ESTABLISHING, RETAINING AND CONVERTING PRIORITY DATES

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Part I: ESTABLISHING THE PRIORITY DATE OF THE PRINCIPAL ALIEN

The regulation at 22 CFR §42.53:

> §42.53 ***Priority date of individual applicants.***
> *(a) Preference applicant. The priority date of a preference visa applicant under INA 203(a)* [family based] *or (b)* [employment based] *shall be the filing date of the approved petition that accorded preference status.*
>
> *(b) Former Western Hemisphere applicant with priority date prior to January 1, 1977. Notwithstanding the provisions of paragraph (a) of this section, an alien who, prior to January 1, 1977, was subject to the numerical limitation specified in section 21(e) of the Act of October 3, 1965, and who was registered as a Western Hemisphere immigrant with a priority date prior to January 1, 1977, shall retain that priority date as a preference immigrant upon approval of a petition according status under INA 203(a) or (b).*
>
> *(c) Derivative priority date for spouse or child of principal alien.*
> *A spouse or child of a principal alien acquired prior to the principal alien's admission shall be entitled to the priority date of the principal alien, whether or not named in the immigrant visa application of the principal alien. A child born of a marriage which existed at the time of principal alien's admission to the United States is considered to have been acquired prior to the principal alien's admission.*

Exceptions to the general rule laid out in part (a), that the priority date is the date of filing the preference visa petition, are:

1-- Priority Date for Labor Certification cases, visa classes EB2 (advanced degree) and EB3(professionals & skilled workers), is the date of filing the labor certification with the Department of Labor. 8 CFR 204.5(d)

2-- Priority Date of the earliest approved EB1, EB2 or EB3 I-140 petition awarded all subsequent petitions in classes EB1, EB2 or EB3.

In the Employment Based preferences, the beneficiary of multiple EB1, EB2 or EB3 petitions retains the priority date of the earliest approved employment based petition. It does not matter whether that priority date was the date of filing the labor certification application or the I-140 visa petition. This becomes the priority date for any subsequently filed first, second or third employment-based preference by the same or different employers, even if the original petition has been withdrawn and revoked by the petitioning employer. 8 CFR §204.5(e)

This exception contrasts with family-based beneficiaries, where priority dates are not generally transferable between preferences nor even for a petition in the same preference by a different petitioner.

3-- Second preference derivative children in Visa class F2A, Children of lawful permanent resident (LPR) retain the priority date of the original I-130 petition when a subsequent I-130 is filed in their behalf by the same petitioner.

This is true regardless of whether the principal beneficiary of the original petition immigrates. The priority date is the date to which the principal beneficiary of the original petition was entitled.

The retention of the priority date is independent of whether or not the child remains in Class F2A due to the Child Status Protection Act (CSPA), or age's out into Class F2B, Son/daughter of LPR.

USCIS regulation 8 CFR §204.2(a)(4) provides:

> *(a)(4) A child accompanying or following to join a principal alien under section 203(a)(2) [family based second preference] of the Act may be included in the principal alien's second preference visa petition.* ***The child will be accorded second preference classification and the same priority date as the principal alien.*** *However, if the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner...*

The first sentence restates the statute, INA§203(d). See also 22 CFR 42.31(b) and 42.32(b).

The highlighted sentence provides a unique exception for the children of a second preference principal alien beneficiary because the eligibility of a child of a principal alien in all other preferences is only a derivative beneficiary whose eligibility is conditioned on his "accompanying or following to join" the principal beneficiary.

The second preference (F2A) child is more than a derivative beneficiary. The F2A child is "*accorded second preference classification and the same priority date as the principal alien*". It is "as if" an individual petition had been filed for each child, whether or not named in the petition and whether or not born before the petition was filed (see "after acquired children" discussion below).

There is no requirement that the F2A child be "accompanying or following to join" the principal alien. The F2A child can precede the principal alien, although a separate visa petition must be filed to accomplish this. The F2A child of the principal alien retains the preference and priority date even if the named principal beneficiary of the petition is divorced, dies, or chooses not to immigrate, or the child "ages out" into F2B classification. It is not necessary to protect against these eventualities by filing individual petitions for child beneficiaries. But when any of these possibilities arises, a separate petition must then be filed for the child to precede the principal alien beneficiary of the original I130 petition; and the child retains the second preference priority date he was "accorded" by the original petition. That priority date might be the petition filing date or it might be an earlier priority date the principal alien acquired as described below.

An illustrative case

LPR petitioner files second preference spousal visa petition in 2006. Petitioner and her husband have three children born in 1994, 2002 and 2007. The 1994 "child" is petitioner's stepchild, the 2002 "child" is an adopted child who was adopted in 2003 and the 2007 child is a biological child of the union. The 2006 petition listed only the step child and the adopted child as the biological child was not yet born. The parties divorced in 2008. In 2016 Petitioner files separate visa petitions for each of the three children. All three children have the priority date of the 2006 petition, but the eldest is now over age 21, so his CSPA age will need to be computed and Table "A" of the Visa Bulletin checked to determine whether he has aged out.

CHILD OF A CHILD IN THE SECOND PREFERENCE F2A

In all preferences, a child derives the preference and priority date of the principal alien. On occasion a child who is an F2A derivative beneficiary has a child, (petitioner's grandchild). In that case an I-130 visa petition must be filed for the F2A derivative child, who becomes then a principal alien with the original priority date retained and the grandchild becomes a derivative

child. See 9 FAM 502.2-3(C)(b)(3). Note that the child of a derivative child in other preferences has no comparable path.

4-- The WESTERN HEMISPHERE PRIORITY DATE (WHPD) Exception

Before 1977, the number of immigrants from countries of the western hemisphere, i.e., North & South America, was limited by the Western Hemisphere Quota. The Immigration Act of 1976 eliminated that quota but a savings clause, codified in subsection (b) of 22 CFR 42.53 above, provided that priority dates would not be lost by passage of time or loss of status on which they were based but could be used in any preference to which the person might later become entitled. The Immigration Act of 1965, effective in 1966, had a similar savings clause so petitions awarded priority dates established in the late 1950s and 1960s are also possible.

Although a WHPD could not be established after 12/31/1976, by order of Federal Court about 100,000 WHPD visas continued to be issued until June, 1982. Visa Bulletin's for January 1977 through June 1982 listed cutoff dates by country for these "non preference" western hemisphere visas.

The WHPD or "non-preference" priority date was recorded on consular documents and annotated by interchangeable terms including any of the following: "Western Hemisphere", "WH", "non-preference", "O-1" "NP", "SA", "SA1", "padre residente", "madre residente", "esposo residente", "hijo", "hijo ciudadano", "hijo residente" and "hijo americano". Visa codes printed on old resident alien cards were "NP", "SA", "O-1" and "SA1".
To claim a WHPD date, it is useful to know how Western Hemisphere Priority Dates were established, how to documentarily prove a WHPD date, and what persons are entitled to claim the WHPD date.

How Western Hemisphere Dates Were Established

Western Hemisphere non-preference dates were established by presenting documents to a U.S. Consular Officer abroad. Generally there was no application form. The principal qualifying relationships and the evidence provided to the consular officer were:

Relationship	Evidence presented
U.S. Citizen Child	Original Certificate of Birth of the child
LPR Parent	Form I-550, INS certification of LPR status of parent
LPR Spouse	Form I-550, INS certification of LPR status of spouse
Employer	Offer of Employment form

The Consulate date stamped these documents and returned them to the applicant. Many families have retained these originals. Old black-negative Texas Birth Certificates with a Consular date stamp on the back side have often been retained in the family.

