AMERICAN IMMIGRATION LAWYERS ASSOCIATION

April 16, 2021

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via e-mail: USCISPolicyManual@uscis.dhs.gov

Re: USCIS Policy Manual, Volume 7: Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act – *Supplemental Comment*

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following supplementary comments relating to updated USCIS policy guidance on the "sought to acquire" requirement under the Child Status Protection Act (CSPA) found in Volume 7: Adjustment of Status, Part A, Adjustment of Status Policies and Procedures, Chapter 7, Child Status Protection Act ("Policy Manual") as announced in a Policy Alert dated November 13, 2020 ("Policy Alert").[1]

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

We appreciate the opportunity to provide comments to USCIS relating to its recent updates to Volume 7, Part A, Chapter 7 of the USCIS Policy Manual pertaining to the Child Status Protection Act. We believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government. For the reasons outlined below, AILA urges USCIS to amend its guidance and require that officers use the "Dates for Filing" chart to determine the applicant's age at the time of visa availability for CSPA age calculation purposes, when the Form I-485 is filed based on a visa being deemed available under DOS' "Dates for Filing" chart. By making this simple adjustment to its guidance, USCIS can avoid age outs that

[1] *See* U.S. CITIZENSHIP & IMMIGRATION SERV., DEPT. OF HOMELAND SECURITY, PA-2020-19, USCIS PUBLIC SERVICES (Nov. 13, 2020), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201113-CSPA.pdf.

devastate families, oftentimes negating a primary purpose of many foreign nationals to maximize economic, educational, and humanitarian opportunities for their children in the United States.

A. USCIS should Amend its CSPA guidance to Conform to Congressional Intent and the Plain Language of the Statute by Providing Protection to Children Who Timely File Form I-485 because the Visa Bulletin "Dates for Filing" Chart B is Current

a. The current guidance will result in the denial of properly filed and accepted adjustment of status applications for which the Visa Bulletin indicated that visas were available.

USCIS's current guidance regarding CSPA takes the position that the calculation of whether CSPA protections are applicable to a child are dependent upon visa availability per the Visa Bulletin's Final Action Date Chart (Chart A). A filing timely made pursuant to the Dates for Filing Chart is not used in calculating a child's CSPA age. In pertinent part, the Policy Manual states:

> *Visa Bulletin Final Action Dates Chart used for Child Status Protection Act Age Determination*
>
> While an adjustment applicant may choose to file an adjustment application based on the Dates for Filing chart, USCIS uses the Final Action Dates chart to determine the applicant's age at the time of visa availability for CSPA age calculation purposes. Age at time of visa availability is the applicant's age on the first day of the month of the DOS Visa Bulletin that indicates availability according to the Final Action Dates chart.
>
> An applicant who chooses to file an adjustment application based on the Dates for Filing chart may ultimately be ineligible for CSPA if his or her calculated CSPA age is 21 or older at the time his or her visa becomes available according to the Final Action Dates chart.[2]

b. USCIS must amend this policy so that it more accurately implements the CSPA's intent to preserve family unity to the maximum extent possible.

AILA believes the Policy Manual provision referenced above is incorrect policy, as it is at odds with the text of the applicable statutory and regulatory provisions, and will lead to the aging out of many children whom the statute was designed to protect. AILA urges USCIS to amend its guidance and require that officers use the "Dates for Filing" chart to determine the applicant's age at the time of visa availability for CSPA age calculation purposes, when the Form I-485 is filed based on a visa being deemed available under DOS' "Dates for Filing" chart. This correction will prevent such age outs and properly extend CSPA protections for hundreds or thousands of families.

i. USCIS's guidance is at odds with the plain meaning of the CSPA provisions in the INA.

[2] https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-7 (last accessed Dec. 7, 2020) (citations omitted).

We begin our analysis with the statutory text. The INA allows for the filing of a Form I-485 adjustment of status application only when "an immigrant visa is immediately available."[3] The relevant sections of CSPA are codified in INA **§** 203(h)(1)(A), which extends CSPA protections and locks in a child's age on the "date on which an immigrant visa number becomes available…but only if the [child] has sought to acquire the status of an alien lawfully admitted for permanent residency within one year of such availability."

