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State Department Realizes that Students Have No Idea What They Want to Do With Their Lives

Foreign nationals wishing to enter the United States in F-1 student status must prove that they have "[nonimmigrant intent](#)." In November, the Department of State issued a cable instructing consular to temper their determinations of whether a F-1 visa applicant has nonimmigrant intent with the consideration that most students have no idea what they plan to do with their lives. The State Department's enlightened view is stated thus:

The typical student is young, without employment, without family dependents, and without personal assets. Students may have only general rather than specific plans for the future.

The memo goes on to state that the availability of jobs in the applicant's field of study in his or her home country is not indicative of immigrant or nonimmigrant intent.

The [memo](#) is available on the Department of State web site.

Form I-864, Affidavits of Support: Basic Overview

Section 212 of the Immigration and Nationality Act lists all of the things that could make an alien inadmissible to the United States. Section 212(a)(4) states that any alien who is likely to become a public charge is inadmissible to the United States. The Service has determined that for certain immigrants, this ground of inadmissibility can only be overcome through the filing of a Form I-864, Affidavit of Support. An I-864 must be filed on behalf of any alien who applies for permanent residency either on the basis of a family relationship, or on the basis of employment where the petitioning company is owned at least 5% by a relative of the alien.

Obligations Assumed by the Petitioner

The Affidavit of Support is a contract between the United States government and the United States citizen or legal permanent resident petitioner who files an I-130 (or in some cases, an I-140) petition on behalf of an alien relative. The petitioner must demonstrate his or her ability to financially support his or her immigrating relative; and must promise to do so until (1) the sponsored immigrant naturalizes; (2) the sponsored immigrant has worked 40 qualifying quarters; (3) the sponsored immigrant dies; (4) the sponsored immigrant [abandons](#) his or her permanent resident status; or (5) the sponsor dies. If the petitioner fails to

provide complete financial support to the alien, such that the alien accesses means-tested public benefits like Welfare or Medicaid, the U.S. government can sue the sponsor for the value of services received by the alien.

The affidavit of support requires the sponsor(s) to promise to pay back the government for any means-tested public benefits accessed by the immigrant, and to provide financial support to the sponsored immigrant at least equal to 125% of the poverty line. The sponsor thus takes on obligations to both the federal government and to the sponsored immigrant.

Proving Ability to Support the Sponsored Immigrant

In order for the Affidavit of Support to be accepted by the government, the petitioner must demonstrate the means to maintain an annual income of at least 125% of the [Federal poverty line](#), which is adjusted annually. This is generally documented through copies of the petitioner's federal income tax returns. In the past, the petitioner was required to supply copies of his or her last three years of tax returns. However, USCIS recently circulated a memorandum stating that the petitioner need only provide one Federal income tax return, for the tax year that is most recent as of the date the Form I-864 was signed. USCIS may still request copies of additional tax returns in its discretion if needed to demonstrate ability to sponsor the immigrant.

In addition to supplying proof that the petitioner's wages bring him or her above the poverty level, the petitioner must also demonstrate that he or she has a means to maintain his or her current income. This is generally demonstrated by a letter from the petitioner's employer specifying the nature of employment and amount of annual wages. If the petitioner's income is through a source other than employment, such as a pension plan, the income can be documented in whatever manner is appropriate.

If the petitioner is unable to demonstrate that his or her income places him at 125% of the poverty level or higher, then a co-sponsor (who can be anyone willing to assume the affidavit of support obligations) may file an additional affidavit of support.

Enforcement

If the sponsored immigrant accesses means-tested public benefits, then the government will request that the sponsor(s) pay the government back. If the government fails to do so, then the government can sue the petitioner for the value of the benefits given to the alien. In addition, the sponsored immigrant may sue the sponsor if the sponsor fails to provide the immigrant with financial support equal to at least 125% of the federal poverty level. In the recent case of [Stump v. Stump](#), 2005 U.S. Dist. LEXIS 26022 (N.D.Ind. 2005), a federal district court upheld the right of a sponsored immigrant to sue a sponsor, her ex-husband, who failed to support her at 125% of the poverty level. The immigrant

was awarded three years worth of unpaid support, reduced by the wages she had earned in the interim and the sums already provided to her by her ex-husband.