The Consulate also mailed a "second packet" and a "third packet" to the principal applicant (most often addressed to the father if registering through a child). The first page of these official packets often is still retained in the family. It shows the name of the principal applicant, the non-preference priority date and one of the notations above as a visa-type code (an example is attached).

Documenting the non-preference priority date is discussed further below.

"Immediate Relative" filings also created a WHPD priority date.

Because a petition filed for an "immediate relative" established no priority date, the Department of State's position was that an immediate relative petition filed before 1977 did not establish a Western Hemisphere priority date for the children of the immediate relative beneficiary, i.e. if a United States citizen had petitioned for his wife, prior to 1977, their children did not thereby establish a priority date. Robert Mautino of San Diego, CA, litigated this issue in 1987 with the result that the Department of State agreed that the filing of an immediate relative visa petition for a native of the Western Hemisphere prior to 1-1-77 established a WHPD for the children of the immediate relative beneficiary.

A copy of a Department of State cable as printed in Interpreter Releases, Vol. 65, p. 617, June 13, 1988, establishing this rule is attached to this article. Notice in item number 3, the secondary evidence used to establish the actual priority date. The use of secondary evidence and the acceptance of an "earliest proven" date other than the actual priority date is not uncommon in such cases.

<u>How to prove the existence of a Western Hemisphere Priority Date.</u>

The FAM points out several ways an alien may establish entitlement to a Western Hemisphere priority date. Item (5) added in 2006 takes such priority date determinations out of the incompetent hands of DHS.

9 FAM 503.3-4(B) Establishing Entitlement to Western Hemisphere Priority Dates

An alien may establish entitlement to a Western Hemisphere priority date in several ways:

(1) The applicant may present documents received from a consular office indicating that the applicant was registered as Western Hemisphere

immigrant with a priority date prior to January 11, 1977.

(2) The consular office may still have records reflecting the applicant's pre-1977 registration as a Western Hemisphere applicant.

(3) The applicant may present proof of the principal applicant's priority date and proof that the required relationship existed at the time.

(4) The alien establishes proof of the principal alien's priority date and evidence that he/she is the child of a marriage which prior to the principal alien's admission to the United States.

(5) We have traditionally promulgated regulations and instructions regarding Western Hemisphere priority dates. Consequently, if you decide that a Western Hemisphere priority date applies in a case, you should make the adjustment without referral to DHS.

The best proof of a Western Hemisphere date is a current confirmation notice from the American Consulate of the priority date. If a Mexican principal applicant never immigrated, the Juarez consulate should still have a record of his application. Even though the initial application may have been filed at a consulate in Monterrey, Mexico, D.F., or Tijuana, all records were transferred to Cd. Juarez when immigrant visa issuance was consolidated there in the mid 1980s. These old filings seem to have become inaccessible and with the sealing of access to the consulate in recent years appears to be lost as a source.

However old confirmation notices and third packet notices from the Consulate years or decades ago containing notations of the preference and priority date (as discussed above) are excellent proof of such dates.

Sometimes an obsolete consular "Form FS497", application form is found. It will bear the priority date and is excellent evidence of a WHPD.

Consular date stamps placed on documents presented to qualify are also excellent proof of such dates. Look for consular date stamps on the back of old U.S. birth certificates. These are accepted as valid evidence of WHPD.

Old documents showing appointment at a visa hearing interview prior to 1977, are sufficient evidence of a non-preference priority date as of the date of the hearing. Even a dated refusal notice has served as sufficient evidence. See item number 3 of the Barajas case cable from Department of State accompanying this article.
If your client can't find any of these documents and if the principal applicant was actually admitted from a Western Hemisphere country prior to 1977 that is evidence of his WHPD. Or if he was admitted with a non-preference visa (read the visa class code on his

I-151 or I-551 Alien Registration Card or old passport); this could have been any date up to June, 1982. To use date of admission as proof where the admission date is after 1977, a copy of the monthly Visa Bulletin from the Department of State for the month in which the principal alien was issued a visa together with a copy of his visa has routinely been accepted as proof of the WHPD date, using the cutoff date for the month of admission as an LPR as the priority date. A copy of the principal alien's actual visa can also be obtained by filing a G-639 FOIA request. This will show the date of visa issuance and date of admission and is good evidence of the principal alien's WHPD, sometimes requiring use of a copy of the visa bulletin dated the same month as the visa to show an "earlier than" cutoff date.

If the principal applicant (parent) immigrated as an immediate relative based on a petition filed before 1977, the priority date will be date stamped on the I-130 visa petition and the original petition will be in his or her A-file. A FOIA request will get it. If the principal applicant (parent) has a pre-1977 "Notice of Approval" of the immediate relative visa petition, that will also be sufficient proof of the priority date.

Who is entitled to use the Western Hemisphere non-preference priority date?

A child or spouse of a "principal alien" existing on the date of establishment of a Western Hemisphere priority date is of course entitled to the date, whether or not the principal alien ever actually immigrates. The spouse and children are deemed to be registered for the priority date as if they were principal aliens. The term "child" is used here as defined in INA §101(b)(1) which of course includes step children, out-of-wedlock children, and adopted children. There is authority for the proposition that later expansion of the definition of illegitimate children to include certain illegitimate children of the father does not retroactively permit them to claim to have been a child when the date was established.

A spouse acquired after the date of establishment of a Western Hemisphere priority date but **prior to admission of the principal alien** for lawful permanent residence is entitled to the principal alien's Western Hemisphere non-preference priority date. One consular decision awarded such a spouse the priority date even though the principal alien did not immigrate on the theory that there was no mechanism for the after-acquired spouse to otherwise be registered other than the re-registration of the principal alien -- but this decision would have been different if the marriage had occurred after 1-1-1977.

A spouse acquired after the date of admission of the principal alien and who became the resident's spouse during a temporary absence abroad, may be accorded a priority date as of the date of the marriage if the marriage occurred before August 31, 1978. This provision was removed from the FAM on that date. However, some consular officers believe it became ineffective on 1-1-1977 and others believe the date must have been

"claimed" prior to August 31, 1978. A copy of the older FAM relevant section is attached.

The "after acquired child" exception discussed below applies fully to non-preference priority dates and applications. Children born of a marriage which existed on the date of admission of the principal alien are entitled to their parent's non-preference priority date. It is not unusual to see children born in Mexico in the 1980s or later who are thus entitled to a parent's pre-1977 priority date. It is not unusual to see such children who are now married adults and the same U.S. citizen sibling who "petitioned" as a baby to establish his parent's priority date is now an adult who can petition for his non-citizen married sibling. Of course, under the "accompanying or following to join" rules for derivative spouse and children, the brother's spouse and children all have the pre-1977 priority date and everybody is at the head of the F4 waiting line! The grandchildren retain the grandparent's priority date!

How far back can you go?

