U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

November 21, 2013 **PM-602-0094**

Policy Memorandum

SUBJECT: Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court Ruling on Mayorkas v. Cuellar de Osorio

Purpose

This policy memorandum (PM) provides guidance for properly assigning priority dates in those instances where a petitioner requests that the priority date from a separate, previously filed petition, be applied to a later filed family-based second-preference "B" petition (F2B) or seeks adjustment of status in the F2B category, based upon an originally-filed family-based second-preference "A" petition (F2A) pursuant to Public Law 107-208, the Child Status Protection Act (CSPA). This guidance is limited in scope to individuals who were beneficiaries or derivative beneficiaries of an F2A petition if either new F2B petitions are filed on their behalf by the same petitioner or they are seeking to adjust status in the F2B category pursuant to the CSPA based upon previously qualifying as derivative beneficiaries of an F2A petition. The Adjudicator's Field Manual (AFM) is updated by adding Chapter 21.2(e)(6), AFM Update AD13-10.

Scope

Unless specifically exempted herein, this PM applies to and is binding on all U.S. Citizenship and Immigration Services (USCIS) employees. This PM supplements previous guidance on the application of the CSPA.

Authority

- Sections 203(h)(1)-(3) of the Immigration and Nationality Act (the "Act"); 8 U.S.C. §§ 1153 (h)(1)-(3), as amended by Public Law 107–208
- 8 CFR 103.2(a)(7), 204.1(b), and 204.2(a)(4)

Background

The CSPA was signed on August 6, 2002, and provides continuing eligibility for immigration benefits to the principal and/or derivative beneficiaries of certain petitions when the beneficiary has "aged out" by turning 21. Specifically, the CSPA addresses certain "age out" consequences in those instances where "aging out" of eligibility for classification as a child is caused by a delay in the adjudication of the petition or application. The CSPA has wide applicability

covering petitions for family-based immigrants. In addition, the CSPA is applicable to employment-based immigrants, diversity visa immigrants, refugees, and asylees when delays in processing petitions would cause a beneficiary to lose the ability to immigrate as a child due to reaching 21 years of age. This PM specifically addresses automatic conversion and priority date retention as set forth in section 203(h)(3) of the Act. This specific provision authorizes certain immigrant visa petitions to "automatically be converted to the appropriate category and…retain the original priority date…"

Historically, USCIS had been limited to the priority date retention for F2A beneficiaries provided for by the regulation then in existence at the time CSPA was enacted. See 8 C.F.R. § 204.2(a)(4). Enactment of CSPA presented new challenges to USCIS, including the evaluation of what changes, if any, CSPA presented to visa petition processing and the relevant regulation.

Following certification of the issue to the Board of Immigration Appeals (the "Board"), the Board issued a precedent decision on June 16, 2009. See *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009).[1] Consistent with USCIS' arguments, the Board held that section 203(h)(3) of the Act provided certain benefits to the aged-out beneficiaries of F2A petitions.[2] *Matter of Wang* defined the use of the term "automatic" as relating to situations where the "beneficiary of that petition then falls within a new classification without the need to file a new visa petition." See *Matter of Wang*, 25 I & N Dec. 28, 35 (B.I.A. 2009). In considering *Matter of Wang*, USCIS concluded that section 203(h)(3) of the Act did not simply codify the existing regulation at 8 C.F.R. § 204.2(a)(4), but provided a new substantive benefit, allowing derivatives in the F2A category to automatically convert to the F2B category without filing another visa petition.[3]

[1] As a published decision, *Matter of Wang* is binding upon USCIS. See AFM 14.4; See 8 C.F.R. § 1003.1(g) providing in part, "decision of the Board… shall be binding on all officers and employees of the Department of Homeland Security…[and] shall serve as precedents in all proceedings involving the same issue or issues."

[2] *Matter of Wang* explains, in part, that: "The CSPA was essentially enacted to provide relief to children who might "age out" of their beneficiary status because of administrative delays in visa processing or adjustment application adjudication," but that "the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates." Considering the statutory history as well as the administrative history, the Board explained that, "[w]ith this understanding of how the automatic conversion and priority date retention processes have operated historically, we turn to this case to determine how section 203(h)(3) would apply to the beneficiary. First, with regard to the 'automatic conversion' referenced in section 203(h)(3), we look to see to which category the fourth-preference petition converted at the moment the beneficiary aged out. When the beneficiary aged out from her status as a derivative beneficiary on a fourth-preference petition, there was no other category to which her visa could convert because no category exists for the niece of a United States citizen. Second, if we apply the 'retention' language of section 203(h) here, we look to see if the new petition was filed on the beneficiary's behalf by the same petitioner. In the beneficiary's case, the new visa petition has been filed by her father, not by her aunt (who was the original petitioner). As noted above, her aunt is not eligible to file a new petition for her because no category exists for the niece of a United States citizen under our existing visa preference classification system."