Overview of Labor Condition Applications (LCA's) Which Must Be Filed by H-1B Petitioners

Every employer who sponsors an H-1B nonimmigrant must file a Labor Condition Application (LCA) with the Department of Labor, and receive a certified LCA before the H-1B petition can be filed with USCIS. The LCA requires the petitioner to make four attestations regarding the wages and working conditions of the H-1B beneficiary. LCA's are filed [online](#). The Department of Labor immediately certifies LCA applications online if they are prima facie approvable. The process of actually filing and receiving approval of an LCA is thus very quick. The Department of Labor enforces LCA's through responding to complaints by U.S. workers or by H-1B beneficiaries, or by doing random audits of companies to ensure that they are in compliance with their obligations. LCA obligations are governed by [20 CFR 655](#).

Employer Attestations

Paying the "Required Wage"

The LCA requires H-1B employers to make four attestations, the first of which is that the H-1B beneficiary will be paid the required wage. The "required wage" is the greater of the "actual wage" rate or the "prevailing wage" rate. The "actual wage" is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. The "prevailing wage" rate is the average wage rate offered in the area of intended employment to all other individuals with similar experience and qualifications for the specific employment in question. The prevailing wage rate can be determined by any legitimate source of wage information, such as the Department of Labor's [Online Wage Library](#). Alternatively, an employer may request a prevailing wage determination from the State Workforce Agency (SWA) in the state where the H-1B beneficiary will be employed; or may conduct his or her own wage survey according to established DOL guidelines. If the employees at the work site are unionized, the employer may also establish the prevailing wage by showing the wage agreed upon in a collective bargaining agreement that was negotiated at arms-length.

In making this attestation, the employer agrees to pay the H-1B employee the higher of the "prevailing" or "actual" wage, cash in hand, free and clear. If an employee is guaranteed bonuses, benefits, or similar compensation, then the bonuses/benefits can be counted as part of the wages offered to the employee; but if bonuses/ benefits are merit-based or otherwise not guaranteed, then they may not be counted as part of the wages offered to the employee. No sum can be reported as part of the beneficiary's wages unless that sum is shown in the

employer's payroll records as compensation, and unless the wages are reported to the IRS.

An employer may make certain deductions from the employee's wages which will reduce the wages below the required wage. Those deductions include those such as taxes which are required by law, or a deduction required under a collective bargaining agreement, such as union dues. Other deductions can be made if the employee is informed of the deductions before work begins, and agrees in writing to the deductions. Those deductions must be primarily for the benefit of the employee.

An employer may not make deductions from an H-1B employee's wages that (1) would reduce the wages below the required wage; and that (2) are a recoupment of "business expenses." Business expenses include the cost of retaining an attorney to prepare an LCA or H-1B petition. An H-1B employee may pay attorney fees associated with preparation of an H-1B petition, but only if the employee's wages minus the attorney costs are still equal to or exceed the required wage. However, under no circumstances may an H-1B employee pay the \$750/ \$1500 ACWIA fee. This fee may only be paid by the petitioning employer.

Working Conditions

The second LCA attestation is that the employment of H-1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment. This requires that the employer afford working conditions to its H-1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed.

No Strike or Lock-Out

The third attestation that an H-1B employer is required to make on the LCA is that there is not at that time a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment. If a strike or lockout of workers in the same occupational classification as the H-1B nonimmigrant occurs at the place of employment, after the LCA has been filed, the employer must notify the Department of Labor of the strike or lockout within three days. The employer may not assign any H-1B employees to the location where a strike or lockout is taking place in the same occupational classification as the H-1B nonimmigrant.

If a strike occurs after the H-1B beneficiary has commenced employment, the employee's participation in a strike will not render him or her out of status. But if the beneficiary remains in the U.S. after expiration of his or her H-1B status, then he/she will be out of status and deportable.

Notice

An H-1B employer must file notice of the filing of the Labor Condition Application to the collective bargaining representative in the area of intended employment in the occupational classification in which the H-1B employee(s) will be employed. If there is no collective bargaining representative, then notice must be posted in two conspicuous places at the place of employment. The notice must indicate the number of H-1B nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H-1B nonimmigrant(s) will be employed; and that the LCA is available for public inspection at the H-1B employer's principal place of business in the U.S. or at the worksite.

Employers are often most reluctant to comply with the notice requirement, because it requires the publishing of the alien's wages, which due to the requirement that the H-1B employee be paid the higher of the prevailing or actual wage, may be higher than those of the other employees at the work site. However, such notice is absolutely required. The employer must retain a copy of the posting notice and make it available for public inspection, and for inspection by the Department of Labor in the event of an audit or investigation. The file copy should state the dates the notice was posted and be signed by the employer.