In 1968, the following regulation (later renumbered §41.51) was in effect:

> *22 CFR §42.62(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, an alien who, before February 1, 1966, was registered as an unqualified non-preference registrant and who subsequently qualified... ...or any alien who between February 1, 1966, and July 1, 1968, qualified for registration as a non-preference immigrant under Departmental regulations in effect at that time may retain his original priority date until such time as a non-preference visa shall become available for his use: Provided however, that no alien shall be given a priority date earlier than January 1, 1944.*

For the 1968 savings clause, if on July 1, 1968, beneficiary was a child or spouse of a principal alien who had established a priority date or had immigrated, then your client has a pre-1968 priority date or can use the date of admission of the principal alien as the priority date.

A "Western Hemisphere" priority date is not lost by change in the relationship on which it was based. It can only be lost by:

> --By using it. A person who has been admitted using a "Western Hemisphere" date who later loses resident status cannot use the date again. But it is not lost when a person immigrates without actually using the "western Hemisphere" date to which he was entitled.

--By operation of INA §203(g) terminating registration for failure to prosecute within one year after notification to the alien of availability of the visa.

5-- The Exception for "after acquired children"

22 CFR § 22.53 (c) provides that a child born of a marriage which existed at the time of the principal alien's admission is entitled to the preference and priority date of the principal alien.

Practice Pointer: One should not file a second preference visa petition for a child entitled to the benefits of subsection (c) because the priority date Merely set up a following to join visa application through NVC or the Consulate, or if the beneficiary is eligible to adjust status, file the I-485 with proof of the principal alien's admission, preference class and priority date. Best practice is to file a form I-824 to notify NVC to set up this record. However proof can be a copy of the visa obtained by FOIA of the principal alien's file if not otherwise available. An old FAM note continues to state that the Principal Alien's I-551 card is sufficient to set up the "following to join" dependent's visa classification and the date of admission may be used for the priority date if that makes it current.

6-- Rules of "Alternate State Chargeability"

The rules of alternate state chargeability are found in INA §202(b) and 22 CFR §42.12 These rules permit the "accompanying or following to join" spouse or children AND the principal alien to be charged either to the principal alien's foreign state or the spouse's foreign state. It may require them to immigrate simultaneously. The term "accompanying or following to join" in this context means the derivative beneficiaries in every preference petition. 9 FAM §503.3-4(A)

This "exception" does not change the priority date, however use of alternate state chargeability can reduce the waiting time by taking advantage of priority date cutoff variability between countries.

Consideration of your client's priority date issues is incomplete without consideration of the possibility of foreign state chargeability.

Part II: AUTOMATIC CONVERSION OF PREFERENCE WITH RETENTION OF PRIORITY DATE

When the principal beneficiary of a visa petition marries or divorces or the petitioner naturalizes the petition may automatically convert to a different visa classification and the priority date of the original petition is retained. The rules for such automatic conversions were modified and complicated by enactment of the Child Status Protection Act (CSPA) in 2002, and by a series of BIA and court decisions which extended the CSPA's reach and eventually by a Supreme Court decision that clarified but narrowed the reach of the act. We have prepared a chart for all such conversions as Appendix II to this paper.

Although it was not retroactive, the **CSPA ended the ageing out of immediate relative children beneficiaries of visa petitions (visa class IR2).** An immediate relative visa petition, form I-130, filed before the child's 21st birthday eliminates age-out without further qualification. For an immediate relative child, there is no "CSPA Age" calculation needed and there is no requirement that the immediate relative child seek visa issuance within one year of visa availability.

For family based preference visa petitions, the CSPA provides that the age of child beneficiaries for purposes of computing when the child loses status at age 21 shall be reduced by however long USCIS takes to adjudicate the petition. However, the child must seek the visa by filing form I-485 or form I-824 or form DS-260, within one year from the date a visa becomes available based on Visa Bulletin Table "A".

The adjusted age for purposes of the CSPA is the age of the child minus the time the petition remained pending before approval. Appendix I provides an example.

Appendix II, titled AUTOMATIC CONVERSION OF FAMILY BASED PREFERENCE, is a complete summary of the automatic conversion rules for each preference. **In all conversions the original priority date is retained**.

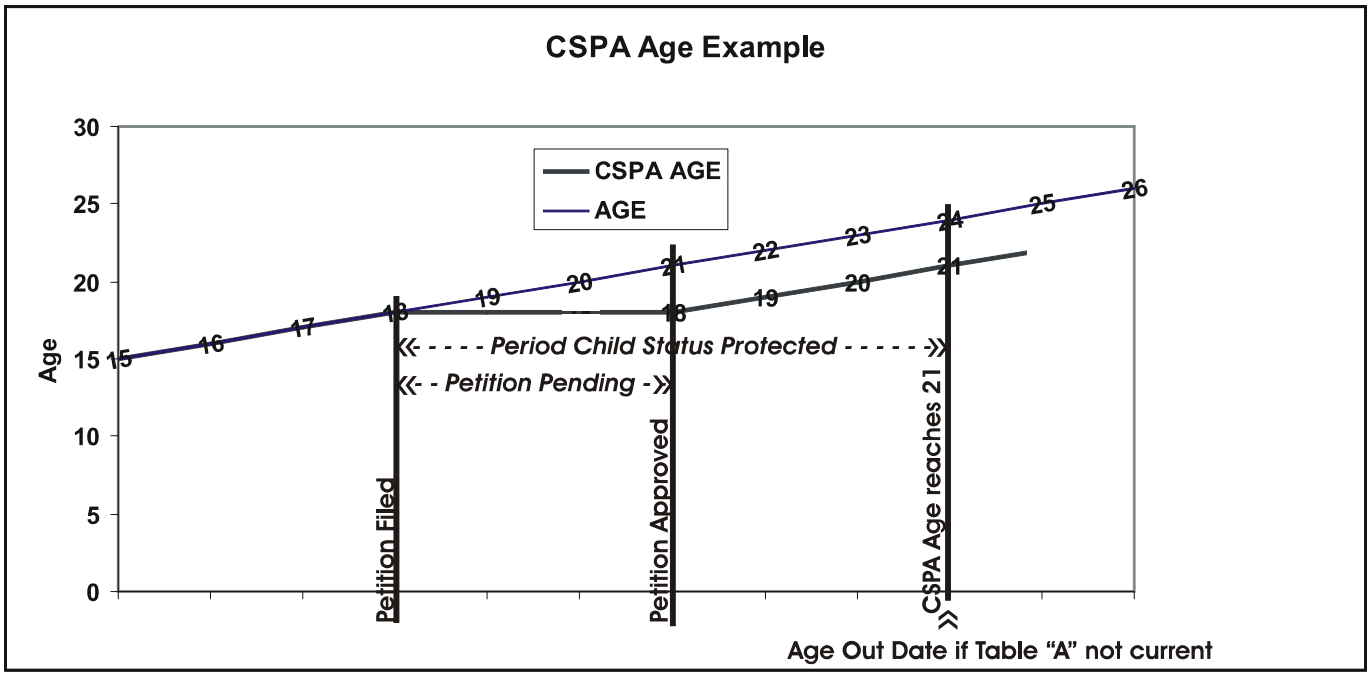
As shown on the chart, there are four different rules for the F2A children of lawful permanent residents due to the interplay of the CSPA cutoff dates and the fact that the child can file an application to adjust status, form I-485, under Table "B" of the visa bulletin yet ultimately age out before Table "A" makes a visa available. This same problem arises for the derivative children in the F3 and F4 preferences.

