

# EB 5 Aging Out: CSPA Protection for Children

A comprehensive guide from EB5 Attorneys

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When a child listed as a derivative beneficiary on an EB 5 petition turns 21 before an immigrant visa becomes available, they "age out" and lose eligibility for a green card through the parent's investment. The Child Status Protection Act (INA section 203(h)) provides a formula to calculate a child's adjusted age, but the protection is not automatic and requires careful planning.

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## What Aging Out Means in the EB 5 Context

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Under INA section 203(d), the spouse and unmarried children under 21 of an EB 5 principal investor qualify as derivative beneficiaries. They receive their green cards through the investor's approved petition without making a separate investment. The age threshold is 21: a child who turns 21 is no longer classified as a "child" under the Immigration and Nationality Act and loses derivative eligibility.

The EB 5 process frequently spans multiple years. The I 526E petition alone can take 12 to 36 months for USCIS adjudication, and visa backlogs in the unreserved category can add additional years for investors from high demand countries such as China, India, and Vietnam. A child who is 17 or 18 at the time of I 526E filing may well be 21 or older by the time a visa becomes available. When that happens, the child ages out and must find an independent immigration pathway, which may not exist without a separate petition or visa category. This is one of the most consequential risks in EB 5 family planning, and it requires proactive attention from the earliest stages of the investment process.

## The CSPA Formula: How a Child's Age Is Calculated

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Congress enacted the Child Status Protection Act in 2002 to address aging out across multiple visa categories. For EB 5 derivative beneficiaries, the relevant provision is INA section 203(h)(1), which establishes a formula for determining a child's age on the date a visa becomes available.

The formula is: Child's biological age on the date a visa becomes available, minus the number of days the I 526E petition was pending before approval.

For example, if a child is biologically 22 years and 3 months old on the date a visa becomes available, and the I 526E petition was pending for 20 months (approximately 609 days), the CSPA adjusted age is approximately 20 years and 7 months. Because the adjusted age is under 21, the child retains derivative eligibility.

The "date a visa becomes available" is typically the date when the investor's priority date becomes current on the Department of State's monthly visa bulletin. For investors in set aside categories where visas have remained current, this date is often the date the I 526E is filed, because visas are immediately available.

There is an additional requirement: the child must "seek to acquire" permanent residence within one year of visa availability. This means the child (through the parent) must take affirmative steps, such as filing Form I 485 or submitting consular processing documents, within that one year window. Missing this deadline can result in loss of CSPA protection even if the adjusted age is under 21.

## How Set Aside Categories Reduce Aging Out Risk

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The EB 5 Reform and Integrity Act of 2022 created reserved visa allocations (set asides) for rural TEA (20% of visas), high unemployment TEA (10%), and infrastructure projects (2%) under INA section 203(b)(5)(B)(iii). These set aside categories have maintained separate visa queues that have generally remained current for all countries since the RIA took effect.

For families with children at risk of aging out, set aside categories offer a significant structural advantage. When visas are immediately available in the investor's category, the CSPA clock starts at the time of I 526E filing. The "date a visa becomes available" is effectively the filing date itself, which means the CSPA adjusted age calculation begins running immediately.

In practical terms, if a 19 year old child is a derivative on an I 526E filed in a rural TEA set aside category, and the petition takes 24 months to adjudicate, the child would be biologically 21 at approval. But the CSPA formula subtracts the 24 months of pending time, producing an adjusted age of 19. The child retains eligibility.

By contrast, an investor in the unreserved category from a retrogressed country may face years of visa backlog on top of petition processing time. The CSPA formula only subtracts the days the petition was pending, not the days spent waiting for visa availability after approval. This distinction is critical: the longer the visa backlog, the less the CSPA formula helps. For families with children approaching 21, filing under a set aside category with current visa availability can eliminate aging out risk entirely.

## Concurrent Filing Benefits for Children

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Under INA section 203(b)(5)(F)(iv), added by the RIA, investors in categories with immediately available visas may file Form I 485 concurrently with the I 526E petition. Concurrent filing provides substantial benefits for derivative children at risk of aging out.

When an I 485 is filed on behalf of a child, it locks the child's age for CSPA purposes as of the I 485 filing date. This provides an additional layer of protection beyond the CSPA formula alone. Even if the I 526E takes years to adjudicate, the child's CSPA age was established at I 485 filing, which may have occurred when the child was still comfortably under 21.

Concurrent filing also provides interim benefits: the child can apply for an Employment Authorization Document (EAD) and Advance Parole, which may be relevant for older children who are working or studying in the United States. These benefits are independent of the I 526E adjudication timeline.

To be eligible for concurrent filing, the investor must be in a category where an immigrant visa is immediately available. As of April 2026, all three set aside categories (rural, high unemployment, infrastructure) have maintained visa currency, making concurrent filing available to most set aside investors. Unreserved category investors must wait until their priority date becomes current on the visa bulletin before filing the I 485.

## Filing Timing Strategies to Protect Children

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Families with children approaching 21 should develop a filing strategy that prioritizes aging out protection from the outset. Several timing considerations are relevant.

File the I 526E as early as possible. The priority date is set on the filing date, and for set aside categories with current visas, the CSPA clock begins running from that date. Every month of delay in filing is a month less of CSPA protection available to the child.

Select a set aside category project if eligible. Rural TEA projects offer the strongest aging out protection because their visa queue has remained current since the RIA took effect. If a rural TEA project is available and otherwise suitable, it provides the best structural position for protecting children.

