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CREATING JOBS THROUGH EB-5 INVESTMENT

Mad Scramble to Save Some EB-5 Kids?

by Robert C. Divine[1] with help from friends[2]

April 21, 2015

Anyone who attended the IIUSA conference in Washington, DC last week saw that there was confusion about the implications of a recent State Department "white paper" about the Child Status Protection Act (CSPA). It creates the impression that children of I-526-approved investors facing the coming retrogression can wait and do nothing until they receive from the National Visa Center (NVC) a bill for the immigrant visa fees. I did not think that was true, but upon further analysis I think it is, and I will explain. Nevertheless, an investor and child wanting to "leave no stone unturned" may want to take one or more steps to "seek to acquire" a visa before May 1, when the State Department publishes a cut-off date for China.

What's going on with Visa Numbers?

There is a limit for EB-5 investors and their family of almost 10,000 visa numbers for each federal fiscal year from October 1 to September 30. Right at the end of last year it was hit for the first time, so the State Department had to stop giving out numbers in September but removed the cutoff in October with the new annual allocation. Now the State Department sees I-526 approvals and visa applications coming at a pace that will use up this year's allocation much earlier in the fiscal year. So the State Department seeks to slow down the use of those visa numbers to an orderly pace by posting in the monthly Visa Bulletin effective May 1, 2015 a cutoff date for EB-5 investors born in mainland China. The cutoff date is May 1, 2013, which means that as of May 1, 2015 only investors who filed their I-526 before May 1, 2013 can move forward to the next step (immigrant visa via the National Visa Center and U.S. consulates abroad, or adjustment of status in the U.S.).

What kind of trends do you see?

Each month the State Department will publish another Visa Bulletin on its web site at http://travel.state.gov/content/visas/english/law-and-policy/bulletin.html. Ideally the cutoff date for mainland China will progress at a regular pace, but if the number of visa applicants starts

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[2] Mr. Divine thanks Bernie Wolfsdorf and Robert Gaffney for many thoughtful conversations and emails about this topic over the last few months.

outpacing the available numbers the State Department can slow the progression or even move backward. Whenever the cutoff date moves backward in time, we call that "retrogression," so this is essentially the ultimate retrogression, from no limit to some limit. It is very hard to predict how this will go. USCIS currently has in its pipeline about 15,000 I-526 petitions. Because family members count against the annual allocation, I think about 3,500 I-526 petitions can lead to using up about 10,000 numbers. Even with some I-526 denials it could take about four years to allocate visas to all those investors and their family members. So the cutoff dates might not move forward by one month every month.

Why Mainland China only?

The law says visa numbers are given out in the order in which the I-526 petitions were filed on a worldwide basis, but persons born in any one country only have the right in that system to use up to 7% of the total. Beyond that they can use more visas only to the extent not used by other countries. In recent years investors from mainland China have been using 85% of the numbers, but the total did not add up to the limit, so it did not matter. Now it matters. By the way, if the investor or the investor's spouse immigrating with the investor was born outside of mainland China (and outside includes Taiwan, Macau, and Hong Kong), then the cutoff date will not have any effect.

How does visa number retrogression affect children immigrating with their parent investors?

After I-526 approval the delay in processing caused by retrogression can cause some children to become too old to immigrate with their parents. The Child Status Protection Act (CSPA) reduces the number of situations in which a child who was under age 21 at the time of I-526 filing could fail to derive permanent residence from the investor parent's processing, but it does not eliminate the problem.

> *Without the Child Status Protection Act (CSPA)*, a child would need to be actually under age 21 until being admitted to the United States as a conditional permanent resident. If the child turns 21 after becoming a conditional permanent resident, it has no effect because the child already immigrated and only needs to remove conditions on that residence.
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> *Under the CSPA*, the age of a child is deemed "frozen" from the time the I-526 petition for the parent as investor is filed until the time the petition is approved, so that the child is not penalized for the time it takes USCIS to adjudicate the I-526 petition.

Once the I-526 petition is approved, what happens next with the child's age and the CSPA depends on whether there is a visa number immediately available and remains available until the child takes steps to acquire permanent residence.

