



Age-Out Rules for Afghan SIV Derivative Children

By Elizabeth Carlson and Charles Wheeler

Most practitioners are probably unaware that the Child Status Protection Act (CSPA) applies to the children of Afghans who qualify for relief under the Special Immigrant Visa (SIV) program. That program allows Afghan nationals to receive SIV status if they have been employed for at least one year by the U.S. government in Afghanistan or by the International Security Assistance Force. SIV status can be granted by the Department of State (DOS) or by the U.S. Citizenship and Immigration Services (USCIS). Those granted SIV status are eligible to file for adjustment of status and classified as lawful permanent residents (LPRs) once the Form I-485 is approved.

The application process for SIV has recently changed, as USCIS announced recently that it is transitioning responsibility for adjudication of the operative form to the Department of State (DOS). All applicants will still apply for Chief of Mission (COM) approval with the DOS and submit Form DS-157, which has long been part of the SIV process. But for those whose COM approval comes on or after July 20, 2022, the DS-157 will serve as the special immigrant petition. These individuals will not be required to file Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. Only those applicants with COM approvals dated prior to July 20, 2022, or those with a COM application pending on that date who either did not submit the DS-157 as part of the COM application or submitted an unsigned DS-157 will be required to submit an I-360 with the USCIS. These changes have been incorporated into the USCIS [Policy Manual](#).

Principal petitioners for SIV status may include their derivative spouse and children, provided that the relationship existed on the date the principal became an LPR. To qualify as a derivative, the child must be under 21 years of age and unmarried. Prior to passage of the CSPA, children who had turned 21 before immigrating lost derivative status. The CSPA allows derivative children of parents applying for certain immigration benefits to use their “adjusted age” instead of their biological age.

The CSPA applies to petitions covered under INA § 204(a)(1)(G). These include petitions filed in the family-based, employment-based, diversity visa, VAWA, refugee, and asylum categories. Applicants for SIV status are applying within the employment-based categories. See 9 Foreign Affairs Manual 502.1-1(D)(1).

Adjusted age for derivatives in the SIV program is calculated by subtracting the time the “petition” is pending from the child’s biological age. The age is measured according to the date the petition is approved or when the priority date in the employment-based EB-4 category is current, whichever is later. At the present time, that category is current for all nationalities. So, as long as it remains current, filing the petition “stops the clock” on the derivative child’s aging. In other words, the age of the child is “frozen” while the petition is pending. The clock would begin running again on the date the petition is approved if the priority date were not current. Before the USCIS changes to the application process, it was clear that the “petition” was Form I-360.

Example: Azeem, an Afghan interpreter, filed an I-360 petition seeking SIV status on July 3, 2019. He listed his spouse and his daughter on the petition since his daughter was unmarried and under 21. The petition was approved 20 months later on April 3, 2021, and the priority date was current at that time. Azeem applied for an immigrant visa, but due to the backlog at the U.S. embassy, he was not interviewed. Instead, he was paroled into the United States with SQ/SI status. He has recently applied for adjustment of status. His wife and daughter stayed behind and are still in hiding in Kabul. The daughter was born on February 1, 1999. Using her biological age, she had already turned 21 on the date the I-360 petition was approved. However, she can subtract 20 months from her biological age, which made her under 21 on April 3, 2021. Another way to calculate her CSPA age is to add 20 months to her date of birth. So instead of being born on February 1, 1999, she was born for CSPA purposes on October 1, 2000. She would then turn 21 on October 1, 2021, or after the petition was approved.

After the July 20, 2022, changes, it is not yet official that Form DS-157 will be treated as the operative petition that is used for CSPA adjusted age calculation. The State Department has not updated the Foreign Affairs Manual or provided any guidance on this issue. But we can assume that it will. The DS-157 used to be termed Supplemental Nonimmigrant Visa Application. But in May 2022 it was expanded and renamed Petition for Special Immigrant Classification for SIV Applicants.

The CSPA applies to the following petitions, pursuant to INA 203(h)(2):

- A. with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A);
or
- B. with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).

