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## HOW SHOULD CHINA-BORN EB-5 INVESTORS RESPOND TO THE NEWS OF EB-5 VISA RETROGRESSION STARTING ON MAY 1, 2015?

As has been anticipated for some time, the U.S. Department of State (DOS) announced this week that EB-5 visa numbers for mainland China-born applicants will retrogress beginning on May 1, 2015, with an initial cut-off date of May 1, 2013.<sup>1</sup> In other words, starting on May 1, 2015, EB-5 visas will be available only to those China-born EB-5 investors whose I-526 petitions were *filed* before May 1, 2013. This initial backlog of exactly two years can be expected to grow over time (unless Congress takes the unlikely action of changing visa quotas), based on previous DOS predictions that the China EB-5 cut-off date would move rather slowly once established.

Chinese investors should not be surprised or alarmed by the EB-5 visa retrogression announcement, nor should they view it alone as a barrier to the ultimate success of their EB-5 case. However, because visa backlogs can delay immigration plans and potentially impact the eligibility of children to immigrate as derivative family members, Chinese EB-5 investors should know what visa retrogression means. This Peng & Weber update offers practical tools to help Chinese EB-5 investors better understand visa retrogression and how to respond to it.<sup>2</sup>

### After EB-5 Visa Retrogression, Can My Child Still Immigrate With Me?

Visa availability cut-off dates can have impact on EB-5 investors far beyond simply how long they have to wait to obtain a green card. Most important, it can determine whether the EB-5 investor's child "ages out." ("Age out" means that the child becomes too old to continue to qualify under the immigrant visa number of one of the parents. If a child "ages out," the child has to find some other way to obtain a green card.)

#### Child Status Protection Act (CSPA)

For an EB-5 investor's child to immigrate with the investor as a derivative immigrant visa applicant, the child must be under the age of 21 and unmarried both at the time the investor files his or her I-526 petition with USCIS and at the time of applying for an immigrant visa or adjustment of status. Due to USCIS processing times, a child who is under 21 at the time the parent's petition is filed may end up turning 21—or "age out"—while the petition is pending. In such a scenario, the Child Status Protection Act (CSPA) provides a way to safeguard the child's eligibility by providing the following:

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<sup>1</sup> See DOS Visa Bulletin for May 2015 at <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-may-2015.html>.

<sup>2</sup> For a general background on visa cut-off dates and visa retrogression, please refer to Peng & Weber's previous update titled "October 24, 2014 Update on Visa Availability for EB-5 Investors from People's Republic of China."



- 1) For the purpose of immigration benefits, the child's age will be calculated as (a) his/her biological age on the date that an immigrant visa becomes available to the parent<sup>3</sup> *minus* (b) the number of days that the immigrant petition was pending with USCIS; and
- 2) As long as the child has sought to acquire lawful permanent residence within 1 year of a visa becoming available, the child's CSPA age will remain frozen and lock in his/her derivative immigration benefits.

CSPA is not a cure-all. CSPA protection depends on how close to 21 a child is when the parent's petition was filed, how long the petition remains pending with USCIS, and whether and how severely visa numbers are backlogged.

### Child Must Be Under 21 At Time A Visa Becomes Available

Although CSPA analysis is complex, the examples below illustrate generally how CSPA age calculation operates both when visas numbers are available and when visa numbers are retrogressed.

#### ***Example 1 – Visas numbers are available***

**Facts:** Child's birthdate is February 1, 1993. Parent's I-526 petition is submitted to USCIS on December 1, 2013, on which date the Child's biological age is 20 years 10 months. Parent's I-526 is approved on March 1, 2015, on which date the Child's biological age is 22 years and 1 month. EB-5 visa numbers are available on the date of I-526 approval. Can Child still immigrate with Parent even though Child is over 21 when the I-526 is approved?

**Analysis:** Child was under 21 when Parent's I-526 was filed. If Child's CSPA age is under 21 at the time a visa becomes available (which is the same as the time of Parent's I-526 approval, in this example) and Child seeks to acquire lawful permanent residence within 1 year of visa availability/I-526 approval, Child's derivative immigration benefits will be locked in.

First, we do the CSPA calculation (using years and months rather than days, for simplicity):

A = Child's biological age on date visa becomes available (March 1, 2015): 22 years and 1 month.

B = Time Parent's I-526 was pending: 15 months.

A - B = 20 years and 10 months.

Second, Child must seek to acquire lawful permanent residence within 1 year of Parent's I-526 approval in order to lock in derivative immigration benefits based on Child's CSPA age of 20 years and 10 months.

#### ***Example 2 – Visa numbers are retrogressed and Parent's I-526 was filed before cut-off***

**Facts:** Child's birthdate is March 1, 1992. Parent's I-526 petition is submitted to USCIS on February 1, 2013, on which date the Child's biological age is 20 years 11 months. Parent's I-526 processing is extremely delayed and finally approved on May 1, 2015, on which date the Child's biological age is 23 years and 2 months. On the date of I-526 approval, there is an EB-5 visa cut-off date of May 1, 2013 for China-born investors. Can Child still immigrate with Parent even though Child is over 21 when the I-526 is approved?

