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Immigration News

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Child Status Protection Act

Offering Solutions Many Have Been Waiting . . . and Waiting . . . and Waiting For

By: Maggie Mills, Attorney at Law

On August 6, 2002, President Bush signed legislation called the "Child Status Protection Act," (CSPA) to address the problem of minor children losing their eligibility for certain immigration benefits as a result of significant delays in INS and/or Department of State processing. This act prevents many children of U.S. citizens, permanent residents and some asylees and refugees from "aging out," before they can obtain immigration benefits they are otherwise eligible to receive.

Prior to this Act, the child's age was determined at the time of adjudicating the grant of permanent residence. And, since the cut-off age for children to qualify for permanent residence based on their parents' status or based on adjustment in connection with their parents' cases is 21, adjudication and the granting of permanent residence had to occur before the child turned 21, or he/she lost all immigration benefits as the child of a U.S. citizen or permanent resident.

This prior definition was problematic in many situations, because immigrant visa availability is severely backlogged, and because INS, Department of Labor and Department of State processing times are often significantly delayed. Families who filed for permanent residence when their oldest children were in their early teens became increasingly frustrated as their children turned 21 one by one, forced to find independent means of staying in the U.S. legally with their family.

The new definition acts to set the child's age at particular stages of processing, (depending on the type of case), so that if a child's application process reaches a certain point before he/she turns 21, he/she is protected

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Photo: courtesy of HUG Internationally, Inc.

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from "aging out," and can adjust to permanent resident or obtain an immigrant visa, so long as he/she applies within one year of becoming eligible.

Age-Out Protection for Children of U.S. Citizens

The CSPA extends benefits to children of U.S. citizens in the immediate relative category (minor children of U.S. citizens) under three specific situations:

The child's age will be determined on the date on which the Form I-130 (Petition for Alien Relative) is filed, rather than when the I-485 (Application for Permanent Residence) is adjudicated.

When a child is sponsored under the family-based second preference category (minor child of permanent resident) and the parent naturalizes to become a U.S. Citizen, the child becomes eligible for immediate relative status and his/her age is fixed on the date of the parent's naturalization.

If a U.S. citizen parent files for a married son or daughter who is under 21 (which is a family-based third preference category), and the child divorces, the child, assuming he/she is under age 21, is qualified as an immediate relative and his/her age is fixed at the time the divorce is final.

Age-Out Protection for Children of Permanent Residents

The CSPA also protects children of lawful permanent residents. This includes children who have been directly sponsored by their parents or who are accompanying or following-to-join their parents, who are the beneficiaries of family-sponsored, employment-based, and diversity immigrant cases. These children are "derivative" beneficiaries, and the immigration benefits for which they are entitled are based on their parents' cases.

For example: Jose, a national of Costa Rica, married Sally, a permanent resident. Sally files an I-130 petition for Jose and his daughter, on which is listed Jose's daughter Maria, who was 16 at the time of filing in July of 1998. Jose and Maria would have been listed in the second preference family-based category (2A). Because they are not "immediate relatives," they must wait for an immigrant visa to become available before they can even apply for permanent resident status. For this category, it is currently taking about five years for immigrant visas to become available. Maria will turn 21 in February of 2003.

Under the old rules, Maria would lose her eligibility to apply for or adjust to permanent resident status when she turns 21. Under the CSPA, Maria will be protected if the following factors are in place:

> Her age on the date the visa becomes available, reduced by the number of days the underlying I-130 petition was pending with INS is under 21; and
>
> She applies for adjustment of status within one year of the date the visa becomes available.

Therefore, if the underlying petition was pending with INS for five months and was approved in December of 1998; and, an immigrant visa became available for Maria in April of 2003 (two months after she turned 21), Maria would be protected. The date the visa became available (April 2003) minus five months time that the petition was pending with INS (five months) is approximately December of 2002, prior to Maria's 21st birthday! Maria can now happily apply for permanent residence after she turns 21, thanks to the CSPA.