The chart does not include the rules for the derivative child of an F1 (unmarried adult child of USC) nor of a derivative child of an F2A principal alien child because these situations are rare and unlikely to involve a child at age 21. The chart is otherwise exhaustive.

Part III: Understanding the Child Status Protection Act (CSPA)

With the issue resolved by the Supreme Court that the CSPA does not convert the aged-out dependent derivative children to another preference, the CSPA has become straight forward. Children subject of an IR2 visa petition are protected as children without limit nor other requirement. Children subject of a preference visa petition are protected as children beyond their 21st birthday only for the period of time that the I-130 visa petition was pending approval. If the priority date becomes available during that time they have one year to take action by either filing an I-485 or a DS-230 or an I-824. The CSPA Age calculation is needed to determine whether the beneficiary remains "under 21" and thus remain protected in that preference as a child. The CSPA Age is calculated as illustrated in Appendix I by subtracting from the child's biological age, the period of time the petition remained pending before approval.

The AUTOMATIC CONVERSION rules chart at Appendix II includes consideration of the CSPA and the effects of Table "B" and Table "A" cutoff dates.



This graph shows the relationship between the biological age and the CSPA Age. In this example a preference visa petition was filed at age 18 and remained pending for three years before USCIS approved it. The CSPA Age subtracts the period of time the petition remained pending from the biological age; so the child is CSPA Age 18 when the petition was approved. After approval the child continues to be protected as his "CSPA Age" advances. His child status is protected until his "CSPA Age" advances to 21. If his priority date has not become available using Table "A" cutoff date, he loses child protected status at CSPA Age of 21.

If he had already filed an I-485 application for adjustment of status when his priority date reached the Table "B" cutoff date, he is in limbo. USCIS may handle this situation similar to the procedures followed when cutoff dates retrogress but no announcement has been made and the situation is not analogous because a visa does not eventually become available.

This graph is useful for understanding why an applicant for adjustment of status filed using Table "B" of the Visa Bulletin while the CSPA age is less than 21 might still reach CSPA Age of 21 before Table "A" of the Visa Bulletin allows final grant of LPR status.

Part IV: Using TABLE "A" AND TABLE "B" of the Visa Bulletin.

For about 40 years continuing until October, 2015, the Department of State has published a monthly visa bulletin with cutoff dates for each preference for every country and worldwide. Visa availability requires a priority date earlier than the cutoff date for the month of immigrant visa issuance abroad or granting of adjustment of status in the U.S. Such dates are now known as Table A of the monthly visa bulletin. The monthly visa bulletin publishes tables for both Employment Based preferences and for Family Based preferences.

Beginning in October, 2015, the Department of State began publishing an earlier set of cutoff dates for the National Visa Center. These are cutoff dates for commencing final consular processing of the visa application, Form DS230, and possibly also for filing of form I-485 Application to Adjust Status with the USCIS. These dates are Table B of the monthly visa bulletin.

This change has been advantageous to applicants, particularly those eligible to file form I-485 because the dates in Table "B" are as much as 19 months earlier than Table "A" (see April, 2016 data below).

USCIS publishes a web page at *www.uscis.gov/visabulletininfo* updated when each monthly visa bulletin is published. It shows whether USCIS is using Table "B" or Table "A" cutoff dates for filing Form I-485 application to adjust status. During April, 2016, USCIS is using Table "B" cutoff dates for Family Based and Table "A" cutoff dates for Employment Based applications to adjust status.

Practice Pointer: Only the USCIS web site should be used for determining cutoff dates and eligibility to file Form I-485, Application for Adjustment of Status because USCIS may or may not use Table "B" of the Visa Bulletin in any particular month.

Below is shown Table "A" and "B" data and the months separating them for April, 2016:

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
TABLE "A" DATES FOR FINAL ACTION :					
F1	22-Sep-08	22-Sep-08	22-Sep-08	22-Jan-95	1-Jul-04

F2A	22-Oct-14	22-Oct-14	22-Oct-14	22-Jul-14	22-Oct-14
F2B	15-Jun-09	15-Jun-09	15-Jun-09	8-Sep-95	1-Apr-05
F3	22-Nov-04	22-Nov-04	22-Nov-04	1-Oct-94	22-Dec-93
F4	22-Jul-03	22-Jul-03	22-Jul-03	8-Apr-97	1-Sep-92

TABLE "B" DATES FOR FILING :

F1	1-Oct-09	1-Oct-09	1-Oct-09	1-Apr-95	1-Sep-05
F2A	15-Jun-15	15-Jun-15	15-Jun-15	15-Jun-15	15-Jun-15
F2B	15-Dec-10	15-Dec-10	15-Dec-10	1-Apr-96	1-May-05
F3	1-Aug-05	1-Aug-05	1-Aug-05	1-May-95	1-Aug-95
F4	1-May-04	1-May-04	1-May-04	1-Jun-98	1-Jan-93

Length of Time Between Table "A" and Table "B" :

F1	12 months	12 months	12 months	2 months	14 months
F2A	8 months	8 months	8 months	11 months	8 months
F2B	18 months	18 months	18 months	7 months	1 months
F3	8 months	8 months	8 months	7 months	19 months
F4	9 months	9 months	9 months	14 months	4 months

Part V: Reinstatement of Petition on Death of Petitioner or Beneficiary

In 2010 Congress enacted legislation waiving the death of family based petitioners and of both employment and family based principal alien beneficiaries. Such waivers are automatic on request if at least one of the beneficiaries is residing in the U.S. at the time of the death and continues to reside in the U.S. until any pending petition is approved and has a qualifying relative to act as substitute sponsor for the affidavit of support, Form I-864.

To be a substitute sponsor, an individual must be a U.S. citizen or lawful permanent resident; be at least 18 years old; and must be the applicant's spouse, parent, mother/father-in-law, sibling, child, son/daughter, son/daughter-in-law, sister/brother-in-law, grandparent, grandchild, or legal guardian.

Because of the requirement that a beneficiary reside in the U.S. the previous

regulation which allowed USCIS to grant a discretionary waiver on the basis of humanitarian considerations has remained in force for cases where no beneficiary was residing in the U.S. at the time of the death of the petitioner or principle beneficiary.

The rules governing the death of petitioners and principal beneficiaries are presented in a chart with citations to relevant law in the "Notes" column at Appendix III, "EFFECT OF DEATH OF PETITIONER OR PRINCIPAL ALIEN".

April 10, 2017

Example for computing CSPA AGE		Formula
Date of Birth:	15-Nov-85	A
Date of Petition Filing:	18-Apr-05	B
Date of Petition Approval:	21-Oct-08	C
Calculate Years Petition Pending:	3.51	d = C - B
Date for Age Calculation:	1-May-10	E
Calculate Biological Age:	24.47	f = E - A
CSPA AGE	20.96	g = f + d

Date calculations are easy using a spreadsheet program such as EXCEL which gives number of days when one date is subtracted from another.

