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VISAS - INFORM CONSULS

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TAGS: CVIS
SUBJECT: CHILD STATUS PROTECTION ACT: ALDAC #2

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

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
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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?
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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

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?

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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 Aldac. (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?

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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

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 meet the requirement.

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 BCIS 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

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/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.

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).

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 reftel 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?
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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

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31. Department has reconsidered the guidance in reftel 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 reftel, 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.

Cases at NVC
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32. As noted in reftel, 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 reftel, 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.

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/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

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