

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 abroad by the Department of State (DOS) through an application for an immigrant visa or by the U.S. Citizenship and Immigration Services (USCIS) through an application for adjustment of status. Those granted SIV status are classified as lawful permanent residents (LPRs).

The first step in the SIV application process usually begins with seeking Chief of Mission approval. After this step, eligible applicants must file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant.

Principal petitioners for SIV status may include their derivative spouse and children, as long as that relationship existed on the date the principal becomes an LPR. In order 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 Form I-360 is pending from the child’s biological age. The age is measured on 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 I-360 “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.

Example: Azeem, an Afghan interpreter, filed an I-360 petition seeking SIV status on July 3, 2021. 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, 2023 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, 2001. 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, 2001, she was born for CSPA purposes on October 1, 2002. She would then turn 21 on October 1, 2023, or after the petition was approved.

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 have to 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 example above, Azeem’s daughter would need to wait for his 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, 2023 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.

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 petition 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.