



U.S. Citizenship
and Immigration
Services

HQ 70/6.1.3 (CSPA Section 6, Opting-Out)
HQ 70/8.1 (Form I-539, V Visas)
AFM Update AD06-21

Interoffice Memorandum

To: SERVICE CENTER DIRECTORS
NATIONAL BENEFITS CENTER DIRECTOR
REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

From: Michael Aytes /s/
Associate Director
Domestic Operations

Date: June 14, 2006

Re: Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under The Child Status Protection Act Section 6 And Form I-539 Adjudications for V Status

Revisions to *Adjudicator's Field Manual (AFM)* Chapters 21.2(e)(4)(C) and 37.4
(AFM Update AD06-21)

Section I of this memorandum clarifies when an alien beneficiary is eligible to exercise the "opt-out provisions under section 6 of the CSPA.

Section II of this memorandum addresses adjudication of Form I-539 requests for extension of V-2 and V-3 status when the petitioner has naturalized. The AFM updates also contain updated filing location information for V related employment authorization requests and amended language to reflect USCIS policy in light of the *Akhtar v. Burzynski*, 384 F.3d 1193 (9th Cir. 2004) decision.

SECTION 1

Clarification of Opting-Out Provisions for F2A Visas by Amending USCIS March 23, 2004, Memorandum "Section 6 of the Child Status Protection Act"

I. Purpose

Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under The Child Status Protection Act Section 6 And Form I-539 Adjudications for V Status

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On March 23, 2004, USCIS issued a memorandum entitled "Section 6 of the Child Status Protection Act." The memorandum provided guidance for adjudicating requests submitted pursuant to section 6 of the Child Status Protection Act (CSPA). CSPA section 6, "Treatment Of Classification Petitions For Unmarried Sons And Daughters Of Naturalized Citizens," amends section 204(k) of the Immigration and Naturalization Act (INA).

As of this memorandum's publication date, USCIS changes a policy announced in the March 23, 2004 memorandum. The change affects requests by sons and daughters of lawful permanent residents (LPRs) whose CSPA section 6 petitions were initially filed while the children were younger than 21. Also, this memorandum clarifies that the age of the alien has no bearing in eligibility for CSPA section 6 "opt-out" coverage.

II. Background

On August 6, 2002, the President signed into law the Child Status Protection Act (CSPA), Public Law 107-208, 116 Stat. 927. CSPA Section 6 allows for the automatic conversion of a petition *initially filed* for an alien unmarried son or daughter's classification as a family-sponsored immigrant under section 203(a)(2)(B) of the INA (emphasis added) to family first preference as the unmarried son or daughter of a United States citizen (USC). See section 204(k)(1) of the INA. However, Section 6 also permits the unmarried son or daughter to "opt-out" of the automatic conversion. See section 204(k)(2) of the INA.

In some cases, visa availability dates are more current for the unmarried sons or daughters of LPRs than for the unmarried sons or daughters of USCs. Therefore, an immigrant visa might become available sooner if the alien remained in the second preference category rather than converted to the first preference category. In those cases, it would be to the alien beneficiary's advantage to "opt-out" of the automatic conversion to the first preference category.

A. The Phrase "Initially Filed"

Section 6 of the CSPA refers to "a petition under this section *initially filed* for an alien unmarried son or daughter's classification as a family-sponsored immigrant under section 203(a)(2)(B)" (emphasis added). One reading of this provision is that it applies only to a beneficiary whose initial Form I-130, Petition for Alien Relative, was initially filed *when the beneficiary was an* unmarried 21 year old son or daughter of an LPR and would not apply to a beneficiary whose Form I-130 was initially filed based on being the child (under 21 years of age) of an LPR. This would mean that if an LPR filed a Form I-130 on behalf of his or her child when the child was under 21 years of age, the child attained the age of 21 years, and then the parent naturalized, section 6 of the CSPA could not be utilized by this beneficiary. This was the reading adopted in the above-mentioned March 23, 2004 memo. The memo advised adjudicators that the opt-out

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provision could not be utilized by a beneficiary whose initial I-130 was filed by an LPR parent when he or she was under 21 years of age.

