

Adjustment Eligibility of Age-Out Not Invalidated

By Reuben S. Seguritan

The application for adjustment of status filed by children below 21 who are beneficiaries of an approved petition by their permanent resident parents is not invalidated once they reach 21 while their petition is pending. This is contained in a memorandum recently issued by the INS. This memo was precipitated by a case in which the I-485 adjustment application was denied by the adjudicating officer for the simple reason that the applicant turned 21. Upon turning 21, the applicant's visa eligibility shifted to a different category for which there is a temporary unavailability of an immigrant visa. Under the new memo, the application will be held in abeyance until his visa priority date is reached.

Generally, if one loses the qualification for an immigrant visa classification, such as reaching the age of 21, he loses eligibility for adjustment of status unless there is a provision for automatic conversion. However, the new memo reiterates the Immigration Service policy that as long as the applicant remains eligible to receive a visa in the same basic visa classification under which he applied, such as the 2A and 2B family based preference, the application remains valid even if there is no immigrant visa immediately available under a reassignment of the beneficiary from 2A to 2B category. The applicant therefore remains eligible for permanent resident status unless he is ineligible or inadmissible to the U.S. for another reason.

However, the case would be different if an alien derived his eligibility for immigrant visa from his status as a child accompanying or following to join a principal visa beneficiary parent. In this instance, the alien loses eligibility for visa benefits when he reaches age 21 unless the original petitioner files a new visa petition on behalf of the alien who now becomes a direct beneficiary instead of merely being a derivative beneficiary.