AUTOMATIC CONVERSION OF FAMILY BASED PREFERENCE			
Original Visa Class	**Event**	**Converted Visa Class**	**Notes**
IR2 (child of USC)	Marriage of Beneficiary	F3 (married son/daughter of USC)	9 FAM § 503.3-3(B)(2)(1)(b)
IR2 (child of USC)	Beneficiary reaches biological age 21	Remains IR2 due to CSPA. [CSPA not retroactive to age outs before 2002]	Not subject to one year requirement of CSPA to seek visa
F1 (unmarried son/daughter of USC)	Marriage of Beneficiary	F3 (married son/daughter of USC)	9 FAM § 503.3-3(B)(2)(1)(a)
F2A (spouse of LPRt)	Petitioner Naturalizes	IR1 (spouse of USC)	9 FAM § 503.3-3(B)(2) (3)
F2A, (child of LPR)	Marriage of Beneficiary	Both the Preference and the Priority Date are lost	Priority date not recaptured by marriage termination
F2A, (child of LPR)	Beneficiary reaches Biological Age 21 before Visa becomes Available per Table A of Visa Bulletin	No effect as not yet at CSPA Age	Must fseek visa, I.e. file I-485, DS260 or I-824 within one year of visa availability.
F2A, (child of LPR)	Visa becomes Available per Table B of Visa Bulletin before Beneficiary reaches CSPA Age 21	Can file I-485 or start processing for consular appointment, but could still lose protected child status.	Beneficiary could still reach CSPA Age Out before visa available per Table A.
F2A, (child of LPR)	Visa becomes Available per Table A of Visa Bulletin before Beneficiary reaches CSPA Age 21	F2A class child status protected	Reverts to F2B if fails to seek visa within one year of visa availability
F2A, (child of LPR)	Beneficiary reaches CSPA Age 21 before Visa becomes Available under Table A of Visa Bulletin	Converts to F2B (unmarried son/daughter of LPR)	However, if I-485 filed using Table B of Visa Bulletin it should remain pending until current. No authority for this yet
F2A, (child of LPR) and biological age under 21	Petitioner Naturalizes	IR2 (child of USC)	Not subject to one year requirement of CSPA to seek visa
F2A, (child of LPR) and biological age over 21 but CSPA age under 21 and priority date unavailable per Table A of Visa Bulletin	Petitioner Naturalizes	F1 (unmarried son/daughter of USC) and can NOT Opt Out to F2B - see Zamora Molina 25 I&N Dec. 606 (BIA 2011) reversing prior USCIS guidance.	However, if I-485 filed using Table B of Visa Bulletin it should remain pending until current.
F2B (son/daughter of LPR) and both biological and CSPA age over 21	Petitioner Naturalizes	F1 (unmarried son/daughter of USC) but can Opt Out to F2B to take advantage of visa availability	However, if I-485 filed using Table B of Visa Bulletin it should remain pending until current.
F2B (son/daughter of LPR)	Marriage of Beneficiary	Both the Preference and the Priority Date are lost	Not subject to recapture by marriage termination
F3 (married son/daughter of USC)	Principal Beneficiary's marriage terminated while under age 21	IR2 (child of USC)	9 FAM § 503.3-3(B)(2)(1)(c)
F3 (married son/daughter of USC)	Principal Beneficiary's marriage terminated while over age 21	F2B (unmarried son/daughter of LPR)	9 FAM § 503.3-3(B)(2)(1)(c)

F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Marriage of Beneficiary	Both the Preference and the Priority Date are lost	Priority date not recaptured by marriage termination
F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Beneficiary reaches Biological Age 21 before Visa becomes Available per Table A of Visa Bulletin	No effect	
F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Visa becomes Available per Table B of Visa Bulletin before Beneficiary reaches CSPA Age 21	Can file I-485 or start processing for consular appointment	Beneficiary could still reach CSPA Age Out before visa available per Table A.
F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Visa becomes Available per Table A of Visa Bulletin before Beneficiary reaches CSPA Age 21	F33 or F44 visa class child status protected	Preference & Priority Date lost if fails to seek visa within one year of visa availability
F33 (derivative child of F3 principal alien), or, F44 (derivative child of F4 principal alien)	Beneficiary reaches CSPA Age 21 before Visa becomes Available under Table A of Visa Bulletin	Both the Preference and the Priority Date are lost	What if I-485 has been filed using Table B of Visa Bulletin?

Effect of Death of Petitioner or Principal Alien

Visa Classification	Circumstances on date of death	Effect on Petition	Notes
E1 through EB5 Employment Based Preferences	**Principal Beneficiary** dies while I-140 pending or approved; and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-140 will be reinstated or approved if that beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)
IR1 Spouse of U.S. Citizen	**Petitioner** dies while I-130 pending or approved.	Petition I-130 reinstated and treated as I-360 or, if pending, adjudicated as an I-360. (2-year marriage requirement eliminated in 2009)	Children included as derivative beneficiaries of the I-360
IR1 Spouse of U.S. Citizen	**Petitioner** dies and no I-130 was ever filed	May file I-360 as Widow/widower within two years of death.	Children included as derivative beneficiaries of the I-360
IR2 Child of U.S. Citizen	**Petitioner** dies while I-130 pending or approved and Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l) [8 CFR204.2(l)(2) is obsolete]
IR2 Child of U.S. Citizen	**Petitioner** dies after approval of I-130 and Beneficiary NOT residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)
IR2 Child of U.S. Citizen	**Petitioner** dies while I-130 remains pending, Beneficiary NOT residing in U.S. at time of death	Petition not approvable.	8 CFR 204.
F2A Spouse of LPR (includes derivative children)	**Petitioner** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F2A Spouse of LPR (includes derivative children)	**Petitioner** dies after approval of-130; NO Beneficiary residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)
F2A Spouse of LPR (includes derivative children)	**Petitioner** dies while I-130 remains pending; NO Beneficiary residing in U.S. at time of death	No waiver available. Petition not approvable.	
F2A Spouse of LPR (includes derivative children)	**Principal Beneficiary** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F2A Child of LPR (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death (Note: principal alien could have derivative child)	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F2A Child of LPR (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies after approval of I-130; NO Beneficiary residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)

F2A Child of LPR (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies while I-130 remains pending; NO Beneficiary residing in U.S. at time of death	Petition not approvable.	
F2A Child of LPR (includes derivative children of the unmarried principal beneficiary)	**Principal Beneficiary** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	Not real sure about this one
F1 Adult Son or Daughter of USC (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies while I-130 pending or approved and Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F1 Adult Son or Daughter of USC (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies after approval of I-130 and Beneficiary NOT residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)
F1 Adult Son or Daughter of USC (includes derivative children of the unmarried principal beneficiary)	**Petitioner** dies while I-130 remains pending, Beneficiary NOT residing in U.S. at time of death	Petition not approvable.	
F3 Married Son or Daughter of USC and derivatives, or, F4 Sibling of USC and derivatives	**Petitioner** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request, the I-130 will be reinstated or approved if beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*
F3 Married Son or Daughter of USC and derivatives, or, F4 Sibling of USC and derivatives	**Petitioner** dies after approval of-130; NO Beneficiary residing in U.S. at time of death	Discretionary Humanitarian Waiver of Death of Petitioner may be requested.	INA 205 and 8 CFR 205.1(a)(3)(C)(2)
F3 Married Son or Daughter of USC and derivatives, or, F4 Sibling of USC and derivatives	**Petitioner** dies while I-130 remains pending; NO Beneficiary residing in U.S. at time of death	Petition not approvable.	
F3 Married Son or Daughter of USC and derivatives, or, F4 Sibling of USC and derivatives	**Principal Beneficiary** dies while I-130 pending or approved and ANY Beneficiary residing in U.S. at time of death	Upon request**, the I-130 will be reinstated or approved if that beneficiary continues to reside in U.S. until adjudicated	INA § 204(l)*

* Section 204(l) is not retroactive to petitions adjudicated before 28-Sep-2009

it expects to have $65,694,000 to allocate to states for social services to refugees and entrants for FY 1988. The notice of the proposed allocations to states of FY 1988 social services funds was published in the *Federal Register*, Vol. 53, No. 37, February 25, 1988, pp. 5646–5650.[1] As a result of the comments received, over $1.5 million that ORR previously had planned to use for discretionary initiatives has been added to the amount initially allocated. Adjustments have also been made in the estimated refugee populations of four states based on evidence submitted by those states.