USCIS has become aware of situations where a beneficiary was petitioned for as a family-based second preference child (F2A) and the petitioning LPR parent naturalized after the beneficiary turned 21 years. The beneficiary was unable to convert to an immediate relative child of a United States citizen and instead converted to the family-based first preference category (unmarried son or daughter of a United States citizen), which entailed a much longer wait for an immigrant visa number and thus permanent residence in the United States. This has had the result that in some families, the older brothers and sisters may immigrate under the family second preference well before their younger brothers and sisters, who must wait sometimes years before an immigrant visa number in the family first preference is available. Such situations have caused USCIS to reevaluate its reading of the “initially filed” phrase of Section 6. Another reading of the phrase “a petition under this section initially filed for an alien unmarried son or daughter’s classification as a family-sponsored immigrant under section 203(a)(2)(B)” is that the petition must have been initially filed for an alien *who is now* in the unmarried son or daughter classification.

USCIS finds this alternate reading to be more compelling and, as a result, is amending its policy as set forth in the memorandum of March 23, 2004.

B. Eligibility for “Opt Out” Provision under Section 6 of the CSPA

On February 14, 2003, USCIS issued a memorandum entitled “The Child Status Protection Act – Memorandum Number 2, AD 03-15.” This memorandum was designed only to address how CSPA age-out determinations are made under sections 2 and 3 of the CSPA. The memorandum did not clarify that age-out analysis is not required for the CSPA section 6 opt-out provision. The memorandum also did not clarify which paragraphs of the CSPA section 8 effective date provision apply to sections 2, 3, and 6 of the CSPA.

For purposes of opt-out determinations made under section 6, the age of the alien has no bearing on the determination. Also note the effective date provisions under section 8, paragraphs 1 and 2, only apply to sections 2 and 3 of the CSPA. The effective date provision under section 8, paragraph 3 applies to the “opt out” provision of sections 6 of the CSPA.

III. Guidance

USCIS adjudicators are advised that if:

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1. Beneficiaries of 2nd preference I-130 petitions that were automatically converted to family first preference upon the petitioning parent's naturalization are permitted to exercise the "opt-out" provision of section 6 even if the petition in question was originally filed in the F2A category but has now converted to F2B.
2. Adjudicators do not need to determine the age of the alien when a Section 6 opt-out request is received.

IV. Contact

This guidance is effective as of the date of this memorandum. USCIS personnel with questions regarding this memorandum should raise them through appropriate channels to Helen deThomas in the Office of Regulations and Product Management.

V. AFM Update

Accordingly, the *AFM* is revised as follows:

1. Section 21.2(e)(4)(C) in Chapter 21 of the Adjudicator's Field Manual is amended to read as follows:

(e) * * *

(4) * * *

(C) CSPA Section 6 Opting-Out Provisions Expanded. [Section added June 14, 2006]

USCIS adjudicators are advised that if:

1. Beneficiaries of 2nd preference I-130 petitions that were automatically converted to family first preference upon the petitioning parent's naturalization may exercise the "opt-out" provision of section 6 even if the petition in question was originally filed in the F2A category but has now converted to F2B.

NOTE: This instruction amends USCIS policy as set forth in the March 23, 2004 memorandum entitled "Section 6 of the Child Status Protection Act."

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2. Adjudicators do not need to determine the age of the alien when a section 6 opt-out request is received.

NOTE: This instruction amends USCIS policy as set forth in the February 14, 2003 memorandum entitled "The Child Status Protection Act – Memorandum 2 (AFM Update D03-15)."

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

| | | |
|-----------------------|-------------------------------|---|
| AD06-21 June 14, 2006 | Chapters 21.2(e)(4)(C) | This memorandum revises Chapter 21.2(e)(4)(C) of the <i>Adjudicator's Field Manual (AFM)</i> to clarify the opting-out provisions for F2A visas. |
|-----------------------|-------------------------------|---|

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SECTION 2

Adjudication of Form I-539 for V-2 and V-3 Status Where the Petitioner Has Naturalized

I. Purpose

This memorandum provides guidance to the National Benefits Center on the adjudication of Form I-539 for extension of V-2 and V-3 status whose petitioning parent has naturalized. It also makes changes to the *Adjudicator's Field Manual* consistent with this guidance and with the January 10, 2005, the Office of Field Operations memorandum implementing *Akhtar v. Burzynski*, 384 F.3d 1193 (9th Cir. 2004).