Age Out Protection for Children of Beneficiaries of Employment-Based Cases

The CSPA also protects children of foreign workers who are the beneficiaries of employment-based immigrant petitions. The same test and timing described in the earlier example is applicable to children of employment-based beneficiaries. However, at the current time, all immigrant visa categories for employment-based petitions are current, meaning that employment-based immigrants are immediately eligible to apply for an immigrant visa or for adjustment to permanent residence once the underlying I-140 petition is approved.

Using the above logic in the current system, one would assume that, right now, the child's age is protected so long as he/she is under 21 when his/her parent's I-140 petition is filed. This is because the immigrant visa "becomes available" as soon as the petition is approved, and therefore the child's age when the I-140 is approved can be reduced by the amount of time it was pending with INS, which brings us back to the date the petition was filed. However, we are still waiting for clarification from INS and regulations for this Act regarding this issue and how the CSPA applies in the current climate, when all employment-based visas are current.

Age-Out Protection for Children of Applicants for Asylum and Refugee Status

Another notable section of the CSPA benefits children of asylum and refugee applicants. Age-out protection is extended to children of asylum applicants and applicants for refugee status if

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THE DEPARTMENT OF HOMELAND SECURITY
& THE END OF IMMIGRATION AS WE KNOW IT

BY: GARRY DAVIS, ATTORNEY AT LAW

After more than a year of debate, Congress has reached a consensus on the highly debated Homeland Security Act. On Tuesday, November 19, 2002, the Senate passed the Homeland Security bill by a vote of 90-9. The House had passed an identical bill previously, and forwarded the Senate-approved bill to the President for signature. President Bush signed the bill into law on November 25, 2002.

INS Commissioner, James W. Ziglar, praised the passage of the bill in a statement on November 20. Mr. Ziglar explains, "By moving the enforcement of the nation's immigration laws to a much larger agency, the border enforcement effort will be enhanced with important new resources and strength. In the new department, there will be a stronger separation between the service and enforcement responsibilities of the INS, but there also will be enhanced communication between these functions, a critical element to the success of our mission." The President explained that the goals of the bill includes "providing for intelligence analysis and infrastructure protection, strengthening our borders, improving the use of science and technology to counter weapons of mass destruction, and creating a comprehensive response and recovery division." He is expected to sign the bill into law before Thanksgiving.

The purpose of the Homeland Security Act is to combat terrorism. In the wake of September 11, 2001, the President has been working with Congress to effectuate the most sweeping restructuring of the federal government since the 1940s. The law creates a new Department of Homeland Security, and provides for a Secretary for the department. The Secretary will be responsible for preventing the entry of terrorists and the instruments of terrorism into the US; securing our borders, territorial waters, all ports of entry and all domestic transportation systems; carrying out immigration and other visa functions; and administering U.S. customs laws. These functions are currently handled by various departments, including the Department of Justice. With the passage of the new law, all of these functions will be brought under one central department, and under the ultimate responsibility of the Secretary of Homeland Security.

The new law will affect many areas of immigration law. In relation to visas, the Department of Homeland Security will provide its own officers to each consular post at which visas are issued. These individuals will provide training to consular officers, review visa applications, and conduct investigations. Also, once any visa is denied and the applicant files another visa application, the reviewing officer must certify that the previous file has been reviewed and explain why the visa is being granted despite the information in the previous file. This will result in processing delays for those seeking to obtain a visa after being previously denied.

The Act provides for the abolishment of INS. While many may cheer this move, do not be too hasty. The INS divisions of Border Patrol, Detention and Deportation, Investigations, and Inspections will be covered by the Under Secretary for Border and Transportation Security. The benefits functions of INS will be handled by the Bureau of Citizenship and Immigration Services, headed by a Director who reports to the Assistant Secretary of the Bureau of Border Security.

Dividing the enforcement and benefits duties of INS, two functions which are always in conflict, into two separate bureaus headed by two

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Happy Holidays

Front row: Attorney, Maggie Mills, Managing Partner, David Swaim, Attorney, Garry Davis.

Second row: Staff members, Mindy Wolfson, Justina Wang, Jessica LeBeau.