Because of the length of the notice and the limited number of readers affected by it, we merely call attention to the notice without reproducing it.

11. DOS Clarifies Western Hemisphere Priority Dates

The following is the text of a cable sent August 13, 1987 by the Department of State, Washington, DC to the American Consul in Tijuana:

> 1. DEPARTMENT HAS REVIEWED ITS FILES ON THE TOPIC OF WESTERN HEMISPHERE PRIORITY DATES FURTHER. IT HAS DISCOVERED THAT IN THE YEAR WHEN THE BARAJAS CASE AROSE, 1976, 9 FAM NOTES ON THE TOPIC STATED THE FOLLOWING: "WHEN THE BENEFICIARY OF AN IMMEDIATE RELATIVE PETITION WHO IS A NATIVE OF THE WESTERN HEMISPHERE HAS A SPOUSE OR A CHILD NOT ENTITLED TO IMMEDIATE RELATIVE STATUS, THE VISA APPLICATION OF SUCH SPOUSE OR CHILD MAY BE PROCESSED WITH A PRIORITY DATE DERIVED FROM THE FILING DATE OF THE PETITION." THE NOTES GO ON TO SAY THAT "A NONPREFERENCE PRIORITY DATE, ONCE PROPERLY ESTABLISHED, IS NOT LOST..."
>
> 2. IT IS CLEAR THAT THE DEPARTMENT'S POLICY AT THE TIME IN QUESTION PERMITTED THE ESTABLISHMENT OF PRIORITY DATES FOR CHILDREN OF IMMEDIATE RELATIVES WHO WERE NATIVES OF THE WESTERN HEMISPHERE AND THAT SUCH PRIORITY DATES WERE NOT LOST SUBSEQUENT TO JANUARY 1, 1977 SINCE THE CHILDREN WERE NOT THEMSELVES IMMEDIATE RELATIVES AND THUS WERE SUBJECT TO THE WESTERN HEMISPHERE QUOTA ON THE DATE THAT THE IMMIGRATION AND NATIONALITY ACT AMENDMENTS OF 1976 BECAME EFFECTIVE, I.E. JANUARY 1, 1977. THEY THEREBY QUALIFIED UNDER THE SECTION 9(B) "SAVINGS CLAUSE" OF THOSE AMENDMENTS.
>
> 3. CONSEQUENTLY MS. BARAJAS APPEARS TO HOLD A PRIORITY DATE OF AT LEAST JANUARY 20, 1976 SINCE HER FATHER'S 212(A)(15) REFUSAL IS ACCEPTABLE AS EVIDENCE OF HIS REGISTRATION FOR IMMIGRATION AND HIS SUBSEQUENT IMMIGRATION AS AN I.R. APPEARS TO CONFIRM THE PROBABILITY THAT THAT WAS HIS INTENDED STATUS IN 1976.
>
> 4. IF SHE IS OTHERWISE ELIGIBLE HER CASE MAY BE PROCESSED TO CONCLUSION AT THIS TIME.

This cable stems from a lawsuit filed last year (*Barajas v. Shultz*, No. 87–0870–E–(IEG)) by San Diego attorney Robert A. Mautino. In that case, the Department of State eventually agreed that Western Hemisphere immigrant visa applicants may obtain derivative priority dates from their parents even though the parents immigrated to the U.S. originally as immediate relatives.

12. BALCA Rules in Job Description Dispute

The Labor Department's Board of Alien Labor Certification Appeals (BALCA) recently decided to remand a case for a more accurate job title of the position offered. In *In re Downey Orthopedic Medical Group*, 87–INA–674 (BALCA, March 16, 1988), five of the BALCA's seven members agreed that the Certifying Officer (CO) mistakenly found that the job requirements were unduly restrictive since it was unclear what the job position was. Two Administrative Law Judges (ALJs) dissented, arguing that in the U.S., a direct correlation exists between the level of skill or knowledge employed and the fee or wages paid for the position.

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1 Reported in *Interpreter Releases*, Vol. 65, No. 9, March 7, 1988, p. 216.

California Service Center
I-130 Priority Date Retention Request Procedures

Supporting Evidence Needed:

- A copy of the approval notice from the previously approved I-130 petition. If the approval notice is not available, submit a copy of a letter issued by the Department of State, National Visa Center (NVC) verifying the approval of the petition, priority date, petitioner, beneficiary and derivative beneficiaries' names.
- If the previously approved I-130 petition was sent to the Department of State, National Visa Center (NVC) for processing, submit a letter, no more than 6 months old, from the NVC stating that the previously approved I-130 petition has not been terminated or revoked.
- If the previously approved I-130 petition has been forwarded to the American Consulate/Embassy, submit a letter, no more than six months old, from the American Consulate/Embassy stating that the previously approved I-130 petition has not been terminated or revoked.
- If there has been a legal name change for either the petitioner or beneficiary, submit evidence to support the change.
- If the principal beneficiary has been granted Lawful Permanent Resident status, submit evidence of the status.

  *Please note that further evidence may be required and requested at the time of adjudication.

For New I-130 Filings:

Submit the I-130 petition and supporting documentation as stated on Form I-130 instructions, include the additional evidence as described above in support of the retention request, with a cover letter clearly labeled **"Priority Date Retention Request".** In order for a priority date retention request to be considered, the new I-130 petition must be filed by the same petitioner as the previously approved I-130 petition.

For I-130 Petitions Currently Pending at the California Service Center:

Call the National Customer Service Center at 1-800-375-5283 to request priority date retention for the petition.

For Approved I-130 Petitions Awaiting Adjustment of Status I-485 Filing:

Please contact the local Field Office by scheduling an appointment online at www.uscis.gov under the InfoPass section.

For Approved I-130 Petitions that are Located at the National Visa Center or American Embassy/Consulate:

Submit a letter labeled **"Priority Date Retention Request"** that includes the current I130 receipt number and all supporting evidence described above to the National Visa Center at:

Department of State
National Visa Center
31 Rochester Avenue
Portsmouth, NH 03801

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August 22, 2011

TO: Sandra Salazar
District Adjudications Officer
USCIS Houston

RE: Form I-485, Visa Class F4, Western Hemisphere Priority Date
Azzz 113 832 MSC1190321216 Principal Alien
Oved E... D...
Azzz 113 833 MSC1190321222 Dependent Spouse
Alejandra O... de E...
Azzz 113 834 MSC1190321219 Dependent Child
Natalia Alejandra E... O...
INTERVIEW DATE: August 15, 2011

Dear Ms. Salazar:

In our discussion last Monday of the Western Hemisphere Priority Date established by the father of OVED E... D..., you were undecided as to whether the derivative beneficiaries (the spouse and child) would be accorded the Western Hemisphere priority date (WHPD) of the principal alien.