II. Background

On January 10, 2005, the Office of Field Operations issued a memorandum implementing the October 5, 2004, U.S. Court of Appeals for Ninth Circuit decision, *Akhtar v. Burzynski*, 384 F.3d 1193 (9th Cir. 2004). *Akhtar* invalidated the age-out provisions at 8 CFR 214.15(g). The January 10, 2005 memorandum stated that if the only reason for potentially denying an I-539 filed for V-2 or V-3 extension is that the alien has turned 21, the application shall be approved.

In reviewing certain cases and the *Akhtar* decision, USCIS determined that the decision also potentially affects another regulation that governs V-status, 8 CFR 214.15(k). USCIS is clarifying that the language of 8 CFR 214.15(k) relating to termination of V status only applies if the alien is an immediate relative as of the date of the petitioner's naturalization. In all other instances, the alien will retain V status, and remain eligible for extensions of V status until an immigrant visa becomes immediately available to the alien. At that time, any request for extension of V status will be processed pursuant to 8 CFR 214.15(g)(4). USCIS will address the implications of the *Akhtar* decision on V status in general in a future rulemaking.

III. Guidance

Effective immediately, the following guidance is provided for adjudication of Form I-539 for V-2 and V-3 extension.

Notwithstanding 8 CFR 214.15(k), applicants who otherwise qualify for extension of V-2 and V-3 status under the terms of the January 10, 2005 memorandum shall not be denied solely because the individual who filed the qualifying petition has naturalized. The provisions of 8 CFR 214.15(k) shall apply only to those individuals who become immediate relatives, as defined in sections 201(b)(2)(A)(i) and 201(f) of the INA, upon the petitioner's naturalization. Those

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applicants who do not become immediate relatives of the newly naturalized citizen may apply to extend their V status in accordance with 8 CFR 214.15(g) (as modified by *Akhtar*).

If an alien's application for extension of V-2 or V-3 status was denied based on the January 10, 2005, memorandum solely because the petitioner on the underlying I-130 naturalized, the alien may submit a written request or file a motion to reopen without fee with the National Benefits Center requesting a new extension.

IV. Contact

For questions regarding this memorandum should raise them through appropriate channels to John Miles or Jeanette Flippen in the Office of Chief Counsel.

V. AFM Update

Accordingly, the *AFM* is revised as follows:

1. Section 37.4(e)(2) in Chapter 37 of the Adjudicator's Field Manual is amended to read as follows:

(e) * * *

(2) Filing Location. All applications for V status and V-related employment authorization must be sent to the USCIS Lock-box, and will be adjudicated at the National Benefits Center. Applicants should send applications for V status by mail to:

USCIS
P.O. Box 7216
Chicago, IL 60680-7216

or by courier to:

USCIS [**Address updated as of June 14, 2006**]
427 S. LaSalle – 3rd Floor
Chicago, IL 60605-1098

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2. Section 37.4(g) in Chapter 37 of the Adjudicator's Field Manual is amended to read as follows:

(g) Period of Admission.

(1) Period of Admission for the Spouse of an LPR. Except as provided in (g)(3), an alien whose status in the United States is changed to V-1 will be granted a period of admission not to exceed 2 years.

(2) Period of Admission for the Child of an LPR or Derivative Child. **[Section revised as of June 14, 2006]** Accordingly, except as provided in (g)(3), an alien whose status in the United States is changed to V-2 or V-3 will be granted a period of admission not to exceed 2 years. **See note below.**

(3) Period of Admission for Aliens with Current Priority Dates. **[Section revised as of June 14, 2006]** If an alien who is eligible for V status has a current priority date and makes an application for V status in the United States, grant the alien a 6-month period of admission.

