U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

June 25, 2015 **PM-602-0118**

Policy Memorandum

SUBJECT: Updated Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Following the Supreme Court Ruling in Scialabba[1] v. Cuellar de Osorio

Purpose

This policy memorandum (PM) rescinds a case hold issued on November 21, 2013, for certain Child Status Protection Act (CSPA) cases impacted by the *Scialabba v. Cuellar de Osorio* litigation as described in PM-602-0094, "Guidance to USCIS Offices on Handling Certain Family-Based Automatic Conversion and Priority Date Retention Requests Pending a Supreme Court decision in *Mayorkas v. Cuellar de Osorio*." Officers are hereby instructed to adjudicate affected cases without further delay.

This PM amends Chapter 21.2(e)(6) of the Adjudicator's Field Manual (AFM) by updating paragraphs (A), (B), (E), and (F), AFM Update AD15-01.

Scope

Unless specifically exempted herein, this PM applies to and is binding on all U.S. Citizenship and Immigration Services (USCIS) employees. This PM rescinds guidance for holding affected cases. Affected cases are hereafter to be adjudicated without delay.

Authorities

- Immigration and Nationality Act (INA) 203(h)(1)-(3)
- 8 U.S.C. §§ 1153(h)(1)-(3), as amended by Public Law 107-208
- 8 CFR 103.2(a)(7), 204.1(b), and 204.2(a)(4)
- *Scialabba v. Cuellar de Osorio*, 134 S. Ct 2191 (2014)
- *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009)

Background

USCIS offices were previously instructed in PM-602-0094 to place certain cases on hold pending the U.S. Supreme Court's ruling in the nationwide class action litigation, *Scialabba v. Cuellar de*

[1] The litigation was originally captioned as Mayorkas v. Cuellar de Osorio. Then Acting Director Scialabba was subsequently substituted as the relevant agency official in place of departing Director Mayorkas.

Osorio. On June 9, 2014, the U.S. Supreme Court issued a decision in favor of the Government, concluding that the Board of Immigration Appeal's interpretation in *Matter of Wang* was entitled to deference and that it is a reasonable interpretation of the law. Accordingly, the Board's holding in *Matter of Wang* remains binding on USCIS, and there is no reason for USCIS to continue holding affected cases.

The policy below provides instruction to USCIS offices to no longer place or keep certain cases on hold but instead to adjudicate these cases without further delay.

Policy
Applications for adjustment of status will be rejected as improperly filed if:

- The sole basis for eligibility is the petition for which priority date retention was requested and denied; and

- Visa availability is contingent upon the older priority date.

Any such applications that were previously accepted and that were held pending the U.S. Supreme Court's ruling in *Scialabba v. Cuellar de Osorio*, must now be adjudicated without further delay.

Implementation
The AFM is updated as follows (AFM Update AD15-01):

☞ 1. AFM chapter 21.2(e)(6), (A), (B), (E), and (F) is revised as follows:

***

(6) Priority Date Retention Requests.

(A) Officers may encounter certain petitions that are eligible for assignment of an earlier priority date. The assignment of an earlier priority date is only permitted for those petitions filed by the same petitioner, on behalf of the same principal beneficiary. However, not every petition filed by the same petitioner on behalf of the same principal beneficiary will qualify. First and foremost, only approved petitions may qualify. Furthermore, those petitions which have been denied, revoked, or from which an immigrant visa has already been used do not qualify. See 8 CFR 204.2(h).

(B) Officers may encounter adjustment of status cases involving applicants eligible to adjust status in the F2B category based on having automatically converted from a derivative in the F2A category to a principal in the F2B category (upon reaching the age of 21) whether or not the petitioner for the F2A petition filed a subsequent petition to classify the applicant as a principal under F2B.

> An assignment under the F2B category is permitted, and is considered to have happened automatically on the original petition, despite the fact that the applicant does not have a separate petition filed on his or her behalf to classify him or her in the F2B category. The original priority date available to the derivative beneficiary once classified pursuant to the F2A category is retained and applied to F2B classification – without need for a separate petition as previously indicated in the regulations. See 8 C.F.R. 204.2(a)(4).

***

(E) If an application for adjustment of status is pending based on INA 245(a) or (i), and visa availability is solely contingent upon a request for priority date retention for which the applicant is not eligible, the officer must deny the application for adjustment of status. If, however, it appears that the applicant is prima facie eligible to adjust on a different visa petition or different section of law, and was so eligible at the time the applicant filed the application for adjustment of status, the officer should request additional evidence as needed, and adjudicate the application based on the alternative basis of eligibility. In such a case, if the application is ultimately denied, the adjudicator should address both the reasons for denial on the original basis, as well as the reasons for denial on the alternate basis. If the applicant was not prima facie eligible on another basis at the time the applicant filed the application for adjustment of status, the officer may not adjudicate the application on any other basis, and must deny the application based upon the original basis.

(F) Officers may encounter motions to reopen or motions to reconsider which are filed by applicants who were previously denied adjustment of status.

- If the motion is solely contingent on a request for priority date retention for which the applicant is not eligible, the officer must deny the motion.

- If the applicant demonstrates that they were, at the time of filing for adjustment of status, prima facie eligible on an alternative basis for adjustment that was not considered before denial, then the officer must reopen the application and adjudicate the application based on the alternative basis of eligibility.

Note: Eligibility pursuant to the alternative basis for adjustment of status must have existed at the time the underlying application for adjustment of status (not the motion) was filed.

*****

☞ 2. The AFM **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD15-01 X/X/XXXX	**Chapter 21.2(e)(6)(A),**	Rescinds a case hold issued on November 21, 2013, for certain Child Status Protection Act

	(B),(E), and (F)	(CSPA) cases impacted by the Scialabba v. Cuellar de Osorio litigation. Officers are instructed to adjudicate affected cases without further delay.

Use
This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information
Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Chief Counsel and the Office of Policy and Strategy, Family Immigration and Victim Protection Division.