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<sup>3</sup> This means the first day of the first month a visa in the relevant category is listed as available in the DOS visa bulletin or the date the immigrant petition is approved, whichever is later.

**Analysis:** Child was under 21 when Parent's I-526 was filed. If Child's CSPA age is under 21 at the time visas become available (which is the same as the time of Parent's I-526 approval, in this example) and Child seeks to acquire lawful permanent residence within 1 year of visa availability/I-526 approval, Child's derivative immigration benefits will be locked in.

First, we do the CSPA calculation (using years and months rather than days, for simplicity):

A = Child's biological age on date visa becomes available (May 1, 2015): 23 years and 2 months.

B = Time Parent's I-526 was pending: 2 years and 3 months.

A - B = 20 years and 11 months.

Second, Child must seek to acquire lawful permanent residence within 1 year of Parent's I-526 approval in order to lock in derivative immigration benefits based on Child's CSPA age of 20 years and 11 months. As you can see, although visa retrogression occurred in Example 2, it did not affect the child's CSPA age calculation because the parent's I-526 petition was filed before the cut-off date.

### ***Example 3 – Visa numbers are retrogressed and Parent's I-526 was filed after cut-off***

**Facts:** Child's birthdate is March 1, 1993. Parent's I-526 petition is submitted to USCIS on February 1, 2014, on which date the Child's biological age is 20 years 11 months. Parent's I-526 is approved on May 1, 2015, on which date the Child's biological age is 22 years and 2 months. On the date of I-526 approval, there is an EB-5 visa cut-off date of May 1, 2013 for China-born investors. For the purpose of this example only, assume that the cut-off date moves forward gradually, advancing to February 2, 2014 on January 1, 2016. Can Child still immigrate with Parent even though Child is over 21 when the I-526 is approved?

**Analysis:** Child was under 21 when Parent's I-526 was filed. If Child's CSPA age is under 21 at the time visas become available (which is January 1, 2016) and Child seeks to acquire lawful permanent residence within 1 year of visa availability/I-526 approval, Child's derivative immigration benefits will be locked in.

First, we do the CSPA calculation (using years and months rather than days, for simplicity):

A = Child's biological age on date visa becomes available (January 1, 2016): 22 years and 10 months.

B = Time Parent's I-526 was pending: 1 year and 3 months.

A - B = 21 years and 7 months.

Because of visa retrogression, Child's CSPA age is over 21. There, Child is not protected under CSPA and cannot immigrate with Parent.

### **Child Must Have "Sought to Acquire" Lawful Permanent Residence Within 1 Year**

Remember: Even if a child's CSPA age is below 21, the child must have "sought to acquire" permanent residence within 1 year of a visa becoming available to the parent in order for the CSPA age to be frozen and lock in derivative immigration benefits. In order for a child to establish that he/she "sought to acquire" lawful permanent residence, the child must do one of the following within 12 months of a visa becoming available:

- 1) Submit the child's Form I-485 (adjustment of status application) to USCIS, provided that the child is eligible to adjust status within the U.S.;
- 2) Submit the child's immigrant visa fee bill to the National Visa Center (NVC) (note: submission of visa fee alone is sufficient to satisfy the "sought to acquire" requirement);

- 3) Submit the child's DS-260 (online immigrant visa application) to the NVC. If submission of the online DS-260 form is not feasible, you may submit DS-230; or
- 4) The parent who is the principal applicant file a Form I-824 (application for action on an approved application or petition) with USCIS.

If the child takes one of these alternative steps within the relevant 12-month period, the child's CSPA protection will be locked in even if visa numbers subsequently retrogress during the 12-month period. If the child fails to lock in CSPA protection within that 12-month period, the child will have a second 12-month window to satisfy the "sought to acquire" requirement once visas become current again; in that scenario, the child's CSPA age would be recalculated using the new visa availability date instead of the date the visa first became available, which could result in the child aging out.

## **What Steps Can I Take If My Child Is At Risk of Aging Out?**

Addressing potential age-out issues requires a complex and highly fact-specific analysis. Below are some general considerations for mainland China-born EB-5 investors facing the upcoming May 1, 2013 visa cut-off date to take effect on May 1, 2015. However, EB-5 investors should refrain from taking any action until after they have consulted with qualified and experienced EB-5 immigration counsel.

### **What if I Have A Pending I-526 And It Is still Pending on May 1, 2015?**

According to Mr. Charles Oppenheim, Chief of the Immigrant Visa Control and Reporting Division of DOS, the NVC will send fee bills to individuals whose I-526 petitions were approved before May 1, 2015 to allow derivative children applicants to pay the immigrant visa application fee any time within 12 months of the parent's I-526 petition approval date. (When visa numbers are current, the I-526 approval date is the first date of visa availability.)<sup>4</sup> Regardless of when your I-526 was filed, if it is approved before May 1, 2015, you must ensure that you take at least one of the 4 "sought to acquire" steps within 12 months. The easiest way to do this is to ensure that your child pays the immigrant visa fee bill to the NVC. The Department of State has indicated that payment of immigrant visa fees alone is adequate to provide CSPA age-out protection.

