

FREQUENTLY ASKED QUESTIONS 1

December 2019

Regarding the Child Status Protection Act Lawsuit for Children Aging Out Due to Nationality

What is the Backlogged Country CSPA Lawsuit?

It is a class action lawsuit to seek equal treatment in the way a child's age is calculated with respect to derivative immigrant status under the Child Status Protection Act (CSPA). It aims to protect children from aging out during the long wait in the backlog.

Currently, some children have no hope of ever immigrating together with their parents because of the decades long wait for an immigrant visa, and because CSPA only fixes a child's age as under 21 years of age when the priority date becomes current. Due to per country limits in the law, some children will not ever remain under 21 years of age because priority dates take longer than 21 years to become current.

Why is this necessary, can't children keep their place in line anyway?

Unfortunately, USCIS and the State Department not allow children to keep their place in line either, even if the parents file an I-130 petition for the children after becoming lawful permanent residents. The children have to step all the way back in line and start over. This narrow view has been upheld by the Supreme Court, even though the agency could have taken the broader view and also had that interpretation upheld. See *Scialabba v. Cuellar de Osorio*, 573 US 41 (2014).

What is more, USCIS has adopted a narrow view of which of the two charts may be used for the CSPA calculation, choosing to use the less advantageous "final action date" chart instead of the "dates for filing chart" for purposes of calculating a child's age under CSPA (see [Cyrus Mehta's blog](#) on this). All this narrow interpretation works a serious inequity upon children who are born in certain countries affected by the backlog. We believe this unfair treatment is a denial of equal protection under the U.S. Constitution.

What does the lawsuit seek to do?

The lawsuit asks the court to do two things: 1) allow children who had H-4 status to determine their age for CSPA purposes based on the Worldwide Employment Visa Bulletin charts instead of the discriminatory national origin-based Visa Bulletin charts. This will allow for most people to retain their child dependent status beyond the age of 21, even if there is an extended wait for a visa number; and 2) allow children to continue to be in H-4 status after age 21, and obtain an EAD card.

What are the chances that the lawsuit will be successful?

The Supreme Court has said that Congress regularly makes rules that would be unacceptable if applied to citizens. One can debate the wisdom of that holding but it is established precedent in America's highest court. This will undoubtedly be an uphill battle. When challenging an immigration law on Equal Protection (EP) grounds, the courts usually use the rational basis test, which allows the unfair law to remain in operation as long as the government can prove that the law is rationally related to a legitimate government purpose. The application of per-country caps to limit the number of individuals being admitted based on country of birth would probably survive this kind of test (meaning, it would be upheld) because the government arguably has a legitimate interest in ensuring that nationals of any one country do not take all of the visa numbers available. Whether or not this is good policy is another issue, and we believe it is not. But it is an entirely different matter to foreclose all possibility of immigration for the children of immigrants from certain countries (at present, India), while protecting the children of immigrants from other countries. This does not serve a legitimate government purpose. We believe that this unfair treatment can be struck down.

Who are the attorneys filing the lawsuit?

Brent Renison will be lead counsel in the lawsuit. He has handled three other class action lawsuits involving immigrant rights, and many more individual lawsuits around the country. With 22 years of corporate immigration law and litigation practice, he is also considered one of the world's leading corporate immigration lawyers, as attested by his inclusion in Who's Who Legal, Best Lawyers in America, and Chambers and Partners.

Will the lawsuit help me even if I'm not a plaintiff, and even if I don't live in Oregon?

We hope so. The court will need to approve the lawsuit as a class action, where a small group of "plaintiffs" represent all the other people with the same kind of problem ("class members"). If the court grants class certification, then a ruling in the case will

affect the class members regardless of where they live, and even if they are not listed as plaintiffs on the lawsuit.

Must I register somewhere in order to be a class member?

Probably not. This kind of class action is the type that affects class members even if they do not register, and even if they are not aware of the lawsuit. The only time that class members are usually required to do something in this type of class action is in a situation where the class member does not want to be bound by the decision of the court as to the class members. This could be important to someone who already has their own lawsuit, or plans for a lawsuit, on the same issues and they wish to have their litigation separate. Under the circumstances of most in this class, it is unlikely someone would want to do this, but there are opportunities to object to class certification.

What is the cost to participate in the lawsuit, or gain benefit from it?

There is no cost to participate, and attorney Brent Renison will be working *pro bono publico* as representative of the plaintiffs and class members. That means he will not charge legal fees. In the unlikely event that any plaintiffs or class members who provide declarations are required to travel for any court related appearances, we will seek to raise funds for the limited purpose of covering these costs.

Where will the lawsuit be filed and when?

The lawsuit will be filed in U.S. District Court (federal court) in Oregon. It is hoped that the lawsuit can be filed before the end of December 2019.

How long will it take to have an answer?

Federal court cases take many years to resolve usually. We estimate that it will take 1 to 2 years for the District Court to decide the case. Once the District Court issues a decision either side can appeal. That means that if we win the case, the government has the right to appeal to the Circuit Court of Appeals. If we lose the case, we have the right to appeal. Because of the importance of this issue, it is assumed that the case will be appealed by one side or the other to the appeals court. It is likely to take the Ninth Circuit Court of Appeals 1 to 2 years to decide the appeal. This would result in a decision from a 3 judge panel. Further, it is also possible for either side to request an en banc hearing with many more appeals court judges, which could take more time. Finally, it is also possible that either side could appeal the Ninth Circuit Court of Appeals decision to the U.S. Supreme Court. The Supreme Court, however, only accepts a small percentage of cases and is not guaranteed to even agree to decide the case. If the Supreme Court decides to accept the case it could take another 1 to 2 years to have a decision from the highest court. But if the Supreme Court declines to hear the case, it would take less time,

and then the Court of Appeals ruling would be final. In summary, it could take anywhere from a couple to 5 or 6 years for the whole case to be decided.

Will this lawsuit help me if I have already aged out?

We hope so. We will request the court to determine all those who are covered by CSPA to be covered by the court's decision. CSPA was enacted on August 6, 2002, and those who did not age out before that date will be requested to join the class and enjoy the benefits of any court decision. Because the employment based backlogs were not severe during that time period, and because the indefinite H-1B and H-4 extensions that permit people to stay for lengthy periods in the United States was not enacted until 2000, it is very unlikely that anyone who aged out before CSPA was enacted would have a claim. The court may set limitations on the class membership.

Where can I find information in the future on this lawsuit?

Our law firm website will provide updates on the litigation:

<http://www.entrylaw.com/backlogcspalawsuit>

Attorney Brent Renison will also post updates on his twitter account: [@brentrenison](https://twitter.com/brentrenison)

What can I do to help?

You can go to that website and enter your information into the form. The data from the form will automatically populate a spreadsheet maintained by attorney Brent Renison. There may be opportunities in the future to provide declarations or affidavits, describing your own case, to help move the litigation forward.