Derivative beneficiaries in the SIV petition process are covered by the provisions of INA § 203(d), and the application/petition process for granting immigrant status is governed by the provisions of INA § 204(a)(1)(G). The form that initiates the process is either the I-360 or the DS-

157, depending largely on the date of approval of the COM application. Both forms include questions asking for the names and dates of birth of the principal petitioner's children.

Example: Azeem, an Afghan interpreter, his wife and daughter were paroled into the United States on August 25, 2022, and were granted two-year humanitarian parole. Azeem filed for SIV status by submitting a request for COM approval together with Form DS-157 to DOS on July 30, 2022. He listed his spouse and his daughter on the petition since his daughter was unmarried and under 21. The petition was approved 20 months later, on March 30, 2024, and the priority date was current at that time. Using her biological age, the daughter had already turned 21 on the date the DS-157 petition was approved. However, she can subtract 20 months from her biological age, which made her under 21 on March 30, 2024.

This processing change is therefore advantageous for many applicants because it allows them to "freeze" their child's age earlier in the process. It also allows them to potentially subtract a longer period of time because recent processing times for the COM process have been relatively lengthy (often ten months or longer) while recent processing times for the I-360 have been short (about two months). If an applicant has a request for COM approval pending but failed to submit a signed DS-157 initially, it is advisable to supplement the pending request now to avoid the need to file an I-360 petition.

Some SIV petitioners receive "conditional approval" of their I-360, which is an intermediary step. Their notices contain the following language: "The above Special Immigrant Visa petition has been conditionally approved by USCIS. Final approval of the petition is contingent upon further action by the US Department of State during your visa interview." The USCIS has not provided official confirmation, but our interpretation is that the petition remains pending — for CSPA age calculation purposes — until final action is taken on the part of DOS.

In order for the derivative child's adjusted age to be "locked in," however, the child must do one more thing: seek LPR status within one year. For most children this means filing for an immigrant visa or for adjustment of status. Therefore, filing an I-485, Application to Register Permanent Residence or Adjust Status, or paying the immigrant visa fee to the Department of State satisfies that one-year requirement. Derivatives must file a separate application for LPR status; they cannot satisfy the one-year requirement through the principal's application for adjustment or an immigrant visa.

This one-year filing requirement could create an obstacle for derivative children who are residing abroad and awaiting their parent's application for LPR status to be approved. In the first example above, Azeem's daughter would need to wait for Azeem's LPR status to be granted in order to be able to apply for an immigrant visa. But she has just one year from April 3, 2021, to file that application and prove that she has "sought to acquire" LPR status within a year of visa availability. If she fails to satisfy this one-year filing requirement, the CSPA protections would no longer apply, and she would age out. To remedy this, Azeem would need to file a Form I-824, Application for Action on an Approved Application or Petition. The filing of

this application also satisfies the one-year requirement. While this is usually filed after the adjustment of status has been approved as a way to jump-start the immigrant visa processing for the derivative child, the application can also be filed concurrently with the Form I-485. It would make sense to do so in this case to ensure that Azeem's daughter continues to receive CSPA protection.

Another way to preserve the "sought to acquire" prong under CSPA is for the derivative to complete the DS-260 immigrant visa application. Some practitioners have reported that, upon approval of the underlying Special Immigrant Visa petition, the petition is automatically sent to the National Visa Center even when the principal applicant indicated an intent to adjust status in the United States. Many have also reported the creation of online cases for Afghan SIV applicants in the State Department's Consular Electronic Application Center (CEAC) site following the approval of the petition. This policy can also be advantageous for Afghan clients because it may eliminate the need to file an I-824 for these derivatives. Rather, simply submitting the DS-260 application online for the derivative can fulfill the "sought to acquire" prong for CSPA purposes. Because there are no fees required as part of the SIV process, there is no need or possibility to pay an immigrant visa fee, which is normally a step that can also help preserve CSPA eligibility for a derivative.

Practitioners should carefully assess whether Afghan clients have children who could turn 21 during the process of obtaining LPR status. If so, practitioners should take necessary steps to protect these children from aging out. For those with children in the United States, this means filing the I-485 applications for all eligible family members within one year of I-360 or DS-157 approval. For those with children outside the United States, this means timely filing an I-824 application so that derivatives overseas are protected under the CSPA, or completing a DS-260 for the derivative through the CEAC website.