Congress has spoken unambiguously to the question of when a visa becomes available under CSPA. The visa must be available at the **initiation** of the visa-application / adjustment of status process, which is by definition always before a visa can be issued or a Form I-485 approved.

In comparing the statutory text with practical experience, whether CSPA protection is applicable depends on two distinct and sequential steps. First, the child's CSPA age is calculated on the date a visa becomes available.[4] Second, to take advantage of her CSPA age, the child must then "seek[] to acquire" status as a lawful permanent resident "within one year of such availability."[5] The CSPA thus prescribes a sequential process for securing age-out protection: (1) a visa first must become "available," and (2) the child must seek to acquire status within one year of visa availability (generally by submitting an application for a visa or adjustment of status). If a child clears both sequential steps, her CSPA age will remain frozen until a visa can be issued or her status adjusted.

However, the Policy Manual guidance diverges from this unambiguous statutory structure when it declares that "An applicant who chooses to file an adjustment application based on the Dates for Filing chart may ultimately be ineligible for CSPA if his or her calculated CSPA age is 21 or older at the time his or her visa becomes available according to the Final Action Dates chart." In other words, a child who seeks to acquire lawful permanent residency where a visa is immediately available (that is, when USCIS accepts the Form I-485) could still lose CSPA protections, in violation of the clear sequence of events codified at INA § 203(h)(1)(A).

Per the Policy Manual guidance, a visa does not become "available" until the Department of State (DOS) deems itself authorized to issue the visa. USCIS then uses those availability dates to determine when an adjustment of status application must be filed. When the demand for visa numbers is less than the available visas, USCIS instructs adjustment of status applicants that they "must use the Dates for Filing chart in the Department of State Visa Bulletin for XXX."[6] By treating the term "available" as synonymous to when a visa *can be issued*, USCIS's policy inverts the proper order of the CSPA's sequential framework as well as general immigrant benefit processing. In the normal course, issuance of lawful permanent residence is the final step of the adjustment process. A green card is granted after a child "seeks to acquire" permanent residency by, *inter alia*, submitting a Form I-485. However, under USCIS's inverted interpretation, a child

[3] INA **§** 245(a)(3) (emphasis added).
[4] 8 U.S.C. § 1153(h)(1).
[5] *Id*.
[6] *See e.g., Adjustment of Status Filing Charts for the Visa Bulletin*, U.S. CITIZENSHIP & IMMIGRATION SERV., (last updated Mar. 2, 2021), www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/adjustment-of-status-filing-charts-from-the-visa-bulletin (mandating the use of the Dates for Filing Chart for all other family-sponsored preference categories for March 2021).

may seemingly seek to acquire permanent resident status *before* a visa becomes available, a contorted statutory interpretation that is the exact opposite of the sequential structure of the CSPA.

Because the statutory text is unambiguous, no guidance is needed.[7] The instant guidance violates long established principles of the INA that prescribe visa availability at the initiation of the adjustment process. Accordingly, USCIS should withdraw the instant guidance and hold that the filing of Form I-485, when a visa is deemed available under DOS' "Dates for Filing" chart but not yet available under its "Final Action Date" chart is sufficient for attaching CSPA protections.

Even if, *arguendo*, the provisions of INA § 203(h)(1)(A) were ambiguous and require explanatory guidance, then USCIS must first look to other fundamental elements of statutory construction before issuing guidance to ameliorate the purported ambiguity. The Supreme Court mandates that agencies consider "the design of the statute as a whole and to its object and policy."[8] Based on this standard, the Policy Manual guidance fails.

USCIS' offending guidance interprets the word "available" in isolation from the rest of the INA. It is a "fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation but must be drawn from the context in which it is used."[9] In this case, neither the specific CSPA provisions nor the INA's provisions relating to granting lawful permanent residency state that a visa is "available" only when the visa is "authorized for issuance" or can "be issued." In fact, Congress specifically used the term "available" in the CSPA despite using the phrases "authorization for issuance" and "to be issued" elsewhere in the same statutory section.[10] Therefore, if Congress intended the child's CSPA age to be calculated on the date "a visa can be issued," it could, and would, have explicitly said so. But it did not. The Supreme Court has instructed that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[11]

ii. USCIS's guidance violates the plain meaning of the words used in the INA, the CSPA, and their implementing regulations.

