age calculation. It will reveal how this calculation depends on whether the child is adjusting status or consular processing, if the child is in the F-2A category or a derivative in one of the other preference categories, and in cases where the petitioner has naturalized, where and when the naturalization took place. Finally, it will point out areas where the agencies have refused to provide any official interpretation and where practitioners wander around in a state of confusion.

### **The Basics: Once an IR, always an IR**

Scenario #1. A U.S. citizen files an I-130 petition for an unmarried child under 21. That child's age is locked in on the date the petition is filed. It doesn't matter how long the petition is pending before it is approved or how long the subsequent application for adjustment of status or an immigrant visa is pending before it is adjudicated. As long as the child does not marry, he or she will immigrate as an immediate relative.

Scenario #2. An LPR files a petition for an unmarried child under 21 but naturalizes before that child turns 21 using his or her biological age. That child automatically converts from the F-2A category to immediate relative and will immigrate as an immediate relative, as long as the child does not marry.

Scenario #3. A U.S. citizen files a petition for a married child under 21, but that child divorces before turning 21. That child automatically converts from the F-3 category to immediate relative and will immigrate as an immediate relative, as long as the child does not re-marry.

### **The Basics: Adjusted Age for an F-2A and Derivative Beneficiary**

Scenario #1. An LPR files a petition for an unmarried child under 21, and before the child immigrates, he or she turns 21. But it is not the biological age that counts—it is the child's

adjusted age on the date the visa becomes available (the priority date becomes current). For the rest of this article, presume that the priority date is not current when the petition is approved. Adjusted age is calculated by subtracting the time the petition was pending from the child's biological age. For example, if the petition was pending for one year before it was approved, the child can subtract one year from his or her biological age on the date the petition was approved or priority date became current (whichever is later) to arrive at the adjusted age. If the child's adjusted age is under 21 on that date, he or she will be locked into the F-2A category provided he or she remains unmarried and "seeks to become an LPR" within one year.

Scenario #2. A U.S. citizen files a petition for a married sibling who has a derivative child. The same formula is applied to derivative beneficiaries in the preference categories. The time the petition was pending is subtracted from their biological age on the date the priority date becomes current; the priority date for the derivative is the same as that for the principal beneficiary. For example, the child in this case turns 21 after the petition is approved but before the priority date in the F-4 category becomes current. The child's adjusted age is their biological age minus the time the petition was pending; the adjusted age is calculated on the date the priority date becomes current. If the child's adjusted age is under 21, he or she will be locked in as a derivative, provided he or she seeks LPR status within one year.

Beneficiaries in the F-2 category cannot marry without losing their immigration status; marriage will result in automatic revocation of any approved petition and denial of any pending one. But that rule does not apply to derivatives in the other preference categories. As long as they are unmarried on the date they and their principal beneficiary apply for adjustment of status or an immigrant visa and remain unmarried until they immigrate, they will be considered a derivative. In other words, they could have married and divorced in the interim. But a divorce that occurs after the derivative child turns 21 (using biological age) and after a visa becomes available will not restore the "child" status because the applicant was married at the time of visa availability. On the other hand, if the derivative child divorces before the visa becomes available, the divorce will restore the applicant's "child" status if his or her adjusted age is under 21.

### **More Complicated: Calculating Adjusted Age if Consular Processing**

But what does it mean for a visa to become available or the priority date to become current? That depends on whether the child is adjusting status or consular processing. If the latter, DOS interprets it as meaning when the priority date first becomes current using the Visa Bulletin's Chart A, Final Action Dates. This could create a dilemma for the beneficiary who is over 21 using his or her biological age but under 21 on the date the priority date becomes current using Chart B, Dates for Filing.

When the priority date in Chart B become current, the National Visa Center (NVC) will send a Welcome Letter and fee bill requiring the immigrant visa applicant to respond within one year; failure to respond will result in petition termination pursuant to INA § 203(g). There is no guarantee, however, that the child's adjusted age will still be under 21 when the priority date becomes current in Chart A, since the child starts to age again from the date the petition is approved. Paying the immigrant visa fee or filing the DS-260, Application for Immigrant Visa,

satisfies the one-year “seek to become an LPR” requirement, but it does not lock in the applicant’s age. For the July 2023 Visa Bulletin, Chart B for the F-2A category is current for all nationalities, but Chart A is backlogged almost three years (almost five years for Mexico).

