U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

April 15, 2015 **PM-602-0097**

Policy Memorandum

SUBJECT: Guidance on Evaluating Claims of "Extraordinary Circumstances" for Late Filings When the Applicant Must Have Sought to Acquire Lawful Permanent Residence Within 1 Year of Visa Availability Pursuant to the Child Status Protection Act

Purpose

An alien seeking classification as a child under sections 203(a)(2)(A) or 203(d) of the Immigration and Nationality Act (INA), or as a derivative beneficiary under INA 203(a) or 203(b), who is under 21 years of age as determined by the Child Status Protection Act (CSPA), must have sought to acquire lawful permanent residence within 1 year of the visa becoming available. In *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012), the Board of Immigration Appeals (the "Board") confirmed previous U.S. Citizenship and Immigration Services (USCIS) guidance that filing an application for adjustment of status or an immigrant visa meets the requirement that a beneficiary "sought to acquire" lawful permanent residence within 1 year of visa availability in order to benefit from the specified age-out protection provided by the CSPA.[1]

The Board further explained that the alien may meet the 1-year "sought to acquire" requirement even though there was a failure to timely file by establishing through persuasive evidence, that there were certain "extraordinary circumstances" beyond the alien's control. This policy memorandum (PM) provides guidance on properly evaluating evidence and exercising discretion when an individual claims that extraordinary circumstances prevented him or her from seeking to acquire lawful permanent residence in a timely manner.

This PM revises Chapter 21.2(e) of the Adjudicator's Field Manual (AFM); AFM Update AD14-01.

Scope

Unless specifically exempted herein, this PM applies to and is binding on all USCIS employees. This PM supplements existing CSPA guidance, but only with regard to properly evaluating evidence and appropriately exercising discretion when an individual claims that extraordinary

[1] USCIS recognizes that guidance from the Department of State (DOS) as to CSPA does not necessarily employ the terminology "filed," due to the specific processes which are unique to consular processing. See e.g., Child Status Protection ALDAC #2, January 17, 2003. The terminology within this USCIS PM applies to procedures for USCIS.

circumstances prevented her or him from seeking to acquire lawful permanent residence in a timely manner.

Authority
INA 203(h)(1); 8 U.S.C. §§ 1153(h)(1), as amended by Public Law 107-208; *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012).

Background
The CSPA was enacted on August 6, 2002, and provides continuing eligibility for immigration benefits to the principal and/or derivative beneficiaries of certain benefit requests when the beneficiary has aged-out by turning 21 years of age. The CSPA has wide applicability, covering family and employment-based beneficiaries, diversity visa immigrants, refugees, and asylees when delays in processing visa petitions or applications cause a beneficiary to lose eligibility for classification as a child solely due to reaching 21 years of age. This PM specifically addresses circumstances in which a family-based preference principal or derivative beneficiary, or an employment-based derivative beneficiary, may be deemed to retain the CSPA age-out protection when he or she fails to seek to acquire lawful permanent residence within 1 year of visa availability due to extraordinary circumstances. *See* INA 203(h)(1).

INA 203(h)(1)(A) and (B) state that to determine whether an alien satisfies the age requirement for classification as a child, the calculation is "the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available to the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability: reduced by the number of days in the period during which the applicable petition described in paragraph (2) was pending". This is the calculation that will be used for the purpose of determining if an alien qualifies for classification as a child, *but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability* [emphasis added].[2] Previous USCIS policy on the "sought to acquire" requirement did not allow officers to use discretion in considering late filings. *Matter of O. Vasquez* allows for discretion in these determinations. This PM outlines the appropriate use of this discretion.

Policy
Under USCIS policy, there are three ways to meet the "sought to acquire" requirement:

[2] "Sought to acquire" has become a term of art for the much longer and more cumbersome, "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability," and is used in this way throughout this memorandum with minor variations to allow for contextual appropriateness (e.g., tense agreement).

- Filing Form I-485, Application to Register Permanent Residence or Adjust Status[3];
- Submitting an Application for Immigrant Visa and Alien Registration;[4] or
- Having Form I-824, Application for Action on an Approved Application or Petition, filed on the derivative beneficiary alien's behalf when the principal applicant is present in the United States.

These actions fulfill the "sought to acquire" requirement because they are affirmative and verifiable actions that can ultimately lead to adjustment of status or the admission of a person as a lawful permanent resident. [5]

In *Matter of O. Vasquez*, the Board found that extraordinary circumstances ***may*** warrant the exercise of discretion in a late filing for purposes of meeting the "sought to acquire" requirement if: (1) the circumstances were not created by the individual's own action or inaction; (2) the circumstances were directly related to the failure to act within the 1-year period; and (3) the delay was reasonable under the circumstances.