I believe you were satisfied as to the documentation regarding the WHPD established by Oved's father. Oved is now claiming the WHPD in

the family-based fourth preference as the brother of a USC.

I wanted to submit a short brief on this subject, which follows:

GENERAL RULE

The regulation at 8 CFR § 204.2(d)(4) provides the general rule:

> 204.2(d)(4) *Derivative beneficiaries.* A spouse or child accompanying or following to join a principal alien as used in this section may be accorded the same preference and priority date as the principal alien without the necessity of a separate petition. However, a child of an alien who is approved for classification as an immediate relative is not eligible for derivative classification and must have a separate petition approved on his or her behalf.

This regulation restates the statute 8 USC 1153(d) which provides:

> A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent. 8 U.S.C. § 1153(d)

The words "accompany" and "following to join" are terms of art defined in the regulations. A derivative beneficiary is considered to "accompany" the principal alien if he or she is in the physical company of the principal or is issued an immigrant visa within six months of the date that the principal receives immigrant status. 22 C.F.R. § 40.1(a)(1). After six months, the derivative beneficiary is "following to join" the principal.

EXCEPTIONS TO THE GENERAL RULE

Other than the spouse or child acquired after the date of admission of the principal alien, there are no exceptions in the statute or regulations and I have been unable to find any exceptions in the case law either.

The priority date regulations are grouped in a single section of the Department of State regulations at 22 CFR § 42.53:

Sec. 42. 53 Priority date of individual applicants.

(a) Preference applicant . The priority date of a preference visa applicant under INA 203 (a) or (b) shall be the filing date of the approved petition that accorded preference status.

(b) Former Western Hemisphere applicant with priority date prior to January 1, 1977 . Notwithstanding the provisions of paragraph (a) of this section, an alien who, prior to January 1, 1977, was subject to the numerical limitation specified in section 21(e) of the Act of October 3, 1965, and who was registered as a Western Hemisphere immigrant with a priority date prior to January 1, 1977, shall retain that priority date as a preference immigrant upon approval of a petition according status under INA 203 (a) or (b).

(c) Derivative priority date for spouse or child of principal alien . A spouse or child of a principal alien acquired prior to the principal alien's admission shall be entitled to the priority date of the principal alien, whether or not named in the immigrant visa application of the principal alien. A child born of a marriage which existed at the time of a principal alien's admission to the United States is considered to have been acquired prior to the principal alien's admission.

There is agreement that the priority date provided in subsection (a), e.g. the petition filing date, is available to the derivative spouse and children.

Regarding subsection (b), there is nothing to imply any exception for the priority date provided in subsection (b), the Western Hemisphere Priority Date. On the contrary, subsection (c) plainly states that the dates conferred on the principal alien in either subsection (a) or subsection (b) are granted to the spouse or child acquired prior to the principal alien's admission.

Of some interest: I found this note in the Foreign Affairs Manual that I think may have given rise to the idea of an exception for the derivative spouse/child using the WHPD:

9 FAM 42.53 N4.3 No Cross-Chargeability

There is no cross-chargeability for Western Hemisphere priority dates. Thus, a derivative spouse who is entitled to a Western Hemisphere priority date cannot transfer entitlement to the principal alien. If the principal alien, however, married the spouse prior to January 11, 1977, then the principal alien may have acquired a priority date as the derivative beneficiary of the spouse who held the Western Hemisphere priority date.

This means that if OVED's wife had acquired a WHPD, (for example her father had registered before 1977 with the American Consul as the parent of a U.S. citizen child) she could not transfer that date to OVED, the principal alien, and thus make the entire family current with the derived date. This

note correctly explains that only the principal alien's entitlement to the WHPD is effective to derive the date. The phrase "*cross-chargeability*" arises out of the regulations dealing with alternative quotas; for example if the quota for Canadians is available and the derivative spouse is Canadian, the principal alien can chose "cross chargeability" to become current under the Canadian quota. But this kind of transfer is not applicable in the context of Western Hemisphere priority dates.

The last sentence is interesting also because it illustrates how OVED obtained the priority date as a derivative beneficiary of his father.

MY ACADEMIC PAPER ON THIS SUBJECT

About 15 years ago, I presented an academic paper on Priority Dates at one of the Immigration Law Conferences held annually by the University of Texas at Austin. I have included a copy of that paper.

The question addressed here is addressed only in a single sentence on page 8 of my paper discussing an "F4" immigrant visa case with a Western Hemisphere Priority Date, as follows:

> "Of course, under the "accompanying or following to join" rules for derivative spouse and children, the spouse and children all have the pre-1977 priority date and everybody in the family is at the head of the F4 waiting line."

At the time I wrote that paper, it had not been suggested that derivative beneficiaries might not benefit from the principal aliens derivative priority date; the rule was so well established that I felt I could simply say "Of course…"

Thank you.

Very truly yours,

Robert H. Crane

NOTES

1. Determination of priority date of nonpreference or Western Hemisphere applicants.

1.1 "Date of submission" and "evidence to establish".

For the purposes of 22 CFR 42.62(b)(2), the phrases "date of submission" and "evidence to establish" are defined as set forth in this Note.

1.11 The "date of submission" of evidence is the date on which the evidence was date-stamped as received by the receiving post, not the date on which it was reviewed. (See P.N. 3 to this section.)

1.12 "Evidence to establish" an applicant's claimed relationship, occupational or professional qualification, or other status is evidence which is sufficient, when taken at face value, to substantiate the applicant's claims. If, in an individual case, the consular officer has reason to believe that the evidence presented cannot be taken at face value and that further investigation or other verification is necessary to confirm that the evidence submitted is genuine and/or that the information contained therein is accurate and truthful, he should record the priority date before commencing the necessary investigation. If the investigation reveals that the evidence submitted was genuine, truthful and accurate, the applicant will have suffered no unnecessary delay because of the investigation. If it is determined that the evidence was not genuine, or that the information contained therein was inaccurate or untruthful, the priority date accorded to the applicant on the basis of the evidence will be revoked.

1.2 Applicants to whom section 212(a)(14) is not applicable.

The priority date for nonpreference or Western Hemisphere applicants to whom section 212(a)(14) is not applicable (See 22 CFR 42.91(a)(14)(ii)) is that on which evidence to establish that fact was date-stamped into the consular office and not the date on which the consular officer evaluated that evidence.

1.3 Western Hemisphere applicants statutorily exempt from section 212(a)(14).

1.31 The priority date of a Western Hemisphere applicant who claims statutory exemption from the labor certification requirement as the parent, spouse, or child of a permanent resident alien, and who is not entitled to a derivative priority date, (see Note 2), will be the date on which the resident alien submitted Form I-550 to the Immigration and Naturalization Service for verification of his status or, in appropriate cases, the date on which the resident alien presented his Form I-151, Alien Registration Receipt Card, to the consular officer for examination. In all cases, the consular officer must verify that the claimed relationship between the applicant and the resident alien exists.

1.32 The priority date of a Western Hemisphere applicant who claims a statutory exemption from section 212(a)(14) as the parent of a minor United States citizen shall be the date of submission to the consular officer of evidence of the relationship and of the child's United States citizenship. In most such cases, evidence of both facts should be contained in the birth certificate of the child.