Scenario #1. An LPR files a petition for an unmarried child under 21. The petition is approved months later. The child’s biological age is over 21 but adjusted age is under 21. The priority date in the F-2A category is current in Chart B, so the child pays the immigrant visa fee bill but later ages out before becoming current in Chart A. He or she automatically converts to the F-2B category and is subject to a much longer wait. The July 2023 Visa Bulletin indicates an almost eight-year backlog in the F-2B category for all nationalities except for the Philippines (almost 12-year backlog) and Mexico (22-year backlog). When the priority date finally becomes current in the F-2B category using Chart A, and the applicant is still unmarried, he or she will need to repay the immigrant visa fee.

Scenario #2. An LPR files a petition for his spouse with an unmarried child under 21 named as a derivative. When the petition is approved, the priority date in the F-2A category is current using Chart B. But the child’s adjusted age is over 21 when the priority date becomes current using Chart A. Derivatives in the F-2A category convert automatically to the F-2B category and become principal beneficiaries if they have aged out using their adjusted age when the priority date becomes current in Chart A. The LPR petitioner does not need to file a separate petition on the son or daughter’s behalf in the F-2B category. But if the petitioner did file one, the beneficiary will be able to retain the original priority date of the petition filed on behalf of the spouse/parent.

Scenario #3. A U.S. citizen files a petition for her married daughter, who has a derivative son. The son’s adjusted age is under 21 when the priority date becomes current in Chart B, so he pays the immigrant visa fee. Unfortunately, the son ages out using his adjusted age on the date the priority date becomes current in Chart A in the F-3 category. Derivatives in these other preference categories do not fare as well as principal or derivative beneficiaries in the F-2A category. If they age out before the priority date becomes current, they do not convert to any category but instead lose what status they had and drop into immigration purgatory. They must wait for their parent to immigrate, file a new petition for them in the F-2B category, and for that priority date to become current. They do not retain the original priority date and they lose the immigrant visa fee they paid.

### **Calculating Adjusted Age if Adjusting Status**

The USCIS recently changed its position on when to calculate adjusted age for a child in the F-2A category, as well as for derivatives in the preference categories. The agency recognized the inequity of having an applicant who is under 21 using adjusted age in Chart B at the time of filing for adjustment only to lose that “child” status and filing fee if they were over 21 when the priority date becomes current in Chart A. Instead of using Chart A to determine when the priority date becomes current and when to calculate the child’s adjusted age, the agency will use whichever chart it is allowing for filing purposes. The USCIS has stated: “The date USCIS considers a visa available for accepting and processing an adjustment of status application

according to the USCIS website and the [Visa Bulletin](#) is also the date USCIS considers a visa available for CSPA purposes if the petition is already approved.”

Each month the USCIS decides whether adjustment of status applicants can use Chart B for filing purposes or must use Chart A and it indicates that decision on its website. Beginning in October 2017, the agency has allowed family-based applicants to use Chart B rather than Chart A (applicants in the F-2A category could use Chart A if that was more favorable).

Scenario #1. An LPR files a petition for an unmarried child under 21. The petition is approved months later. The child’s biological age is over 21, but adjusted age is under 21. The priority date in the F-2A category is current in Chart B, and the USCIS states that Chart B is the one to use for filing purposes. The child files for adjustment of status within one year of the petition being approved and while the priority date in Chart B is still current. The child is locked into the F-2A category; it doesn’t matter if the child’s adjusted age is over 21 when the priority date becomes current in Chart A. The child must stay unmarried until becoming an LPR.

Scenario #2. A U.S. citizen files a petition for her married daughter, who has a derivative son. The petition is approved and the priority date in the F-3 category becomes current using Chart B, which the USCIS allows to use for filing purposes. The derivative son’s adjusted age is under 21 on that date and he files for adjustment of status within one year and while the priority date in Chart B is still current. The child is locked in as a derivative; it doesn’t matter if the child’s adjusted age is over 21 when the priority date becomes current in Chart A.