USCIS' established practice, recognized in the Policy Manual, is that Forms I-485 can be filed earlier than the final action date, thereby implicitly acknowledging the availability of an immigrant visa, as INA § 245 (a)(3) does not permit the filing of Form I-485 if an immigrant visa is not immediately available. Thus, allowing a child to age out notwithstanding a properly and timely filed Form I-485 under the "Dates for Filing" Chart is incongruent with the concept that a visa must be available.

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[7] *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).
[8] *Dada v. Mukasey*, 554 U.S. 1, 16, (2008). *See also King v. Burwell*, 576 U.S. 473 (2015).
[9] *Deal v. United States*, 508 U.S. 129, 132 (1993).
[10] *See* 8 U.S.C. §§ 1153(c)(1)(E)(iv), (f), (g).
[11] *Kucana v. Holder*, 558 U.S. 233, 247-50 (2010), *quoting Nken v. Holder*, 556 U.S. 418 (2009); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

The regulation at 8 CFR § 245.1(g) (1) speaks to the availability of visas, and states explicitly that an immigrant visa is immediately available when the Visa Bulletin so indicates, stating:

> ***Availability of immigrant visas under section 245.*** An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. *A preference immigrant visa is considered available for accepting and processing if the applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin* (or the Bulletin shows that numbers for visa applicants in his or her category are current). Information concerning the immediate availability of an immigrant visa may be obtained at any Service office. (emphasis added)

DOS' utilization of the two charts in each Visa Bulletin, as well as the USCIS dedicated website[12] document when a visa is considered immediately available for purposes of filing a Form I-485. Assuming arguendo that the agency would not intentionally adopt a policy in direct contravention of its own regulatory requirements, if USCIS will accept a Form I-485, a visa must be, by definition, immediately available.

Accordingly, when we compare the prerequisite for filing a Form I-485 where a visa must be "immediately available" to the CSPA protections requiring the determination of when the same visa "becomes available" we find no meaningful or rational basis for distinguishing between when a visa "becomes available" and when one is "immediately available". As defined by Merriam-Webster, "immediate" is defined as:

> 1a: occurring, acting, or accomplished without loss or interval of time : INSTANT
> ….
>
> 1b(2) of or relating to the here and now : CURRENT[13]

Thus, if a Form I-485 can be filed based on the *immediate* availability of the visa, it logically follows that the visa has *become* available based on the plain meaning of the word "immediate." The priority date is necessarily current, even if the agency is not yet taking final action on the particular adjustment of status application at issue. This plain meaning comports with the sequential nature of CSPA's codified text, and aligns logically with the requirements of 8 CFR § 245.1(g) (1) as discussed above.

iii. USCIS' Policy Manual guidance violates Congressional intent.

[12] *Adjustment of Status Filing Charts for the Visa Bulletin, supra* note 6.
[13] https://www.merriam-webster.com/dictionary/immediate (last accessed Dec. 7, 2020).

In interpreting CSPA, courts have held that it "was 'meant to be an ameliorative statute, applying to as many parties as practicable.'"[14] As the Supreme Court has recognized, Congress intended the CSPA to protect children from aging out of their derivative status "at . . . the front and back ends of the immigration process."[15] Thus, while Congress did not intend for the CSPA to protect *all* children, it did intend its "ameliorative effect" to apply as broadly as possible—throughout the majority of the immigration process—because it recognized that delays occur after a visa becomes available.[16]

USCIS's guidance is unduly restrictive and its effects violate clear Congressional intent. Through the CSPA, Congress sought to ensure that children would receive age-out protection from the "initiation of the visa application process," rather than "requiring an alien to wait until the end of the application process" to receive age-out protection.[17] This is why actions at the *initiation* of the visa application process, such as submitting a Form I-485, must be interpreted to fulfill the CSPA's "seek to acquire" requirement, rather than events at the *end* of the visa application process, such as final adjudication of Form I-485. By reversing this policy, USCIS will accomplish Congress' objective of protecting family unity to the maximum extent possible.