[3] Matter of Wang has no bearing on existing USCIS practice which permits principal beneficiaries classified pursuant to the F2A visa preference category to convert automatically to the F2B visa preference category upon turning 21 years of age.

The decision in *Matter of Wang* has been subject to extensive federal litigation, including a nationwide class-action lawsuit, which has now reached the United States Supreme Court. See Mayorkas v. Cuellar de Osorio, (No. 12-930).

Policy

While Mayorkas v. Cuellar de Osorio remains pending before the U.S. Supreme Court, *Matter of Wang* remains in effect and binding on USCIS.[4] Accordingly, USCIS will continue to assign priority dates upon proper filing of a family-based petition and will continue to comply with *Matter of Wang*. *See* 8 CFR 103.2(a)(7). Specifically, USCIS will assign priority dates for family-based immigrant petitions based upon the date they are properly filed (with signature and proper fee).[5] This guidance does not affect priority date retention based upon multiple Immigrant Petitions for Alien Worker or other bases outside the CSPA.[6]

In instances where a petitioner files an F2B petition on behalf of a former derivative beneficiary of a previously-approved F2A petition, requests for priority date retention will continue to be granted if they meet the requirements of 8 CFR 204.2(a)(4) or 204.2(h)(2). In addition, in observing *Matter of Wang*, a derivative beneficiary of a petition originally approved for F2A classification is eligible to adjust status in the F2B classification absent a second petition. In such cases, USCIS will accept an application for adjustment of status and may grant the application when the applicant was previously classifiable in the F2A category, has a qualifying relationship to the original petitioner, is eligible for classification as the son or daughter of that petitioner, and is otherwise eligible for adjustment of status. USCIS will deny priority date retention requests when a petition for F2B classification is filed by any individual other than the original petitioner using the standard language provided through the appropriate chain of command. Upon a final determination by the U.S. Supreme Court, USCIS will evaluate whether any modifications in USCIS policy are necessary. Should the ruling result in conflict with current USCIS policy, USCIS will update its policy and previously denied requests for priority date retention will be reconsidered upon request of the individual having proper standing before USCIS.[7]

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[4] *Matter of Wang* remains binding on USCIS because the Ninth Circuit has "stayed the mandate" of its September 26, 2012 decision pending resolution by the U.S. Supreme Court. Since Cuellar de Osorio is a nationwide class action suit, the stay extends beyond the jurisdiction of the Ninth Circuit. This stay includes those cases arising in the Fifth Circuit, notwithstanding the ruling in Khalid v. Holder, 655 F.3d 363 (5th Cir. 2011). The U.S. Supreme Court is expected to rule on Cuellar de Osorio v. Mayorkas in the spring of 2014.

[5] This PM applies in all jurisdictions and has been made following consultation with the Department of Justice.

[6] Under section 9 of the INA Amendments of 1976 (Public Law 94-571), an alien who was registered as a Western Hemisphere immigrant with a priority date prior to January *1*, 1977, retains the priority date and may use that priority date for the purpose of any preference petition subsequently approved in his or her behalf. This PM does not alter eligibility for Western Hemisphere priority date retention.

[7] 8 CFR 103.3(a)(iii)(B) provides in part that, "affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter."

The denial of a request for priority date retention shall have no bearing on the evaluation of the record evidence and will not affect the adjudication of a petition on its merits. Petitions must continue to be adjudicated according to applicable law, regulations, and policies related to eligibility for the benefit sought. Applications for adjustment of status, for which the sole basis for eligibility is the petition for which priority date retention was requested and denied and for which visa availability is contingent upon the requested older priority date, shall be rejected as improperly filed. Any such applications that were previously accepted as properly filed shall be held pending the U.S. Supreme Court's ruling on Mayorkas v. Cuellar de Osorio. However, if an applicant for adjustment of status has an alternate basis for adjustment, the adjudication should not be delayed.

Implementation

The AFM is updated as follows (AFM Update AD13-10):

☞ 1. AFM Chapter 21.2(e)(6) is added.

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(6) Priority date retention requests.

Officers may encounter cases where they believe a newly-filed petition is eligible for assignment of an earlier priority date. Officers may also encounter cases where they believe an applicant is eligible to adjust status in the F2B category – despite no longer qualifying as a derivative beneficiary of the original petition and despite having no subsequent petition filed to classify the individual in the F2B category. Pending the U.S. Supreme Court ruling in Mayorkas v. Cuellar de Osorio (anticipated ruling in spring 2014), follow the guidance below when considering eligibility for priority date retention.

