DOS Cable Provides Guidance on Applications Adjudicated Prior to the Effective Date of the CSPA

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SUBJECT: CHILD STATUS PROTECTION ACT: ALDAC #4 -
WHAT CONSTITUTES A "FINAL DETERMINATION" ON AN APPLICATION ADJUDICATED PRIOR TO THE EFFECTIVE DATE OF CSPA?

REF: (A) 03 State 15049 (B) 02 State 163054

1. SUMMARY. The following supplements the guidance in Refs A and B on the Child Status Protection Act (CSPA):
-- A mandatory advisory opinion is no longer required in cases where the alien applied for the immigrant visa before the effective date of CSPA (August 6, 2002) and was refused on a ground other than 221(g).
-- In such cases, if the alien's visa application was refused between August 6, 2001 and August 5, 2002, the refusal will not be considered a "final determination" and the CSPA may be applied to the case.
-- If the refusal occurred prior to August 6, 2001, then the refusal will/will be considered a "final determination", unless either the refusal was under 221(g) or the alien applied for a waiver and the waiver application was pending on August 6, 2002.
-- If the refusal occurred prior to August 6, 2001 and a waiver application was either decided before August 6, 2002 or filed after August 6, 2002, the case should be submitted to CA/VO/L/A for an advisory opinion.

END SUMMARY

2. As explained in Ref A, the first step of the three-part CSPA analysis is to determine whether the CSPA even applies to the case. Under Section 8 of the CSPA, an alien who is the beneficiary of an immigrant visa petition that was approved before August 6, 2002 (the effective date of the CSPA) will not benefit from the CSPA unless there was no "final determination" on the alien's application before that date. In Refs A and B, Department advised that a 221(g) refusal will not be considered a "final determination" for purposes of this rule but required that cases involving other grounds of refusal be referred for an advisory opinion. This mandatory AO requirement is now canceled. Henceforth, posts may resolve these cases at post, according to the following analysis:

3. Department regulations at 22 CFR 42.81(e) provide that an alien has a one-year window within which to overcome any refusal without the need to file a new application. As such, in Department's view, a refusal that is less than one year old should not be considered a "final determination", even if the refusal involves a permanent, nonwaivable ineligibility. Therefore, if an alien seeking CSPA benefits was refused a visa in the one-year period prior to the August 6, 2002 effective date of the CSPA (i.e., between August 6, 2001 and August 5, 2002), the refusal will not be considered a "final determination", regardless of the ground of refusal, and the CSPA may be applied to the case. (Per Ref A, posts are reminded that this would only take the case past Step One in the CSPA analysis; post would then need to proceed to Step Two and (if applicable) Step Three and calculate the alien's CSPA age to determine whether it is under 21 and (if applicable) verify that the alien sought legal permanent resident status (i.e., submitted the DS-230 Part I (returned Packet III)) prior to or within one year of visa availability.)

4. If the alien was refused on a ground other than 221(g) more than one year before the effective date of the CSPA (i.e., before August 6, 2001), then that refusal will generally be considered a final determination, and the CSPA generally would not apply. However, a refusal occurring prior to August 6, 2001 will not be considered a "final determination" if the alien applied for a waiver and the waiver application was still pending as of August 6, 2002. In such a case, the CSPA would apply, and post would then have to proceed to Steps Two and (if applicable) Three of the CSPA analysis to see whether the alien qualifies or not.

5. A 221(g) refusal will not be considered a "final determination," regardless of whether it occurred within a year of August 6, 2002 or earlier. (The only exception to this would be if the alien's case was ultimately terminated under INA 203(g) for failure to make reasonable efforts to overcome to 221(g) refusal. A 203(g) termination will be considered a "final determination.")

6. The only cases not covered by the above guidance would involve refusals other than 221(g) which occurred prior to August 6, 2001, and where a waiver application was either decided before August 6, 2002 or filed after August 6, 2002. If any such cases arise, and if the alien is otherwise qualified for CSPA benefits, the case should be submitted to VO/L/A for a determination of whether the requirements of Step One of the CSPA analysis have been met.

7. MINIMIZE CONSIDERED

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