The change in USCIS policy means that children who file for adjustment of status using Chart B because their adjusted age is under 21 are protected from aging out. They will remain in the F-2A or derivative category provided they seek LPR status within one year. But it is also important to remember that the one-year period starts on the date the priority date first becomes current. In the past, that meant current using Chart A. If the USCIS requires applicants to use Chart B for filing purposes, as it has done consistently for more than 5½ years, practitioners will need to use that earlier date and pay closer attention to the Visa Bulletin. Failure to satisfy the one-year rule—absent “extraordinary circumstances”—will mean the CSPA does not apply, and the child has aged out.

### **Ridiculously Complicated: Child Status when Parent Naturalizes**

Naturalization of the petitioner can create unique issues—and often disastrous results—for the child beneficiary.

Scenario #1. The simplest and most favorable scenario, as discussed earlier, is if the petitioner naturalizes when the beneficiary is an unmarried child under the age of 21, using his or her biological age. The child automatically converts from F-2A to immediate relative.

Scenario #2. Derivative children in the F-2A category lose their derivative status when the petitioner naturalizes and will require a second petition to be filed on their behalf. If the child is still unmarried and under 21 when the U.S. citizen parent files the petition on their behalf, the child will be classified as an immediate relative; if the child is over 21 and unmarried, he or she will be in the F-1 category; if the child is married, he or she will be in the F-3 category. In

neither of those scenarios does the child retain the original priority date for the petition filed on behalf of the spouse/parent.

Scenario #3. The next scenario, in terms of complexity, is when the child starts out in the F-2B category as the unmarried son or daughter of an LPR or starts out in the F-2A category and ages out (using adjusted age) converting to F-2B. When the petitioner naturalizes, the son or daughter automatically converts to the F-1 category as the unmarried son or daughter of a U.S. citizen. But the F-1 category is sometimes backlogged farther than the F-2B category. For example, in the July 2023 Visa Bulletin, the F-2B is more favorable than F-1 for all nationalities except for the Philippines using Chart A; the F-1 category is more favorable than F-2B for all nationalities using Chart B. It would discourage any LPR petitioner in this situation from naturalizing if the result were to delay the immigration of their children.

Congress anticipated this problem and created a specific section of the CSPA that allows beneficiaries to opt out of that automatic conversion and remain in the F-2B category. They would file a formal request to opt out when filing for adjustment of status if the F-2B category is current and F-1 is still backlogged. Applicants for an immigrant visa follow a different procedure: if their case is at the NVC, they submit a request to opt out using the NVC [public inquiry form](#). The NVC will forward the request to USCIS and change the visa category back to F-2B upon receipt of USCIS's approval.

Scenario #4. What happens if the unmarried child of an LPR is over 21 using his or her biological age but under 21 using adjusted age on the date the petitioner naturalizes. The child cannot opt out of conversion from the F-2A category to the F-1, according to the BIA. So, the majority of children in this situation convert to the F-1 category. The July 2023 Visa Bulletin shows the F-1 backlogged about six years farther than F-2A using Chart A. Pity the practitioner who has to inform the family of this new development after representing the petitioner in the naturalization process.

But can't the child argue that it is their adjusted age—not their biological age—on the date of naturalization that controls, and therefore they convert to the immediate relative category? That was successful in two federal court challenges. *Tovar v. Sessions*, 882 F.3d 895 (9th Cir. 2018) and *Cuthill v. Blinken*, 990 F.3d 272 (2d Cir. 2021). So, while the child in the F-2A category who is over 21 using biological age (under 21 using adjusted age) cannot opt out of automatic conversion to F-1, that child doesn't have to opt out because he or she converts automatically from F-2A to immediate relative when the petitioner naturalizes.

These two courts applied a similar interpretation of INA § 201(f)(2), which states that the child's eligibility for immediate relative status is determined by "the age of the alien on the date of the parent's naturalization." The two courts found that "age" means "statutory age," which is the adjusted age after applying the CSPA formula for those in the F-2A category and not biological age. Therefore, if the child qualified for the F-2A category on the date of the parent's naturalization, that child also qualifies as an immediate relative based on that naturalization. The fact that Congress did not allow for opt-out of the F-1 category for those in the F-2A category as it did for those in the F-2B only reinforced the courts' reasoning.

Note that these decisions only apply to those residing in those two judicial circuits. The Ninth Circuit includes the following states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Northern Mariana Islands. The Second Circuit includes the following states: Connecticut, Vermont, and New York.