Additionally, the Board found that the "sought to acquire" requirement may be met if the applicant can show with persuasive evidence that his or her application was rejected for a technical or procedural error. In that case, the late filing must be followed by the filing of a corrected application within a reasonable time after its return. In its decision, the Board emphasized that a showing of "sought to acquire" requires substantive and timely action and cannot be shown by simply contacting an attorney or organization for advice about obtaining a visa.

The Board's decision, however, does not provide specific criteria for establishing extraordinary circumstances for failure to meet the "sought to acquire" requirement. Consequently, this guidance draws from existing statutory and regulatory frameworks to assist officers in exercising discretion when an alien claims that extraordinary circumstances warrant finding that the "sought to acquire" requirement was satisfied, even though there was a failure to file timely.

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[3] Note that when a principal beneficiary files Form I-485, this does not satisfy "sought to acquire" for a derivative beneficiary. The derivative beneficiary must file the Form I-485 in order to satisfy the "sought to acquire" requirement.

[4] The procedures for submitting the Application for Immigrant Visa and Alien Registration, DS-260, (which has replaced the paper form DS-230) to DOS are substantively different from those for filing Form I-485 with USCIS. DOS notifies beneficiaries or their designated agents of documents they need to submit at each step in the process. Prior to the visa becoming available, DOS notifies the beneficiary of impending visa availability and requests submission of fees and an Affidavit of Support, and initiates processing in advance of accepting the actual application. As such, applicants for immigrant visas can meet the "sought to acquire" requirement in advance of the actual filing of DS-260.

[5] For applications presenting circumstances that are not addressed by the three listed examples above, which present legal arguments why such circumstances constitute "substantial steps," that may satisfy the "sough to acquire" requirement, USCIS personnel should consult USCIS Office of Chief Counsel (OCC).

Asylum regulations and the Board's asylum law precedent provide some guidance on criteria for showing "extraordinary circumstances" in the context of the 1-year filing deadline for asylum applications. For example, 8 CFR 208.4(a)(5) articulates factors for consideration of extraordinary circumstances and provides examples of circumstances that may warrant the exercise of discretion in accepting a late application.[6] Similar to those factors enumerated in the asylum context which are, by statute, evaluated "to the satisfaction of the Attorney General," Officers must consider the totality of the circumstances and must use the "preponderance of the evidence" standard when determining whether an alien demonstrated extraordinary circumstances for not meeting the "sought to acquire" requirement in a timely fashion.[7] The accompanying AFM update provides specific factors to consider.

Implementation

☞ 1. AFM chapter 21.2(e) is revised as follows:

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(1) CSPA Coverage

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(ii) Adjustment Under a Preference Category

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(C) Derivative Beneficiaries – Family and Employment-Based

[Text box removed.]

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(E) Sought to Acquire

Section 203(h)(1)(A) states that to determine whether an alien satisfies the age requirement for classification as a child, the calculation is "the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available to the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability…"

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[6] The Board in *Matter of O. Vasquez* employs the term "satisfy" in a number of instances throughout its opinion. While not explicit, USCIS construes the opinion as employing the very same "to the satisfaction of the Attorney General" language found throughout the INA. See e.g. INA 208 and 246. Any reference concerning the asylum regulations is not intended to create conflict with, and in no way should be read to amend, abridge, or otherwise modify existing and governing asylum policy or precedent.

[7] See Matter of Chawathe, 25 I&N Dec. 369 (AAO 2010).

"Sought to acquire" has become a term of art for the much longer, and more cumbersome "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability." It is used in this way in policy and in this manual with minor variations to allow for contextual appropriateness (e.g. tense agreement).

(I) General Requirements. An alien seeking classification as a child under sections 203(a)(2)(A) or 203(d), or as a derivative beneficiary under sections 203(a) or 203(b), who has a "CSPA age"[8] under 21, must have sought to acquire lawful permanent residence within one year of the visa becoming available.

- The date of visa availability is the first day of the month in which the priority cut-off date or visa is identified as *current* pursuant to the Department of State's Visa Bulletin or the date the petition was approved, whichever is later.

- If a visa regresses and: (a) becomes available again within one year and (b) the alien seeks to acquire within one year of the original visa availability date, use the biological age on the original visa availability date for purposes of the age calculation. (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).