Third row: Andrea Schnitker, Mercedes Benavides, Jennifer Lowry, Barbara Nelson.

Fourth row: Holly Nichols, Teresa Cook, Jennifer Lee.

Fifth row: Attorney, Amy Hsu, Grace Shyi, Jobina Ho, Amanda Stewart.

TSA Posts Successes

NOVEMBER 2002

H-1B - 6
L-1 - 1
R-1 - 1
I-140s - 4
I-765 - 13
I-131 - 30
Labor Certifications - 3

OCTOBER 2002

H-1B - 12
L-1 - 5
O-1 - 1
I-140 - 4
I-765 - 18
I-131 - 16
Labor Certification - 5
Permanent Residence - 6

SEPTEMBER 2002

H-1B - 27
L-1 - 6
R-1 - 1
I-140 - 3
I-765 - 13
I-131 - 31
Labor Certifications - 4
National Interest Waiver - 1
Permanent Residence - 3

AUGUST 2002

H-1B - 16
I-131 - 15
I-140 - 6
I-765 - 20
L-1 - 1
Labor Certification - 1
Permanent Residence -12

Child Status Protection Act . . .

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the child was under the age of 21 when the application was filed. The child will be considered a child for purposes of derivative asylum or refugee benefits.

There are a few other categories of children who are offered protection under the CSPA, in certain circumstances and if specific factors apply. We encourage all of our clients and friends who may benefit from this wonderful Act to meet with us to determine if the factors and requirements apply.

This is one of the most important immigration-related pieces of legislation signed into law this year, and it promises to offer countless benefits to children and young adults (and their parents) in the future – benefits many have been and will be waiting for for a very long time! ■

New Rules on Special Registration for Non-Immigrants

BY: GARRY DAVIS, ATTORNEY AT LAW

Pursuant to a final rule published by the United States Attorney General on August 12, 2002, certain nonimmigrants are required to subject themselves to special registration requirements and closer monitoring while they are in this country. The rule was recently modified to add registration requirements to some individuals who are already in the United States. Below is a breakdown of the critical information needed to understand who is subject to the requirements and what is required.

REGISTRATION AT INSPECTION

Those required to comply with the special registration requirements are:

1. Citizens or nationals of Iran, Iraq, Libya, Sudan and Syria;
2. Individuals the inspecting officer has reason to believe are citizens of these countries (i.e. dual citizens);
3. Individuals who meet certain criteria as established by the Attorney General in the interest of national security; or
4. Individuals who a consular officer or inspecting officer has reason to believe meet certain criteria established by the Attorney General in the interest of national security.

The most troubling criteria are numbers 3 and 4, which leave a great deal of discretion with the consular or inspecting officer to make determinations about someone's subjectivity to the requirements. One hard and fast additional criterion has been established pursuant to number 3: Citizens of Pakistan, Saudi Arabia and Yemen, who are males aged 16 to 45, are required to register. In addition, the consular or inspecting officer has discretion to require a nonimmigrant seeking admission to be subjected to the special registration requirements. The officer may only consider the following in making this discretionary determination:

1. The nonimmigrant has made unexplained trips to Iran, Iraq, Libya, Sudan, Syria, North Korea, Cuba, Saudi Arabia, Afghanistan, Yemen, Egypt, Somalia, Pakistan, Indonesia, or Malaysia, or the explanation of such trips lacks credibility.
2. The nonimmigrant has engaged in other travel, not well explained by his or her job or other legitimate circumstances.
3. The nonimmigrant has previously overstayed in the United States on a nonimmigrant visa, and monitoring is now appropriate in the interest of national security.
4. The nonimmigrant meets characterization established by current intelligence updates and advisories.
5. The nonimmigrant is identified by local, state or federal law enforcement as requiring monitoring in the interest of national security.
6. The nonimmigrant's behavior, demeanor, or answers indicate that he or she should be monitored in the interest of national security.
7. The nonimmigrant provides information that causes the immigration officer to reasonably determine that the individual requires monitoring in the interest of national security.

