In a long-awaited decision, the US Supreme Court recently ruled that the only aged-out children who can retain (and convert) their original priority date under the Child Status Protection Act (CSPA) are those who were petitioned by a lawful permanent resident (LPR) parent in the F-2A category (minor child of LPR), either as a direct beneficiary or as a derivative of their parent's petition.

All other derivative beneficiaries are out of luck, and would have to "go to the back of the line," based on a newly filed F-2B petition filed by their parent. They cannot retain the original priority date on their parent's petition. However, to be clear, the Supreme Court's ruling did not strike down the entire CSPA. (Some people asked me after the ruling, "Does this mean CSPA is dead?") The ruling applies only to a particular section of the CSPA which dealt with an aged out child's ability to retain the original priority date of their parent's petition. That provision stated that if a child's age was calculated to be over 21, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." It was argued that children who were petitioned in the F-2A category, as well as all other derivative beneficiaries of the other preference categories (such as F-1, F-2B, F-3 and F-4), should automatically retain their parent's original priority date on a newly filed F-2B petition. Unfortunately, the Supreme Court gave a very limiting and restrictive interpretation of that provision.

The Supreme Court focused on the language in the statute concerning "automatic conversion," which they interpreted to mean "when a petition could move seamlessly from one family preference category to another." The conversion is merely moving the same petition from one category to another, where the petitioner/sponsor, and the petition itself, remain the same throughout. However, that policyprocedure has not always been the case in immigration law!

* For years, the USCIS has allowed retention of priority dates for employment based petitions! There is an existing regulation that states if a person already has an approved employment-based (Form I-140) petition, the person can retain or transfer "the priority date of the approved petition for any subsequently filed petition for any [employment-based] classification...", whether it is the same or a different petitioner, or the same or different job (i.e. a person had been petitioned by their first employer, as a caregiver, and is now being petitioned as an accountant by a second employer). Once a person has an approved I-140 petition with a particular employer, and the case does not push through, but years later, finds a different employer, the new employer can file a new PERM case, and the alien could "automatically" retain, convert, or transfer the original priority date to the new petition, even though there is a new filing by a new petitioner, and an entirely different petition classification - something the Supreme Court said was not possible under existing immigration law or procedures. Well, it is possible, and was being practiced! So it is possible to convert or transfer a priority date, even if there is a new petition and new petitioner.

* An Act of Congress over a $110 filing fee? When CSPA was enacted, there was already an existing regulation that provided if the child was a derivative under a parent's F-2A petition, and then aged out, a separate petition would be required. However, in such a case, Òthe original priority date will be retained if the subsequent petition is filed by the same petitioner." In other words, existing regulations already provided for the retention/conversion of priority dates for F-2A beneficiaries who aged out. Under the Supreme Court's interpretation, the CSPA merely codified (made into a law), an already an existing regulation. The net gain is that if a derivative beneficiary of an F-2A petition ages out, the parent need not file a new petition. That's it?! The filing fee for a new petition was only about $110 back then. So Congress passed a law in 2002, just so a handful of people could save a $110 filing fee? I know this was not the decision or outcome we had all been hoping for. I commend those who brought the case, as they fought the good fight. However, even with this ruling, make sure your math was correct, as perhaps the child's age could have been calculated to be under 21, in which case they would not need to rely on that automatic conversion provision of the CSPA. Also, if you were originally an F-2A beneficiary and aged out, at least you could retain that same priority date in the F-2B category.

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