(A) If the beneficiary was previously found eligible as a derivative on an approvable F2A category petition ("petition #1") that has not been revoked or otherwise terminated, and the subsequent petition ("petition #2") was filed by the same petitioner as in petition #1, USCIS will apply the earlier priority date to petition #2 (regardless of whether the second petition is initially filed in the F2B or F1 classification).

(B) If the beneficiary was previously the subject of an approved F2A petition and that petition has not been revoked or otherwise terminated, any subsequent petition filed by the same petitioner, which is approved by USCIS shall be entitled to the older priority date and approval of the new petition shall be considered a reaffirmation of the previous approval, as provided in 8 CFR 204.2(h)(2).

(C) If the principal beneficiary of an F2B petition (petition #2) was ***previously*** the derivative beneficiary of a petition filed pursuant to sections 203(a)(1), (3), (4), or 203(b), and the petitioner of petition #2 was not the petitioner on the previous petition

(petition #1), then petition #2 is NOT entitled to the older priority date. See 8 CFR 204.1(b); 22 CFR 42.53(a). Instead, petition #2 should be assigned a priority date based on the date of filing. Send the standard notice of denial of priority date retention provided through the appropriate chain of command. Continue to otherwise adjudicate the petition on its merits in accordance with applicable law, regulations, and policies.

Example 1: Alice is an LPR. She files a petition for her husband, Barney, for F2A classification. Their son, Charlie, is listed as a derivative. Charlie ages out. Barney adjusts status.

Scenario A: Barney files a petition on behalf of Charlie for classification as an F2B. This petition *cannot* retain the priority date from the petition filed by Alice because it was filed by a different petitioner.

Scenario B: Alice files a petition on behalf of Charlie for classification as an F2B. This petition *can* retain the priority date from the petition filed by Alice for Barney because it is the same petitioner filing on behalf of the same beneficiary.

Example 2: David is a USC. He files a petition on behalf of his brother, Eric. Eric's daughter, Fanny, is listed as a derivative. Fanny ages out. Eric adjusts status.

Scenario: Eric files a petition for Fanny for classification as an F2B. This petition *cannot* retain the priority date from the petition filed by David because it was filed by a different petitioner.

(D) If an individual files an application for adjustment of status in the F2B or F1 classification based on previous F2A *derivative* classification, but the petitioner did not file a new (subsequent) petition on behalf of the individual, the individual may be eligible for adjustment of status if:

(i) he or she was previously the derivative beneficiary of an approvable F2A petition;

(ii) he or she qualifies as the son or daughter of the original petitioner (take particular care that step-relationships were created before the applicant turned 18); and

(iii) all other eligibility requirements are met.

Example 3: Gregory is an LPR. He files a petition for his wife, Heather. Heather's son, Igor, is listed as a derivative beneficiary on the petition, but he ages out. Heather adjusts status.

Scenario 1: Igor was 17 years old when his mother married Gregory. He files an application for adjustment of status in the F2B category. Igor qualifies as Gregory's stepson and may use the priority date from the petition filed on behalf of his mother to adjust status.

Scenario 2: Igor was 19 years old when his mother married Gregory. He files an application for adjustment of status in the F2B category. Igor does not qualify as Gregory's stepson and is not eligible to adjust status in the F2B category, so the application must be denied on the basis that there is no visa available to him because he is not eligible for an immigrant visa classification.

(E) If an application for adjustment of status is pending and eligibility is solely contingent upon a request for priority date retention for which he or she is not eligible, hold the application pending the U.S. Supreme Court's ruling on Mayorkas v. Cuellar de Osorio and applicable guidance issued pursuant to that ruling. If, however, the applicant has another basis of eligibility for adjustment, adjudication based on the alternate basis of eligibility should not be delayed.

(F) If a denied applicant for adjustment of status files a motion to reopen or reconsider, or if such a motion is pending, and eligibility is solely contingent upon a request for priority date retention for which he or she is not eligible, hold the motion pending the U.S. Supreme Court's ruling on Mayorkas v. Cuellar de Osorio and applicable guidance issued pursuant to that ruling. If the applicant demonstrates another basis of eligibility for adjustment that was not properly considered before denial, the application should be reopened and adjudication based on the alternate basis of eligibility should not be delayed.

☞ 2. The AFM Transmittal Memoranda button is revised by adding, in numerical order, a new entry to read:

AD13-10 11/21/2013	Chapter 21.2(e)(6)	Provides guidance for properly assigning priority dates in those instances where a petitioner requests that the priority date from a separate, previously filed petition, be applied to a later filed F2B petition, pursuant to the CSPA.

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 or suggestions regarding this PM should be addressed through appropriate channels to the Office of the Chief Counsel and the Office of Policy and Strategy.