1. Cont'd.

1.4 Applicants who are beneficiaries of individual labor certifications ("PSA - Not Schedule A" and "job offers").

The Department of Labor has determined that, in cases of "PSA - Not Schedule A" or "job offer" certifications, the labor certification is granted as of the date the application for such certification was accepted for processing by the responsible office, rather than as of the date action was taken on the application. Therefore, for the purposes of 22 CFR 42.62(b)(1), the priority date of an alien for whom a "PSA - Not Schedule A" or "job offer" certification has been granted will be the date of acceptance of the application for processing by the appropriate labor office. This date will be evidenced by an endorsement on the approved labor certification consisting of the letters "L.O." for Local Office, "R.O." for Regional Office, or "N.O." for National Office, and a date. (See Note 6.6 to 22 CFR 42.91(a)(14), however, for date of commencement of validity of approved labor certification.)

2. Derivative priority dates in certain cases.

2.1 No derivative priority date for parents.

22 CFR 42.62(d) provides for a derivative priority date only for the spouse and children of a principal alien. There is no derivative priority date provided by regulation for the parents of an intending immigrant.

2.2 Spouse and children acquired by principal applicant prior to his initial admission for permanent residence.

2.21 Although 22 CFR 42.62(d) provides that the spouse and children are to be accorded derivatively the priority date assigned to the principal applicant in connection with the issuance of an immigrant visa to him or with his adjustment of status to permanent resident, often the process of determining that priority date may be time-consuming and difficult. Therefore, if the use of the date of the principal applicant's date of admission for permanent residence as the priority date for his spouse and children would bring them within the cut-off date for the numerical limitation applicable to them, the consular officer need not attempt to determine the principal applicant's priority date. If, on the other hand, the use of the principal applicant's date of admission would not bring the spouse and children within the cut-off date, the consular officer must take whatever steps may be necessary to determine the principal applicant's priority date and assign that date as the priority date of the spouse and children.

2.22 The use of the principal alien's date of admission for permanent residence as the priority date for his spouse or child is not authorized, however, when, under special legislation or regulatory provisions, the principal alien's date of admission for permanent residence is deemed to be a date preceding the actual date on which the Service acted to accord him permanent resident status.

2.3 Derivative priority date in certain cases for "after-acquired" spouse or child.

Since the reentry into the United States of a permanent resident after a temporary absence abroad is usually held to be an admission for permanent residence, an applicant who became the spouse of a permanent resident during such a temporary absence or who is the child of such a marriage may derive a priority date on that basis. An applicant who is the spouse of a permanent resident alien, but who became the resident's spouse during a temporary absence abroad, may be accorded a priority date as of the date of the marriage. In such cases, presentation of a marriage certificate showing that the marriage was performed outside the United States will be sufficient to establish that the resident alien was temporarily absent from the United States at the time, unless it is indicated that the marriage was a proxy marriage. A child accompanying the spouse in such a case should also be accorded the date of his parents' marriage as his priority date. In the case of a child who is the issue of such a marriage, but who is immigrating alone, the priority date will be the date of the child's birth. If the marriage took place in the United States, there is no entitlement to a derivative priority date and the priority date of the spouse and children will be established as provided in Note 1.31.

3. Priority date of a petition beneficiary.

3.1 In preference cases, the beneficiary's preference priority date is the filing date of the petition as indicated in the appropriate block on Form I-130 or I-140, as applicable. In a case in which the petition can be approved by the consular officer (see Note 3 to 22 CFR 42.40), the petition filing date will be the date on which the petition is date-stamped into the consular office, provided the required fee has been paid and the petition has been sworn to and signed, even though the evidence of relationship may be lacking at the time. (The petition may not, of course, be approved until the substantiating evidence is submitted.)

3.2 If a consular officer merely administers the oath and/or collects the fee, and forwards the petition to an office of the Service for adjudication, as in third or sixth preference cases or in relative preference cases in which the petitioner and beneficiary are not physically present in the consular district, the petition is not filed with a consular office and thus no preference priority date is established until the petition reaches the office of the Service by which it will be adjudicated.

3.3 When the beneficiary of an immediate relative petition who is a native of the Western Hemisphere has a spouse or child not entitled to immediate relative status, the visa application of such spouse or child may be processed with a priority date derived from the filing date of the petition. Thus, natives of the Western Hemisphere who are children of a Western Hemisphere mother derive a priority date through the filing date of the I-130 petition filed by the mother's United States citizen husband through whom they have not derived immediate relative status. Likewise, the filing date of a petition by a United States citizen over 21 years of age to confer IR-1 status on his widowed mother, a native of the Western Hemisphere, would be the priority date for processing a visa application for her Western Hemisphere born alien husband. (Added)

4. Preservation of nonpreference and Western Hemisphere priority dates.

4.1 A nonpreference or Western Hemisphere priority date, once properly established, is not lost through the passage of time or because of the expiration or withdrawal of the labor certification, or the termination of the relationship or status upon which it was based, unless it is determined that the priority date was established fraudulently in which case it would be nullified ab initio. Thus, there will be cases in which the applicant retains a previously established priority date but has lost his previous entitlement to status and will have to meet the requirements of section 212(a)(14) a second time. It is therefore most important that the distinction between preservation of a priority date and of entitlement to status be recognized and given effect.

4.2 There are listed in this Note examples of situations in which priority dates are preserved even though the basis for their establishment no longer exists.

4.21 Sons and daughters who qualify as derivative aliens shall not lose their derivative priority dates solely because they may subsequently reach the age of 21 or marry. The retention of priority dates in such cases, however, does not relieve the aliens of meeting the requirements of section 212(a)(14) of the Act.

4.22 A spouse who acquired a derivative priority date shall not lose such date solely because of the death of the principal alien through whom the priority date was derived. In such a case the alien becomes subject to the provisions of section 212(a)(14) of the Act.

4.23 In the case of a non-worker, the priority date is not lost because the nephew whom an elderly applicant was going to join has died, if the applicant is still able to establish that he is not going to work and can meet the requirements of section 212(a)(15) without working, perhaps by joining another member of the family.

4. (4.2 Cont'd)

4.24 Under 22 CFR 42.91(a)(14)(ii)(E), an alien serviceman who has not been admitted for permanent residence is entitled to classification as one "not coming for the purpose of employment." He is entitled to a priority date as of his induction into the Armed Foreces, i.e., the date on which he established this "non-working" status. If he intends to immigrate, he should of course be encouraged to make every effort to obtain an immigrant visa from a United States consular officer abroad prior to his discharge from military service if visa numbers are available. However, if he does not (or cannot) do so, he would retain his priority date even though he would lose his exemption from section 212(a)(14) upon discharge from the service and would have to be able to meet the requirements of that section at the time of formal application for a visa.

4.25 A sixth preference alien whose petition expires retains his original nonpreference priority date (see Note 2 to 22 CFR 42.61). In retaining such nonpreference priority date it is irrelevant whether sixth preference status is lost. The alien must, however, be qualified or re-qualify under the provisions of section 212(a)(14) when he formally applies for a visa.

4.3 It will be noted, however, that an alien who is entitled to a priority date derivatively as the spouse or child of an alien who established a priority date may not benefit from the derivative priority date for the purpose of preceding the principal alien to the United States.