Amending the current CSPA guidance would promote Congress' goals by equating the event that triggers the CSPA's protection, the date a visa becomes "available," to events that open the child's window to initiate the adjustment process. This ensures that the CSPA's ameliorative effect applies at both the front and back ends, as Congress had intended. This interpretation would also comport with Congress's intent to protect children who have shown they genuinely intend to immigrate to the United States by submitting an application and paying the U.S. Government a substantial fee.[18]

USCIS guidance instead defeats Congress' goals by "requiring [the child] to wait until the end of the application process" to be afforded CSPA protection.[19] By equating the date on which a visa *becomes available* to the date on which the visa can be *issued*, USCIS would deprive a child of the CSPA's protection until the very end of the process, *after* she has submitted her visa application, paid all fees, and committed to immigrating permanently to the United States and all attendant responsibilities of being a lawful permanent resident.

iv. Broadening CSPA protections is sound policy and would avoid unconscionable results

There is often a wide divergence between Final Action Dates and Dates for Filing, thereby increasing the risk that children may age out. For example, in the EB-5 category, in March 2021, the Final Action Date for Vietnam is October 22 , 2017. Yet the relevant Date for Filing is "current" – a divergence of over three years and four months. Similarly, in the EB-3 category, in March 2021, the Final Action Date for India is July 1, 2010, whereas the Dates for Filing is nearly 3 ½ years later, January 1, 2014. The problem is also apparent in the F3 categories for married Mexican

[14] *Schwebel v. Crandall*, 343 F. Supp. 3d 322, 330 (S.D.N.Y. 2018) (quoting *Arobelidze v. Holder*, 653 F.3d 513, 521 (7th Cir. 2011)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).
[15] *Scialabba*,v. *Cuellar de Osorio*, 573 U.S. 41 (2014) at 53.
[16] *Id.*
[17] *Matter of O. Vazquez*, 25 I&N Dec. 817 (BIA 2012) at 819–20.
[18] *Matter of O. Vazquez* at 821 n.9.
[19] *Matter of O. Vazquez* at 820.

sons and daughters of U.S. Citizens, where the Final Action Date is September 15, 1996 and the Dates for Filing is September 8, 2000. Amidst the global COVID-19 pandemic, consulates have closed or operate with extremely limited capacity and visa issuance capabilities. It is not clear if or when final action dates will advance. The administrative backlog grows each day, especially as the mostly operational USCIS continues to approve Forms I-526, I-140 and I-130.

By amending the Policy Manual guidance to attach CSPA protections based on the "Dates for Filing," hundreds, if not thousands of families would remain together as USCIS, DOS, and the world recover from the interruptions caused by a once-in-a-century pandemic. Even in "normal times," however, by aligning interpretive guidance with the statute, regulations and Congressional intent to encompass filings timely made by the "Dates for Filing," the date USCIS requires Forms I-485 to be filed, the overarching goals of CSPA would be properly realized, and families seeking to normalize their lives in the U.S. as permanent residents would be better able to do so without separation.

By making this simple adjustment to its guidance, USCIS can avoid age outs that devastate families, oftentimes negating a primary purpose of many foreign nationals to maximize economic, educational, and humanitarian opportunities for their children in the United States. Quite simply, this is sound, humane policy. Moreover, it is consistent with the goal of Congress and the Biden Administration to protect children broadly from aging out and from families being separated. The alternative, that an unnecessarily restrictive policy interpretation could deprive families of the opportunity to immigrate with their children, is unconscionable. This unacceptable outcome can simply be eliminated by amending the guidance, at no hardship to the agency. In balancing the equities, we urge USCIS to consider the plight of the affected families and expand its policy to lead to more just, fair, humane outcomes.

B. Conclusion

We thank you for this opportunity to provide comments to the policy guidance contained in Volume 7, Part A, Chapter 7 of the USCIS Policy Manual regarding the Child Status Protection Act. We look forward to a continuing dialogue on this and related matters.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION