Age-Out Rules for Afghan SIV Derivative Children

By Elizabeth Carlson and Charles Wheeler

The Child Status Protection Act (CSPA) applies to the children of Afghans who qualify for relief under the Special Immigrant Visa (SIV) program. That program allows Afghan nationals to receive SIV status if they have been employed for at least one year by the U.S. government in Afghanistan or by the International Security Assistance Force. SIV status can be granted by the Department of State (DOS) or by U.S. Citizenship and Immigration Services (USCIS). Those granted SIV status are eligible to file for adjustment of status and be classified as lawful permanent residents (LPRs) once the Form I-485 is approved.

As background, the CSPA applies to the following petitions, pursuant to INA § 203(h)(2):

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).

Derivative beneficiaries in the SIV petition process are covered by the provisions of INA § 203(d), and the application/petition process for granting immigrant status is governed by the provisions of INA § 204(a)(1)(G). The form that initiates the process is either the I-360, Petition for Amerasian, Widow(er), or Special Immigrant; or the DS-157, Petition for Special Immigrant Classification for Afghan SIV Applicants, depending on the rules in effect at the time of filing for SIV status. Both forms include questions asking for the names and dates of birth of the principal petitioner's children.

Principal petitioners for SIV status may include their derivative spouse and children, provided that the relationship existed on the date the principal became an LPR. To qualify as a derivative, the child must be under 21 years of age and unmarried. Prior to passage of the CSPA, children who had turned 21 before immigrating lost derivative status. The CSPA allows derivative children of parents applying for certain immigration benefits to use their "adjusted age" instead of their biological age.

The CSPA applies to petitions covered under INA § 204(a)(1)(G). These include petitions filed in the family-based, employment-based, diversity visa, VAWA, refugee, and asylum categories. Applicants for SIV status are applying within the employment-based categories. See 9 Foreign Affairs Manual 502.1-1(D)(1).

Adjusted age for derivatives in the SIV program is calculated by subtracting the time the "petition" is pending from the child's biological age. The age is measured according to the date the petition is approved or when the priority date in the employment-based EB-4 category is current, whichever is later. At the present time, that category is current for all nationalities. So, as long as it remains current, filing the petition "stops the clock" on the derivative child's aging. In other words, the age of the child is "frozen" while the petition is pending. The clock would begin running again on the date the petition is approved if the priority date were not current.

> ***Example:*** *Azeem, an Afghan interpreter, and his wife and daughter were paroled into the United States on August 25, 2022, and were granted two-year humanitarian parole. Azeem filed for SIV status by submitting a request for Chief of Mission (COM) approval together with Form DS-157 to DOS on July 30, 2022. He listed his spouse and his daughter on the petition since his daughter was unmarried and under 21. The petition was approved 20 months later, on March 30, 2024, and the priority date was current at that time. Using her biological age, the daughter had already turned 21 on the date the DS-157 petition was approved. However, based on the CSPA, her age was frozen on the date the petition was filed and remained as such until the petition was approved. Alternatively, she can subtract 20 months from her biological age on the date of petition approval, which made her under 21 on March 30, 2024.*

The issue of which petition controlled — the I-360 or the DS-157 — for CSPA purposes for Afghan SIV applicants changed in July 2022 when the USCIS transitioned responsibility for adjudication of the operative form to the Department of State (DOS). Before the USCIS changes, the "petition" was Form I-360. Beginning on July 20, 2022, applicants apply for COM approval with the DOS by submitting only Form DS-157, which serves as the special immigrant petition. These individuals are no longer required to file Form I-360. Only those applicants with COM approvals dated prior to July 20, 2022, or those with a COM application pending on that date who either did not submit the DS-157 as part of the COM application or submitted an unsigned DS-157 are required to submit an I-360 with the USCIS. These changes were incorporated into the USCIS Policy Manual.

After the July 20, 2022, changes, the Form DS-157 became the operative petition used for CSPA adjusted age calculation. As a result of litigation[1], the State Department recently updated the Foreign Affairs Manual to clarify that the "'petition' used for CSPA calculation differs between those applicants who filed a Form I-360 with USCIS following COM approval and those applicants whose Form DS-157 filed with an application for COM approval serves as the petition." (emphasis in the original). For those who filed only the DS-157, that form stops the derivative's child's age for CSPA calculation. Those who were required to file the Form I-360 may now request to withdraw it so that the filing of the DS-157 would serve as the petition triggering the "stop-time" for CSPA purposes.

This official change in policy will benefit the derivative children who were under 21 on the date the principal applicant filed the COM approval application along with the DS-

157. Otherwise, had the child turned 21 before the I-360 was filed, they would have aged out and lost derivative status. This FAM change only applies to cases where the Afghan has a pending application for adjustment of status or an immigrant visa. See 9 FAM 502.1-1(D)(5)(a)(6)(c). This change is also limited to cases in which the principal applicant has not yet been admitted to the United States or adjusted status based on the petition. The FAM goes on to explain that after the I-360 is withdrawn, "the date the petition was filed is the date of the initial email to the National Visa Center (NVC) at AfghanSIVApplication@state.gov, commencing the SQ SIV application process." Assuming the child was under 21 on that date, they will remain derivatives as long as they are unmarried and seek to become a permanent resident with one year of the petition approval.

The State Department website contains the following instructions on withdrawing a case: "To withdraw a petition, you must submit a signed written statement requesting that the petition be withdrawn and explaining the reason to NVC using our Public Inquiry Form. If an attorney or accredited representative submits the request, a G-28, Notice of Entry of Appearance as Attorney or Representative, must accompany the request."

1 *See M.M.M. v. Department of State*, 1:24-cv-1120 (E.D.Va.).

The link to the public inquiry form is available here: Public Inquiry Form

This processing change is therefore advantageous for many applicants because it allows them to "freeze" their child's age earlier in the process. It also allows them to potentially subtract a longer period of time because recent processing times for the COM process have been relatively lengthy (often ten months or longer) while recent processing times for the I-360 have been short (about two months). If an applicant has a request for COM approval pending but failed to submit a signed DS-157 initially, it is advisable to supplement the pending request now to avoid the need to file an I-360 petition. Applicants can supplement their application by emailing AfghanSIVApplication@state.gov.[2] Be sure to include the applicant's full name, date of birth, and SIV case number.

In order for the derivative child's adjusted age to be "locked in," however, the child must do one more thing: seek LPR status within one year. For most children this means filing for an immigrant visa or for adjustment of status. Therefore, filing an I-485, Application to Register Permanent Residence or Adjust Status, or paying the immigrant visa fee to the Department of State satisfies that one-year requirement. Derivatives must file a separate application for LPR status; they cannot satisfy the one-year requirement through the principal's application for adjustment or an immigrant visa.

This one-year filing requirement could create an obstacle for derivative children who are residing abroad and awaiting their parent's application for LPR status to be approved. In the example above, if Azeem's daughter had not been paroled into the United States, she would need to wait for Azeem's LPR status to be granted to be able to apply for an immigrant visa. But she has just one year from March 30, 2024, to file that application and prove that she has "sought to acquire" LPR status within a year of visa availability. If she fails to satisfy this one-year filing requirement, the CSPA protections would no longer apply, and she would age out. To remedy this, Azeem would need to file a Form I-824, Application for Action on an Approved Application or Petition. The filing of this application also satisfies the one-year requirement. While this is usually filed after the adjustment of status has been approved as a way to jump-start the immigrant visa processing for the derivative child, the application can also be filed concurrently with the Form I-485. It would make sense to do so in this case to ensure that Azeem's daughter continues to receive CSPA protection.

Another way to preserve the "sought to acquire" prong under CSPA is for the derivative to complete the DS-260 immigrant visa application. Because there are no fees required as part of the SIV process, there is no need or possibility to pay an immigrant visa fee, which is normally a step that can also help preserve CSPA eligibility for a derivative.

Practitioners should carefully assess whether Afghan clients have children who could turn 21 during the process of obtaining LPR status. If so, practitioners should take necessary steps to protect these children from aging out. For those with children in the United States, this means filing the I-485 applications for all eligible family members within one year of I-360 or DS-157 approval. For those with children outside the United States, this means timely filing an I-824 application so that derivatives overseas are protected under the CSPA, or completing a DS-260 for the derivative through the CEAC website.

2 Guide for submission of SIV applications are available here: Afghan-SIV-Guidelines-and-DS157-Instructions-3-8-2023.pdf.