- An alien may satisfy the sought to acquire requirement by: (a) filing Form I-485; (b) submitting an Application for Immigrant Visa and Alien Registration to the Department of State (Note: the consular process is different and "sought to acquire" may be satisfied with payment of the visa application fees or filing the Affidavit of Support (Form I-864) rather than submission of the actual immigrant visa application); or, (c) having a Form I-824 filed on the alien's behalf by the principal applicant who is in the United States.

(II) Extraordinary Circumstances for Late Filing. In *Matter of O. Vasquez,* 25 I&N Dec. 817 (BIA 2012), the Board ruled that extraordinary circumstances could warrant the exercise of discretion to find the alien met the "sought to acquire" requirement by establishing, through persuasive evidence, that … there were other extraordinary circumstances, particularly those where the failure to timely file was due to circumstances beyond the alien's control. The guidance below draws from asylum

[8] CSPA Age under 21is defined in INA 203(h)(1)(A) and (B), which state that to determine whether an alien satisfies the age requirement for classification as a child, the calculation is "the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available to the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability: reduced by the number of days in the period during which the applicable petition described in paragraph (2) was pending".

regulations, which also require extraordinary circumstances as an exception to the one-year filing bar (see 8 CFR 208.4(a)(5)).[9]

In order to establish extraordinary circumstances, the alien must demonstrate that:

(1) The circumstances are beyond the control of the alien and must not have been intentionally created by his or her own action or inaction. (See 8 CFR 208.4(a)(5)).
(2) Those circumstances were directly related to the alien's failure to file the application within the one-year period; and
(3) The delay was reasonable under the circumstances.

Examples of extraordinary circumstances that *may* warrant a favorable exercise of discretion include, but are not limited to:

- Serious illness or mental or physical disability during the one-year period;

- Legal disability, such as instances where the applicant is suffering from a mental impairment, during the one-year period;

- Ineffective assistance of counsel, when the following requirements are met:
  (1) Alien filed an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;
  (2) Counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him and been given an opportunity to respond, or that a good faith effort to do so is demonstrated; and
  (3) Alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities and, if not, why;

- Death or serious illness or incapacity of the alien's legal representative or a member of the alien's immediate family.

When considering a claim of extraordinary circumstances, the officer should weigh the totality of the circumstances and the nexus of the circumstances presented to the failure to meet the "sought to acquire" requirement, as well as the reasonableness of the delay. In order to warrant a favorable exercise of discretion, the circumstances must be extraordinary and beyond the alien's control. Circumstances such as financial difficulty, minor medical conditions, and circumstances within the alien's control such as when to seek counsel or begin preparing the application package are not considered

[9] Asylum regulations also allow for "changed circumstances" which are not allowed in this context.

extraordinary. Further, the fact of being or having been a child is common to all applicants seeking protection under the CSPA and does not constitute extraordinary circumstances beyond one's control to timely "seek to acquire".

Procedurally, when an alien seeks to acquire after one year of visa availability and does not provide an explanation and/or evidence of extraordinary circumstances, the officer will issue a notice of intent to deny allowing the applicant the opportunity to rebut the presumptive ineligibility.

(III) Filing Error: In *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012), the Board observed that instances may also occur where a petition is timely filed, but rejected for certain reasons. While filing error will not ordinarily be related to extraordinary circumstances, USCIS and the Board recognize that in certain limited instances where the filing error is corrected and the application is re-filed in a reasonable period of time thereafter, the applicant's failure to meet the deadline may be excused.

(IV) Motions to Reopen

Decisions issued by USCIS prior to *Matter of O. Vasquez*, and which denied benefits solely based upon a "failure to seek to acquire" status within one-year of visa availability, are not affected by this policy memorandum. Such decisions were proper based upon the law and policy in effect before *Matter of O. Vasquez*. However, for those cases denied after *Matter of O. Vasquez*, and where such denial is solely based upon a "failure to seek to acquire" status within one-year of visa availability, a motion to reopen may be filed with USCIS. Such motions to reopen will be adjudicated on a case-by-case basis and based upon the evidence accompanying the motion.

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

AD14-01 6/6/2014	**Chapter 21.2(e)**	Provides guidance on properly evaluating evidence and appropriately exercising discretion when individuals claim extraordinary circumstances prevented them from seeking to acquire lawful permanent residence in a timely manner.

Official Duties

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Chief Counsel and the Office of Policy and Strategy.