The notice requirement can also become complicated where an employee will be assigned to multiple work locations. In most cases, if the employee is reassigned to a different or additional work location not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer must place two posting notices at each work location. However, in limited circumstances, an employer may place an employee on a short-term assignment to a new work location without filing a new LCA. Such a short-term placement is permitted only if the H-1B employee is not assigned to a location where there is a strike or lockout; if the employer continues to pay the worker the required wage for the worker's permanent worksite; if the employer pays the actual cost of lodging for both workdays and non-workdays, as well as the actual cost of travel, meals, and incidental miscellaneous expenses for both workdays and non-workdays. The combined duration of these temporary assignments cannot exceed a total 30 work days in any given year. (In limited circumstances, such assignments can go on for up to 60 days, if the employer is able to show that the employee maintains an office or work site at the location specified in the LCA; if it can be proven that the employee spends a substantial amount of time at the permanent work site per year; and if the beneficiary resides in the vicinity of the permanent work site). The employer who employs a roving H-1B employee will in many cases have the choice of whether to file new LCAs for each work location, or whether to use the "temporary reassignment" provisions.

Enforcement

The Department of Labor can conduct investigations of employers' LCA documentation upon the filing of a complaint (which is generally made by a U.S. worker or by an H-1B beneficiary who has not been paid enough or who has been

treated differently than US workers, but can be made by any aggrieved party), or randomly. Penalties are very serious, including possible fines of up to \$5,000 and/or the employer can be disqualified from filing any I-140 immigrant petitions, or any nonimmigrant petitions on behalf of employees for at least two years. The Department of Labor can also impose further administrative remedies as the Administrator considers appropriate, including requiring the employer to pay back-wages to employees. There are also criminal penalties for wilfull misrepresentation of material facts in the LCA.

In November 2005, the Department of Labor ordered Computech, Inc. of Southfield, Michigan to pay \$2.25 million in back wages to 232 computer professionals plus a \$400,00 fine to settle immigration law violations. The Department of Labor concluded upon an investigation of Computech that it had failed to pay many H-1B employees the required wage, and that it also frequently "benched" employees without pay. ("Benching" occurs when an H-1B employer does not have enough work for an H-1B employee. Benching is legal so long as the employer continues to pay the employee the wage stated in the LCA. If the employer benches an employee without pay, the employer violates the LCA).

Conclusion

LCA's are easy and quick to file, but the attestations in the LCA require the employer's compliance with wage and working condition requirements which, if broken, can lead to serious consequences for employers. The information provided above is a general overview of the LCA requirements and obligations. To determine whether LCA obligations have been or are being met in a certain situation, an attorney should be consulted.

Child Status Protection Act: Protecting Children from "Aging Out"

The Immigration and Nationality Act defines a "child" as someone who is unmarried and under the age of twenty-one. There are several immigration benefits that are only available to children, or are available to children on more favorable terms than to adults, based on the immigration status of the child's parent. For example, a US Citizen or Legal Permanent Resident parent can petition for his or her sons and daughters to become permanent residents. If the sons and daughters are "children" of U.S. citizens, an immigrant visa number is immediately available to them, whereas there is currently a backlog of at least four years in visa availability for the unmarried sons and daughters of U.S. Citizens. Similarly, there is a three-year backlog on visa availability for the "children" of permanent residents while there is a nine-year backlog on visa availability for the unmarried sons and daughters of permanent residents.

Prior to the passage of the Child Status Protection Act in 2002, a child could only benefit from his "child" status if he remained a child right up until the date that he obtained an immigrant visa to come to the U.S. There were many expedite provisions available for children who were close to "aging out" and losing child

status. However, in many cases children "aged out" due to processing delays on the part of INS and the Department of State. The Child Status Protection Act was passed to remedy this problem.

The Child Status Protection Act (PL 107-208), or CSPA, was enacted and became effective on August 6, 2002. It provides age-out protection for "children" who would otherwise lose immigration benefits, often due to processing delays, upon turning twenty-one. The CSPA provides age-out protection to immediate relative children; to derivative beneficiaries of employment-based and diversity visa applicants; and to the child beneficiaries of I-130 petitions filed by a legal permanent resident parent.

Protection for Immediate Relative Children

First, the CSPA protects "immediate relative" "children" from aging out. Immediate relatives are defined in Section 201(b)(2)(A)(i) of the Immigration and Nationality Act as "the children, spouses, and parents of a citizen of the United States." An unlimited number of visas can be issued to immediate relatives, so there is no backlog of visa availability. A visa number is always immediately available to immediate relatives. Children of immediate relatives can thus obtain permanent residence very quickly in most cases. However, if the child of a U.S. citizen turns twenty-one, he/she loses "immediate relative" status and can only qualify for a green card if the U.S. citizen parent files an I-130 petition. The son or daughter must then wait for a family-based first preference visa number to become available to him. Currently it will take approximately four years for a visa number to become available. If the son or daughter should happen to get married during those years, he will fall to an even lower preference category: family based third preference, for which there is now approximately a seven year wait on visa availability.