Since the petitioner and the child beneficiary were both residing in the same judicial circuit when the naturalization occurred, the two courts did not address whether it was the petitioner's or beneficiary's residence at the time of the naturalization that controlled. Nor did they address whether the petitioner or beneficiary could relocate to the Ninth or Second Circuit after the naturalization and take advantage of the courts' interpretation. Would DOS, which was not a party to the legal challenges, honor the court's interpretation if the beneficiary were consular processing?

The State Department answered these questions in a recent update to the Foreign Affairs Manual. It will apply the two circuit court interpretations of the CSPA in cases where the petitioner was residing in one of those states when the naturalization occurred. The residence of the immigrant visa applicant is irrelevant, as is any subsequent residence of the petitioner. The DOS spells out that it is the beneficiary/applicant's adjusted age on the date of naturalization that determines the immigration category (immediate relative or F-1). But it goes on to state: "You must also use the date of the petitioner's naturalization in determining whether the applicant 'sought to acquire' LPR status within one year of the date of visa availability (i.e., the date of visa availability)." That, of course, would only apply if the child's adjusted age was 21 years or older, since if the child was younger, he or she would be classified as an immediate relative and the one-year rule would not apply.

## **No Answers**

The agencies have yet to resolve questions that involve several scenarios, despite having plenty of time and opportunity. The following are brief summaries of these unanswered questions:

Scenario #1: The USCIS's recent change in policy does not apply retroactively to cases where the applicant aged out after Chart B was current but before Chart A became current, even though the USCIS allowed the applicant to use Chart B for filing. It applies only to pending applications and those adjudicated on or after February 14, 2023. The USCIS indicated that those children who were previously denied adjustment based on the prior policy may file a motion to reopen their application by using Form I-290B, Notice of Appeal or Motion. While a motion to reopen (MTR) must generally be filed within 30 days of the denial, the agency stated that it "may, in its discretion, excuse the untimely filing of the motion if the noncitizen demonstrates that the delay was reasonable and was beyond the noncitizen's control." While such a statement invites those who were denied based on the prior policy to file an MTR and overturn the denial, the updated USCIS Policy Manual does not state how the agency plans to rule on such motions or what standard it will employ. Nor does it provide a remedy to those who elected not to file for adjustment of status using Chart B when they were under 21 based on fear of age-out and denial.

Scenario #2: To satisfy the one-year “seek to become an LPR” requirement, the child or the I-130 petitioner can take any of the following steps within one year of the petition approval or the visa becoming available, whichever is later:

- file an I-485, Application to Register Permanent Residence or Adjust Status;
- file a Form I-824, Application for Action on an Approved Application or Petition;
- pay the immigrant visa fee with the National Visa Center (NVC);
- pay the affidavit of support fee with the NVC;
- file the DS-260, Immigrant Visa Electronic Application, with the Department of State.

But what about when an applicant files for adjustment of status within one-year period, that application is denied or subsequently withdrawn, and the applicant switches to consular processing. In that scenario, has the one-year requirement been satisfied if the I-824 is filed more than one year after visa availability or petition approval? The same question arises if the child pays the immigrant visa or affidavit of support fee to the NVC within one year of visa availability but later withdraws and files for adjustment of status. If the Form I-485 is filed more than one year after visa availability or petition approval, has the one-year rule been satisfied?

Scenario #3. If a child in the F-2A or derivative category pays the immigrant visa fee within one year, has he or she satisfied the one-year rule if the case is delayed and the NVC requires the applicant to re-pay the fee? Practitioners have reported cases where the consulate has claimed the applicant has not satisfied the one-year rule since the repayment occurred more than one year after visa availability.

Scenario #4. Death of the petitioner results in automatic revocation of an I-130 petition, except for widow(er)s where the I-130 would automatically convert to an I-360 self-petition. Other beneficiaries may qualify to reinstate an approved petition based on humanitarian factors or the beneficiary’s residence in the United States on the date of the petitioner’s death, in addition to the beneficiary’s having secured a substitute sponsor (or being exempt from the affidavit of support requirements). What effect does the death and a subsequent request for reinstatement have on the beneficiary’s ability to satisfy the one-year “seek to become an LPR” rule? Is the one-year period tolled while the request is pending?