Unfortunately, this is all we have been given, without explanation as to what "behavior," "demeanor," "answers," or "information" would give rise to suspicion. But at least this information gives some idea about who will be required to comply with the special registration requirements.

Those determined to be subject to these requirements will undergo a special inspection upon entry into the United States. Fingerprints and a photo will be taken, and an interview will be conducted to gain information regarding the individual's plans for their stay. If the individual remains in the United States for longer than 30 days, they must report to a designated INS office between 30 and 40 days to demonstrate to the INS that the travel plans discussed in the interview are being followed. If the individual remains in the United States longer than 1 year, they must report to a designated INS office within 10 days of the anniversary date of admission. If the individual changes address, employer, or school after remaining in the United States for 30 days or more, the INS must be notified of the change within 10 days. Finally, upon departure, the individual must leave through a designated port of entry, have a departure interview with an INS officer, and then leave from that same port the same day. The designated ports of entry as of October 1, 2002 can be found at INS' website. Most major airports are included.

As long as the above conditions are met, there should be no issues with travel to the US for those subject to the requirements. However, failure to comply will be deemed a violation of status, rendering the individual out of status, subject to arrest, detention, fines and removal. Furthermore, future applications for benefits may also be negatively impacted for failure to comply.

REGISTRATION FOR THOSE ALREADY IN U.S.

Citizens or nationals of Iran, Iraq, Libya, Sudan, or Syria who are male, born on or before November 15, 1986, and who plan to stay in the U.S. past December 16, 2002, must report

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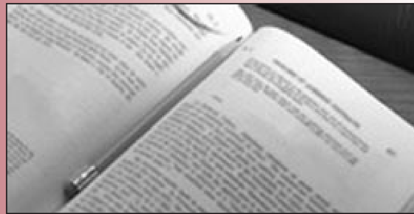
BY: AMY HSU
ATTORNEY AT LAW

SPECIAL IMMIGRANT RELIGIOUS WORKERS:

DOES SEMINARY STUDY COUNT?



In order to qualify for an immigrant visa as a special immigrant religious worker, the person seeking to immigrate to the U.S. must meet the following requirements: 1) For at least two years immediately preceding the time of the application, the person has been a member of a religious denomination having a bona fide, nonprofit, religious organization in the U.S. and 2) the person seeks to enter the U.S. to either a) solely carry on a vocation as a minister, or b) if before October 2003 he or she seeks to work in a professional capacity in a religious vocation or occupation or to work for an organization or 501 (c) (3) affiliate in a religious vocation or occupation, and 3) he or she has been carrying on such vocation, professional work or other work continuously for at least a two-year period.

One question that arises frequently is whether we can count seminary study by an F-1 student toward the two-year employment requirement for a special immigrant religious worker? The regulations do not provide an answer to this question. While there are several cases addressing this issue, the answer really depends on two sentences in a letter from INS essentially saying that seminary study equals work.

In a letter from Lawrence Weinig, the Acting Assistant Commissioner of Adjudications of the INS, dated May 8, 1992, Mr. Weinig states that "Continued study by a priest will be considered as carrying on the vocation of a minister of religion if it can be demonstrated that such study is consistent with the priest's ministerial vocation and provided that the priest continues to perform the duties of a minister of religion. Continued study by a nun will be considered as qualifying as religious work provided that it can be demonstrated that such study is consistent with her vocation as a nun."

What exactly does this mean? The literal reading of this language is that the two years of seminary study done by the F-1 student is equal to two years of work. And even though the letter refers to priests and nuns specifically, it could be interpreted to apply to other kinds of religious workers, especially ministers. So the answer to the question seems to be, yes, based on this letter, but a letter from the INS isn't the best source for information because they are not actually legally binding the way the regulation and case law is.

Several cases also help clarify the requirements.In one case the Administrative Appeals Office (AAO) explained that in order to count the work toward the two-year requirement, it must "continued" study. The applicant came to the U.S. as an F-1 student to study theology in order to become qualified as a priest. He was not ordained or authorized to perform as a priest while he was in school, so his application was denied. If he had been here as an F-1 student to continue his studies, the case would have been approved.