In any case, if the alien has not filed an application either for adjustment of status or for an application for an immigrant visa within that period, the alien cannot extend or be readmitted to V nonimmigrant status. If the alien does file an application either for adjustment of status or for an immigrant visa within the time allowed, the alien will continue to be eligible for further extensions of V nonimmigrant status as provided in this section while that application remains pending. **See note below.**

(4) Extension. **[Section revised as of June 14, 2006]** An alien may apply to USCIS for an extension of V nonimmigrant status pursuant to 8 CFR 214.15. Aliens may apply for the extension of V nonimmigrant status, submitting Form I-539, and the associated filing fee, 120 days before the expiration of their current period of admission. If approved, grant an extension to aliens in V nonimmigrant status who remain eligible for V nonimmigrant status for a period not to exceed 2 years. **See note below.**

(5) Application for Extension Where There Is a Current Priority Date. **[Section revised as of June 14, 2006]** If an alien who remains eligible for V-1 status has a current priority date and makes an application for the extension of V status in the United States, grant the alien a 6-month extension. If an alien who remains eligible

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for V-2 or V-3 status has a current priority date and makes an application for the extension of V status in the United States, grant the alien a 6-month extension.

If the alien has not filed an application either for adjustment of status or for an immigrant visa within the 6-month period, the alien cannot extend further or be readmitted to V nonimmigrant status. If the alien does file an application either for adjustment of status or for an immigrant visa within the time allowed, the alien will continue to be eligible for further extensions of V nonimmigrant status as provided in this section while that application remains pending. **See note below.**

NOTE: Although the regulations at 8 CFR 214.15(g) limit the period of admission for aliens in V-2 or V-3 status until the date of the alien's twenty-first (21st) birthday, that regulation has been invalidated by the Ninth Circuit Court of Appeals in *Akhtar v. Burzynski*, 384 F.3d 1193 (9th Cir. 2004). USCIS has acquiesced in this position nationwide. Any delay or failure to file in filing an application for extension of status by an applicant whose prior V-2 or V-3 status expired prior to the *Akhtar* decision pursuant to 8 CFR 214.15(g) shall be considered to have been due to "extraordinary circumstances beyond the control of the applicant" as provided in 8 CFR 214.1(c)(4)(i). If otherwise eligible for an extension, such applicant's extension shall be granted from the date the previous authorized stay expired.

3. Section 37.4(k)(1) in Chapter 37 of the Adjudicator's Field Manual is amended to read as follows:

(1) Principal Beneficiaries. **[Section revised as of June 14, 2006]**

(A) Immediate Relatives. If the lawful permanent resident who filed the qualifying Form I-130 immigrant visa petition subsequently naturalizes, the V nonimmigrant status of the spouse and any children who become immediate relatives of a U.S. citizen as defined in section **201(b)** of the INA will terminate after his or her current period of admission ends. In such cases, the alien spouse or child who is the principal beneficiary of the Form I-130 (V-1 or V-2) will be eligible to apply for adjustment of status and related employment authorization immediately. If the V-1 spouse or V-2 child had already filed an application for adjustment of status by the time the LPR naturalized, a new application for adjustment will not be required. An alien in V-3 status who is an immediate relative of the U.S. citizen may file Form I-485 immediately together with the U.S. citizen's I-130 petition on his or her behalf.

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(B) Aliens in V-2 and V-3 Status who are not Immediate Relatives. The language of 8 CFR 214.15(k) relating to termination of V status only applies if an alien beneficiary is an immediate relative as of the date of the petitioner's naturalization. In all other instances, the alien will retain V status, and remain eligible for extensions of V status until an immigrant visa becomes immediately available to the alien. At that time, any requests for extension of V status will be processed pursuant to 8 CFR 214.15(g)(4) and paragraphs (g)(4) and (g)(5) of this Chapter.

4. The AFM Transmittal Memoranda button is amended by adding a new entry, in numerical order, to read:

| | | |
|-----------------------|---|---|
| AD06-21 June 14, 2006 | Chapters 37.4(e)(2), 37.4(g), and 37.4(k)(1) | This memorandum revises Chapters 37.4(e)(2), 37.4(g), and 37.4(k)(1) in the <i>Adjudicator's Field Manual (AFM)</i> regarding adjudication of Form I-539 for V-2, V-3 Status whose petitioning parent has naturalized. |
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