### **Will USCIS Expedite Approval of Pending I-526 Petitions before May 1, 2015?**

Although USCIS sometimes grants requests for expedited petition adjudication on a discretionary basis, expedite requests are reviewed stringently and require the showing of one or more specific criteria, e.g. severe financial loss to a company or individual, an extreme emergent or humanitarian situation, or a compelling interest of USCIS. USCIS does not presently have a special procedure for expediting the adjudication of I-526 petitions solely on the basis that the petitioner's child is at risk of aging out due to visa retrogression. EB-5 investors with aging out children may try to request adjudication of their pending I-526 petitions before May 1, 2015 by framing their requests using one of the specified criteria, but USCIS will have discretion to grant or deny the request. For a pending I-526 petition that is already *outside* of the current USCIS-posted I-526 processing time of 14.2 months, USCIS might be amenable to a request for expeditious adjudication based on a child's potential age-out once visa numbers retrogress.

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<sup>4</sup> Mr. Oppenheim provided this information at the 8<sup>th</sup> Annual EB-5 Regional Economic Development Advocacy Conference in Washington, D.C. sponsored by the Association to Invest in USA (IIUSA) on April 13, 2015.

### What if I Have A Pending I-526 And It Is Not Approved Before May 1, 2015?

If your pending I-526 petition was filed *before* May 1, 2013 and approved on or after May 1, 2015, then your priority date would be earlier than the initial EB-5 visa cut-off date. This means that your case would proceed as though visa numbers were current, unless the cut-off date retrogresses further.

If your pending I-526 petition was filed *on or after* May 1, 2013 and approved on or after May 1, 2015, then you would have to stand in line behind other China-born EB-5 investors who filed their I-526 petitions before the initial May 1, 2013 cut-off date. As illustrated above, CSPA may or may not provide your child with protection, depending on how close to 21 the child was when your petition was filed, how long the petition remains pending with USCIS, and whether and how severely visa numbers are backlogged. It is theoretically possible for a parent with a pending I-526 petition to withdraw the pending petition, obtain a refund of investment funds from the EB-5 project, and gift them to the child so the child can file an I-526 petition as the principal investor. However, this can prove complicated and may not always be a viable option.

### What If I Haven't Filed My I-526 Petition Yet?

If you have a child who is 18 years or older, it may be safest to have that child to be the I-526 petitioner instead of attempting to include the child in your petition as a derivative. Most regional center-affiliated projects accept investors who are at least 18 years of age, since this is the age of majority for purposes of contract law in most states. (Please inquire with the particular regional center or project you are interested investing to confirm their investor requirements.) Immigration regulations do not explicitly impose a minimum age for filing an I-526 petition as the principal investor, but the general consensus is that 18 years of age is acceptable. Keep in mind, however, that if you file only in the child's name, and Congress changes the law to make more visas available and removes the visa backlog altogether, those having filed only in the child's name, would have missed out the opportunity for the whole family to obtain a green card through the EB-5 visa program, and would have to wait for the child to become a U.S. to immigrate under the family-based immigration category.

### Will EB-5 Visa Retrogression Affect I-526 Petition Adjudications?

Visa cut-off dates imposed by DOS affect how soon after receiving I-526 petition approval an EB-5 investor may apply for an immigrant visa or adjustment of status. However, they do *not* affect the manner in which the U.S. Citizenship and Immigration Services (USCIS) processes I-526 petitions. Irrespective of visa backlogs, USCIS will continue receiving new I-526 petitions from Chinese investors and will process those petitions and any already pending I-526 petitions pursuant to existing law and policy, in accordance with the processing times posted on USCIS's website. (Actual processing times will vary on a case-by-case basis.) A visa cut-off date for Chinese EB-5 investors does *not* change the existing EB-5 program or governing regulations and policy guidance.

### Where Can I Obtain Further Information?

Please check back with Peng & Weber, PLLC at [www.GreencardLawyers.com](http://www.GreencardLawyers.com) for more information on EB-5 visa allocation and related issues, including child "age outs." Or contact Attorney Elizabeth Peng and Cletus M. Weber at Peng & Weber, PLLC, Attorneys at Law at the following coordinates:

Elizabeth Peng, Esq.

PENG & WEBER, PLLC

3035 Island Crest Way, Suite 200

Mercer Island, WA 98040

(206) 382-1962 Voice, ext. 101

(206) 382-0245 Fax

[peng@greencardlawyers.com](mailto:peng@greencardlawyers.com)

中国免费电话: 950-4037-6346

(直拨, 无需拨国家号或地区号)

微信 ID : elizabethpeng

[www.GreencardLawyers.com](http://www.GreencardLawyers.com)

Cletus M. Weber, Esq.

Peng & Weber, PLLC

3035 Island Crest Way, Suite 200

Mercer Island, WA 98040

(206) 382-1962 phone

(206) 382-0245 fax

[weber@greencardlawyers.com](mailto:weber@greencardlawyers.com)

中国免费电话: 950-4037-6346

(直拨, 无需拨国家号或地区号)

[www.GreencardLawyers.com](http://www.GreencardLawyers.com)