> *A. If a visa number is available upon I-526 approval*, then the child's age remains frozen (as of the time the I-526 was filed) and the child remains eligible to obtain permanent residence as long as the child (with the investor parent) "seeks to acquire" permanent residence by taking any of certain steps *within one year* of the I-526 approval notice:

(1) paying the immigrant visa fee to the National Visa Center (NVC) as the first step in the process for an immigrant visa outside the U.S.[3] or submitting the old application form DS-230 [not clear how in the absence of a fee bill].

(2) submitting Form I-485 to USCIS if the parent and child are within the U.S. and eligible for "adjustment of status," or

(3) having the principal EB-5 petitioning parent who files for adjustment within the U.S. also file Form I-824 with USCIS (asking that the NVC be notified of the parent's adjustment so that the child can then process for an immigrant visa).

Even if visa numbers become unavailable (we say that the category "retrogresses" or "regresses") after one of those steps is taken, according to USCIS and State Department policy the child's age remains frozen, and the child can resume processing as soon as the visa number is available again.

B. If a visa number is not available when the I-526 is approved (that is, if the State Department has set a cut-off date for China later than the date the person's I-526 was filed with USCIS), then the child's age un-freezes as of the time of the I-526 approval, and if the child's adjusted age (real age minus the time the I-526 petition was pending with USCIS) reaches 21 before visa numbers become available, the child would become ineligible for immigration with the parent. If visa numbers become available again before the child's adjusted age reaches 21, the child's age for CSPA purposes will be frozen again at the time of availability as long as the child takes one of the steps to acquire permanent residence within one year of availability and before numbers retrogress again (if they do).

C. If a visa number is available when the I-526 is approved but becomes unavailable (retrogression) [and a year passes from the I-526 approval? see discussion below] before the child takes one of the steps to acquire permanent residence, then the child's age will be un-frozen as of the time the I-526 petition was approved until a visa number again becomes available, and if the child's adjusted age (real age minus the time the I-526 petition was pending with USCIS) reaches 21 before visa numbers become available again, the child would become ineligible for immigration with the parent. If visa numbers become available again before the child's adjusted age reaches 21, the child's age will be frozen again at the time of availability as long as the child takes one of the steps to acquire permanent residence before any further retrogression of cut-off dates.

What if the Child Marries?

No matter what the child's adjusted age, if the child marries before becoming a conditional permanent resident, he or she will be unable to derive permanent residence from the parent's immigration.

[3] For confirmation of this, see footnote 2 in the USCIS policy found at http://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/PM-602-0097_Extraordinary_Circumstances.pdf and in the State Department white paper linked below.

What if the I-526 petition has not been approved before retrogression?

Because a child can only "seek to acquire" a visa and thus freeze his or her age permanently until the I-526 petition is approved, there is nothing a child can do before-526 approval to protect against retrogression except try to get the I-526 expedited and approved. [We have requested expediting for our investor clients with older children. We are told the cases are "with an officer" for decision and therefore no further expediting will be provided. We can only hope approvals will pour in later this week or early next week.]

What if the I-526 is approved but NVC has not sent the fee bill?

Of course, if the investor and child are both in the U.S. and otherwise eligible, they can file I-485 and related papers for adjustment of status. If the investor is in the U.S. but the child is not, the investor can simultaneously file I-485 for his own adjustment and I-824 requesting notification to the National Visa Center of the adjustment decision once it is made. Either would lock in the age.

Beyond that, the State Department's guidance released at IIUSA, and now posted at an obscure location on the Department's web site,[4] was confusing to me. First, I thought the representative said that the NVC is going to quickly issue fee bills for all outstanding I-526 approved petitions received at NVC, which would be nice and helpful, but we have not seen it happen yet, and I am not sure that's what he said. [If we get a fee bill before May 1, we will immediately pay the bill electronically, and the child's adjusted age is locked in.]

Second, the Department's white paper made it sound like it would be good enough to take "seek to acquire" steps within one year of visa availability even if a retrogression occurred before the step was taken. I did not think that's true, because normally such steps cannot be taken if the visa number is not available. The USCIS policy (in the memo linked above) where this comes from says this:

> If the visa regresses before the alien has had a full and continuous year in which to seek to acquire, the full one year clock will start again when the visa once again becomes available and the age will be calculated from the more recent date on which the visa became available (Note: if the alien seeks to acquire within one calendar year of the actual first date on which the visa became available, despite a regression, use the earlier date for purposes of the age calculation).