The two years of religious work must be continuous, but they do not need to be full time in the sense of requiring forty hours of work per week. In another special immigrant religious worker case involving a missionary, he had spent the previous two years doing missionary work for thirty five hours a week and received $200 a week in compensation. The AAU noted that the law does not require that the religious work be completed on a full-time basis. They then approved the immigrant religious worker petition because the person had established that he had been employed for at least two years prior to filing the petition.

In another case, the AAU found that a teacher who taught for thirty-two hours a week was employed full-time for the required two years. The teacher also spent additional hours every week grading papers, preparing for classes, and meeting with school officials and that was enough to approve the petition.

Voluntary service will not satisfy the two-year requirement. The person must have been remunerated for the work. The AAO denied a special immigrant religious worker petition on the grounds that incidental voluntary participation in church activities did not satisfy the requirement of having been continuously carrying on a religious occupation for the two-year period. The petition was also denied because the petitioning church failed to demonstrate the ability to pay the proffered wage. The law requires that the church or organization submit financial documents such as tax returns or audit reports in order to show that it has the ability to pay the person's wage and to show that the person will not become a public charge.

These cases show that it is possible to use the F-1 time spent studying religious subjects to fulfill the two-year requirement if the following criteria are met: 1) the F-1 student was studying to continue the religious vocation, 2) the work is consistent with ministerial duties, 3) the work is continuous for two years, and 4) the person was compensated for his work and he or she was not simply a volunteer. Also, full-time employment is not required. ■

Immigration Updates

BARBARA NELSON, SENIOR PARALEGAL
MINDY WOLFSON, SENIOR PARALEGAL

The Department of State (DOS)

In the last issue of *The Compass*, I reported that the fee for the Machine Readable Visa or MRV fee was increased to U.S. $65.00. The fee has again increased on November 1, 2002 to U.S. $100.00.

Also on November 1, 2002, the American Consulate in Ciudad Juarez, Mexico stopped taking appointments for nonimmigrant visas for third country nationals (TCN). There are two exceptions to this new rule,

(1) Non-Mexican applicants who have Mexican legal residency/work permits and reside or are employed in the Juarez consular district of the Mexican states of Chihuahua and Durango; and

(2) Non-Mexican F-1 students in full-time degree programs who can demonstrate that their initial F1 or B2 "Prospective Student" visa was issued in their home country.

The delays at the American Consul offices are increasing since the establishment of additional security checks. You should allow enough time to process the visa while you are on holiday or business. Apply at the AC immediately upon arrival and request a tentative processing time schedule. We can't stress enough the importance of this, especially with holiday travel. Additionally, you should check the website of the appropriate visa office to determine backlogs – call, if necessary; but know in advance what delays you will encounter. We have several clients who went home for a one month vacation in the summer and they are still waiting on obtaining new visas. Remember male nationals of certain countries can expect longer delays due to the security checks (IBIS).

The Department of Labor (DOL)

There hasn't been any significant changes in DOL policy or procedures since our last issue. We continue to see long delays at all SWA and DOL offices. The major delays are the 245(i) cutoff of April 30, 2001 and the IT layoff situation. Some SWA offices have indicated that it could take almost one year to complete the April 2001 backlog of regular labor certification cases. RIR cases are somewhat faster; however, in some offices there is only a slight difference in processing times.

Immigration & Naturalization Service (INS)

On November 2, 2002, President Bush signed the "21st Century Department of Justice Appropriations Authorization Act" referred to as the DOJ Authorization Act. This new law covered many areas. If you are on an H-1B visa, the most significant aspect of this new law is that you are now permitted to file for a 7th-year extension as long as a labor certification application has been filed for at least 365 days. This also applies to individuals who had previously run out of time and either left the United States or changed status to another type of nonimmigrant visa.

New changes have been implemented by INS regarding filing the Change of Address form AR-11. The form must now be sent to London, Kentucky by either regular or overnight mail. See our website **www.tsalaw.com** for the new edition of the form along with the filing information.