The CSPA addresses this problem by stating that the age of an immediate relative child is frozen as of the date the parent filed the I-130 petition on his behalf. This is the child's "CSPA age" and never changes for immigration purposes once it is locked in. This keeps children from getting bumped to lower and lower preference categories due to USCIS processing delays. Similarly, if a child is the beneficiary of an I-130 petition filed by his or her permanent resident parent, and the parent later naturalizes and becomes a U.S. citizen, the child's preference category will be "upgraded" to an "immediate relative" petition for which a visa number is immediately available. In that case, the age of the child is frozen at whatever it was on the date the parent's naturalization date. Again, this "CSPA age" never changes once it is locked in. Finally, if a the son or daughter was originally married and is the beneficiary of a family-based third preference I-130 petition filed by his or her U.S. citizen parent, and the child later divorces, the child's I-130 is upgraded to an "immediate relative" petition if he is under age twenty-one, or to a family-based first preference petition, if he is over age twenty-one. In such a case, the determination of whether the beneficiary is a "child" or not depends on his age on the date his marriage was legally terminated.

Protection for Derivative Beneficiaries of Employment Based or Diversity Visa Lottery Applicants

Second, the CSPA protects family-based 2(A) preference children of permanent residents, and derivative children of employment-based and diversity visa lottery applicants for permanent residency from aging out. Under the 2(A) preference category children (under age twenty-one) are eligible for green cards as the direct beneficiaries of an I-130 petition filed by a permanent resident parent. Once they turn twenty-one those children are bumped down to the 2(B) preference category. (If they get married, they lose all eligibility to receive a green card based on a relationship to a U.S. permanent resident parent. Only after that parent naturalizes will that son or daughter again become eligible to be the beneficiary of an I-130 petition filed by the parent). The CSPA protects such "child" beneficiaries from aging out of the 2(A) preference category.

The spouse and children of the beneficiary of employment-based, diversity visa, and all family-based petitions (except for immediate relatives) are eligible for an immigrant visa as a "derivative beneficiary". As a derivative, the child of an I-140 and certain I-130 petitions is eligible for an immigrant visa number at the same time and under the same preference category as his or her parent. Prior to the CSPA, if a child turned twenty-one prior to being issued an immigrant visa or obtaining approval of an adjustment of status application, the child would "age out" and lose eligibility for a green card based on his parent's application. An aged-out derivative child would then either have to leave the U.S., or must have been in a nonimmigrant status independent of his parents in order to remain here. (If he was in a derivative status based on his parent's status, he would also lose that status upon turning twenty-one). The parent could then only help him immigrate to the United States by filing an I-130 petition on the child's behalf. It could be several years before such a child could reunite with his parents.

The Child Status Protection Act addresses the problem of family-based 2(A) children aging out, and of derivative child beneficiaries aging out, through a complex formula that freezes the child's age at a certain point. This point is the "CSPA age" and never changes once it is locked in. The CSPA formula for locking in the age of a family based 2(A) beneficiary or the derivative beneficiary of an I-140 employment-based petition is :

- 1.) The age of the child on the date that an immigrant visa number becomes available for such alien (or in the case of a derivative beneficiary, for the alien's parent);
- 2.) Minus the number of days the relevant I-130 or I-140 petition was pending;
- 3.) But only if the alien has "sought to acquire" permanent residence within one year of visa availability.

Note that an immigrant visa number "becomes available" on the first day after an I-130 or I-140 petition has been approved, that an visa number is available in the alien's preference category. Remember, if the alien is a derivative beneficiary of a parent's I-140 petition, then he or she draws a visa number from the same preference category as the parent. For example, Michael Smith is the beneficiary of an employment-based third preference I-140 petition that was filed on March 1, 2005. His son Jozef was born on January 1, 1985 and will turn twenty-one on January 1, 2006. The I-140 petition is approved on December 27, 2005. Because his father is in the employment-based third preference category, a visa number is not currently available to either Michael or Jozef. According to the [January 2006 Visa Bulletin](#), world wide EB-3 numbers are backed up to April 1, 2001. We can thus estimate that a visa will not "become available" to Jozef for approximately four years, and possibly longer. Assuming a visa becomes available to Michael and Jozef in December 2010, Jozef will be twenty-five years old. His "CSPA age" will be his age on the date the visa number becomes available, or 25, minus the number of days the I-140 petition was pending, or 301 days. This still only brings Jozef's age down to 24. He has "aged out" even with the help of the CSPA.