I think USCIS meant the parenthetical to convey that if a regression occurred before the first year was up, and then the regression ended so that the child could take "seek to acquire" steps before the first year was up, then the child still gets to lock in on the adjusted age as of the I-526 filing. This makes sense at least on the USCIS side of relevant processes, because someone cannot file for adjustment of status with USCIS if a visa number is not available -- USCIS will reject the application.

[4] See http://travel.state.gov/content/dam/visas/VO%20Attends%20IIUSA%20EB5%20Conference.pdf.

The State Department applied the USCIS policy in its white paper saying this:

> - If a retrogression or setting of a cutoff date occurs within the 12 month window, the applicant can still satisfy the "sought to acquire" requirement until the 12 month period expires. In addition, if the applicant did not lock in CSPA's age-out protection during the first 12 month period in which a retrogression occurred, an applicant would have a second 12 month window to satisfy the sought to acquire requirement once the petition becomes current again, although the CSPA age would be calculated using the new availability date (vice the date the visa first came available). If the applicant seeks to acquire LPR status within 12 months of the visa coming available, the applicant will lock in his CSPA age-out protection. See USCIS's Adjudicator's Field Manual, section 21.2(e)(1)(ii)(E).
>
> [language omitted]
>
> Do you have an example?
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> - Yes. For example, if a petition were approved by USCIS on April 3, 2015, and a cut-off date had been established effective on May 1, 2015, the National Visa Center (NVC) will send a fee bill to those whose petitions were approved prior to May 1, 2015 to allow the applicant to pay the IV application fee within the 12 month period. The applicant's CSPA age would be calculated using April 3, 2015 – the date at which a visa first became available—and the applicant could lock in that CSPA age-out protection by seeking to acquire LPR status by April 3, 2016.

This only makes sense if an applicant can pay a fee bill during a time when a visa number is not available. But it has occurred to me that nothing prohibits this. I think normally the State Department would not send out a fee bill if the category has experienced retrogression and further progress for the applicant to visa number availability is not expected within the near future. But I think the white paper and the representative said that the State Department will send out a fee bill even after May 1 for petitions that were approved before May 1, despite the retrogression, just so that the children will get a chance to pay the bill and lock in their age. The NVC and consulate will not schedule an interview before the visa number becomes available to the applicant, but the child's "age out" of derivative eligibility will have been prevented.

So, in summary, the State Department white paper seems to establish three things:

1. Payment of the NVC visa fee bill constitutes "seeking to acquire" a visa.

2. Even after May 1 when the EB-5 retrogression for mainland China takes effect, the State Department will be sending out fee bills for I-526 petitions that were approved through April 30.

3. The payment of such a fee bill for the investor and child, even during a time when a visa number is not available to the applicant, locks in the adjusted age of the investor's child as of the time of I-526 filing as long as the fee bill is paid within one year of the I-526

approval that occurred during a time when a visa number was available to the applicant according to the Visa Bulletin in effect at that time.

Can we trust that, and do nothing, waiting on a fee bill to arrive after May 1?

I have become paranoid watching government agencies shift their positions in EB-5 matters. The State Department document is not on its letterhead-- just white paper. I just don't feel sure I can trust it or my revised understanding of it. So I have continued to offer clients to take before May 1 any or all of the following steps if they have an I-526 approval and no NVC fee bill:

- Mail for the investor and child, at least, a cashier's check and/or signed DS-230 Part 1 to the NVC's St. Louis lockbox with a copy of the I-526 approval notice, passport biography pages, and birth certificates with translation, and email a copy to the NVC.

- File with USCIS a Form I-824 with filing fee by the investor listing the child for notification of petition approval. It makes no sense to use the form this way, but at least it creates a clear record of "seeking to acquire," and it was suggested by some State Department people earlier.

And if in light of retrogression the fee bill does not come from NVC within one year of the I-526 approval, the child later can argue-- in federal court if necessary-- that the NVC never sent a fee bill and that a confusing State Department white paper delivered at a conference made the investor and child think to expect the fee bill even after retrogression occurred. I would argue that this constitutes "extraordinary circumstances" excusing a late effort to "seek to acquire" under the *Matter of O. Vasquez* case discussed in the USCIS policy memorandum linked above.