As we went to press in the last issue, we reported that it is now permissible, in certain circumstances to file both the I-140 and the I-485 application (along with the I-765 and I-131 applications) at the same time with the appropriate Service Center. There is some controversy at the Service Centers as to when the I-765 and I-131 applications should be adjudicated. Some Service Centers have indicated that they will "perform an I-140 prima facie review prior to adjudication of the I-765/I-131 and, if prima facie eligible, EAD/AP document(s) will be issued and the I-140/I-485 will be returned to the I-140 backlog to be worked in date receipt order." Others, such as Texas Service Center, have waited until the I-140 petition has been approved and then adjudicated the I-765 and I-131. There hasn't been an official policy memorandum issued on this subject yet. Once we have defined procedures, we will let you know.

Immigration and Naturalization Service Processing Times

California Service Center as of July, 2002

I-140 - 08/08/2002	I-485 - 11/19/01
I-765 - 07/27/02	I-131 - 10/02/02

Nebraska Service Center as of June, 2002

I-140 - 09/23/02	I-485 - 06/17/01
I-765 - 09/17/02	I-131 - 09/17/02

Texas Service Center as of July, 2002

I-140 - 05/14/02	I-485 - 10/01/00
I-765 - 07/10/02	I-131 - 08/16/02

Vermont Service Center as of June, 2002

I-140 - 02/22/02	I-485 - 09/15/01
I-765 - 09/23/02	I-131 - 09/26/02

State Employment Security Agency / Department of Labor Processing Times

Texas SESA	Texas DOL
Basic - 04/2001	01/2000
RIR - 08/2002	08/2002
Conversion from Basic to RIR	7/29/2002
Remands from DOL	4/6/2001

Oklahoma SESA	Texas DOL
Basic -03/2001	same as above
RIR - 04/2001	

California SESA	California DOL
Basic - 04/2001	10/2000
RIR - 10/2001	01/2002

New York SESA	New York DOL
Basic - 10/1998	02/2002
RIR - 04/2001	09/2002

Illinois SESA	Illinois DOL
Basic - 04/2001	07/2002
RIR - 08/2002	07/2002

"New Rules . . ." *Continued from Page 5*

to INS for special registration. Also, effective November 22, 2002, males born on or before December 2, 1986 who are citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen, who were last admitted as nonimmigrants on or before September 30, 2002 and who will remain in the United States at least until January 10, 2003, must also report to INS for special registration. The interview will be very similar to the airport inspection interview, and all other special registration requirements apply. Each person subject to the November 15 effective date must report to the INS for inspection before December 16, 2002, or will be subject to the consequences mentioned above. Those subject to the November 22 regulation must report on or before January 10, 2003. In Texas, the INS offices performing these inspections are Dallas, El Paso, Harlingen, Houston, and San Antonio. ■

"Homeland Security . . ." *Continued from Page 3*

different individuals will likely lead to incongruous policies. These conflicts could be serious nightmares for those seeking benefits for which they are eligible.

Spending legislation is deadlocked in the lame duck session of Congress, which puts off implementation of some of the department's programs. Overseas inspection of containers coming to the U.S. will be delayed, as will additional grants to strengthen local law enforcement and fire departments provided for in the Homeland Security Bill. Also, financing to the National Institutes of Health for bioterrorism research will be limited, and many domestic security programs would be affected, including airport, maritime and trucking security, Coast Guard harbor patrols, additional Border Patrol agents and immigration inspectors, and hospital preparedness. These delays are likely to be resolved and the funding provided for shortly after the next session of Congress begins.

This sweeping change in our federal governmental structure will bring noticeable changes to the way people come to the United States. There is a delicate balance between protecting our citizens and residents from the threat of terrorism and the economic and social benefits of immigration. Through our immigration laws, families are reunited; those fleeing for their lives from those who would do them harm are given solace; folks from varied backgrounds and experiences bring richness to our culture; and we are protected from those who would come to this country with malicious intent. The new Department of Homeland Security should keep these interests and charges in mind as we move forward in this brave new world. ■

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