Retrogression of employment-based visa numbers has severely limited the ability of CSPA to help the derivative beneficiaries of employment-based petitions. In the I-130 context, USCIS has said that it will hold I-130 petitions and not adjudicate them until a visa number is available. This means that I-130 petitions can pend for 3, 4, 10 years. This long pendency helps the child beneficiary of an I-130 petition to be covered by CSPA, because it greatly increases the number of days that can be subtracted from the age of a child on the date when a visa number becomes available, in order to arrive at the CSPA age. Unfortunately for the derivative beneficiaries of I-140 petitions, I-140's are adjudicated in order of submission and are not held until a visa number becomes available. It would be very helpful to potential age-out children if USCIS would hold I-140 petitions for adjudication until a visa number became available. It would not hurt the I-140 beneficiary for USCIS to hold the petition, because the beneficiary could still concurrently file an I-485 adjustment of status application while the I-140 petition remained pending. In addition, the approval of the I-140 petition locks in a priority date for the beneficiary for any subsequently approved I-140 petitions (assuming the I-140 petitioner does not withdraw the approved I-140 petition). The only down side to USCIS holding I-140 petitions for adjudication until a visa number becomes available is that section 104 of the [American Competitiveness in the Twenty First Century Act](#) permits the beneficiaries of approved I-140 petitions to extend H-1B status in three year increments if a visa number is unavailable to them. If an I-140 was not adjudicated, the I-140 beneficiary would be constrained to getting one year extensions of H-1B status under section 106 of AC21. However, this seems to be a small sacrifice to make on behalf of one's children.

Take note that CSPA only applies I-130 2(A) beneficiaries and to the derivative beneficiaries of I-140 employment-based petitions if they "seek to acquire" permanent residence within one year of visa availability. The Department of State

has stated that a beneficiary seeks to acquire LPR status either by filing form DS-230 with a consulate, or by filing an adjustment of status application with USCIS. For those derivative beneficiaries who are outside the U.S. and whose parent has already adjusted status in the U.S., the parent's filing of an I-824 to notify the consulate of the child's eligibility for an immigrant visa indicates the child has "sought to acquire" permanent resident status.

One situation the CSPA drafters did not contemplate in drafting this provision is that a visa can become available to an alien, and then quickly become unavailable. For instance, a visa number could have become available to the derivative beneficiary of an employment based third preference I-140 petition in February 2005. It would have very quickly become unavailable when visa numbers retrogressed, and the child would have had no forewarning and very little time to "seek to acquire" permanent resident status. Not only that, if visa numbers remained backed up for the next year, she would be totally incapable of "seeking to acquire" permanent resident status during that one-year window. It is unclear how the Department of State would treat the issuance of an immigrant visa number to a child caught in that situation.

Who the CSPA Does Not Protect

The CSPA does not protect anyone unless the petition for the alien's (or in the case of a derivative beneficiary, the alien's parent) was approved on or after August 6, 2002, the effective date of the Act. According to the Department of State [ALDAC #2](#), the CSPA may also apply to certain cases involving petitions approved before August 6, 2002, but only if:

- a.) The alien aged out on or after August 6, 2002, or
- b.) The alien aged out before that date but had applied for the visa before aging out and was refused under 221(g) [for insufficient proof of eligibility for an immigrant visa]

The CSPA also does not protect nonimmigrant children from aging out and losing their nonimmigrant status. Children are only eligible to obtain dependent nonimmigrant status based on a parent's status until they reach age 21. Upon turning twenty-one, the child is no longer eligible for dependent nonimmigrant status and is considered "out of status." These children must either leave the U.S. before turning twenty-one, or must apply for a change of status prior to their twenty-first birthday. Note that in order to be able to change status, the child must not only file the change of status application before turning twenty-one, but must also be eligible for the new status prior to turning twenty-one. This can be a problem where a child is in a dependent nonimmigrant status such as L-2 or H-4 and files a change of status to F-1 student status. Most schools do not begin classes until late August, and students are not eligible for F-1 status until thirty days prior to the start of classes. Therefore, if the child turns twenty-one before he can enter F-1 status, there will be a gap in his status and the change of status application must be denied.

Conclusion

The Child Status Protection Act offers several protections to children who would otherwise "age out," and not all are mentioned in this article. The analysis of whether CSPA applies to a child's case often involves a very complicated analysis and legal advice should be sought to assist in such a determination.

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