File the I 485 concurrently if eligible. For investors in categories with immediate visa availability, filing the I 485 at the same time as the I 526E provides the earliest possible CSPA age lock. Coordinate with your EB 5 attorney to ensure the I 485 is filed promptly.

Consider the child's current age and realistic processing times. If a child is 16 and the likely total processing time (I 526E plus any visa backlog) is three years, aging out risk is low. If a child is 19 and filing in a retrogressed category, the risk is high. Your attorney should model the CSPA calculation under different processing time scenarios to quantify the risk.

Plan for worst case scenarios. Processing times are estimates, not guarantees. RFEs can add months. Visa bulletin movement can retrogress. Build a filing strategy that protects the child even if every stage takes longer than expected.

## What Happens When a Child Ages Out

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If a child's CSPA adjusted age exceeds 21 and they lose derivative eligibility, the consequences are significant. The child cannot receive a green card through the parent's EB 5 petition and must find an independent immigration pathway.

Options for an aged out child depend on their circumstances. If the child is in the United States on a student visa (F 1), they may continue their studies and potentially pursue employment based immigration after graduation. If the child qualifies for their own employment based visa (H 1B, O 1), they can pursue that independently. In some cases, the parent, once a permanent resident, can file a separate family based petition for the aged out child, but this creates its own multi year timeline and visa backlog.

The emotional and financial cost of aging out is substantial. Families who invested hundreds of thousands of dollars with the expectation that the entire family would receive green cards find themselves with a child who is excluded from the benefit. The child may need to leave the United States if they have no independent legal status, creating family separation.

There is no appeal or waiver for aging out. If the CSPA formula produces an age of 21 or older, the child is ineligible, and no discretionary relief exists. This makes preventive planning, not reactive problem solving, the only effective approach.

## Working With Your EB 5 Attorney on Aging Out Prevention

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Your EB 5 attorney should raise aging out risk at the initial consultation if you have children under 21. Any competent EB 5 practitioner will ask about your children's ages and build a filing strategy that accounts for this risk from day one.

Specifically, your attorney should calculate the CSPA adjusted age under multiple scenarios: best case processing, average processing, and worst case processing with RFE delays and visa backlog. They should advise on project selection (set aside versus unreserved category) with aging out implications clearly explained. They should prepare a concurrent filing strategy if eligible, including I 485, EAD, and advance parole applications for each derivative beneficiary.

If your attorney does not raise aging out as a topic during your initial consultation, and you have children between 14 and 20, raise it yourself. Ask them to model the CSPA calculation for your family. Ask them what project type they recommend specifically to protect your children's eligibility. And ask them what happens if your child ages out despite their best efforts. Their answers will tell you whether they have the experience and attention to detail your family's case requires.

Document the attorney's aging out analysis in writing. If the attorney assures you that your child will not age out, ask them to explain the assumptions behind that conclusion. Processing time estimates change, visa bulletin movement is unpredictable, and any assurance should be qualified by the range of possible outcomes.

## Special Considerations for Multi Child Families

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Families with multiple children face compounded aging out risk. If one child is 18 and another is 15 at the time of filing, the older child requires more aggressive protection strategies while the younger child has more margin.

In some situations, families file separate EB 5 petitions for different projects to provide redundancy. For example, the primary investor might invest in a rural TEA project (maximizing aging out protection through the set aside category), while also considering whether a second family member could file independently if necessary.

The cost of a second petition is substantial: a separate \$800,000 or \$1,050,000 investment, plus filing fees and attorney fees. This approach is not practical for most families, but for high net worth investors with multiple children approaching 21, it may warrant consideration.

More commonly, families with multiple children at varying ages should prioritize the filing strategy around the eldest child's timeline. If the eldest child is protected, younger siblings with more time remaining are inherently protected as well. Your EB 5 attorney should map out the CSPA calculation for each child individually and identify the "binding constraint," the child with the tightest timeline, as the basis for strategy decisions.

# Frequently Asked Questions

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## 1. At what age does a child 'age out' of EB 5 derivative eligibility?

A child ages out at 21. Under the Immigration and Nationality Act, a "child" must be unmarried and under 21. Once a derivative beneficiary turns 21 (based on the CSPA adjusted age calculation), they lose eligibility for a green card through the parent's EB 5 petition. The CSPA formula at INA section 203(h) may reduce the child's effective age by subtracting the days the I 526E was pending, but if the adjusted age still exceeds 21, the child is ineligible.

## 2. How does the CSPA formula work for EB 5 cases?

The formula subtracts the number of days the I 526E petition was pending from the child's biological age on the date an immigrant visa becomes available. For example, if a child is biologically 22 when a visa becomes available but the petition was pending for 18 months, the CSPA adjusted age is approximately 20 years and 6 months. The child must also seek to acquire permanent residence within one year of visa availability (INA section 203(h)(1)).

## 3. Do set aside categories help prevent aging out?

Yes, significantly. Set aside categories (rural TEA, high unemployment TEA, infrastructure) under the RIA have maintained current visa availability for all countries since March 2022. When visas are immediately available, the CSPA clock starts at I 526E filing. This means the full petition processing time is subtracted from the child's age, providing maximum CSPA protection. Unreserved category investors face visa backlogs that are not subtracted under the CSPA formula.

## 4. What is concurrent filing and how does it protect children?

Concurrent filing allows investors to file Form I 485 (adjustment of status) at the same time as the I 526E when a visa is immediately available. Filing the I 485 locks the child's age for CSPA purposes as of that filing date. It also provides interim benefits: the child can apply for work authorization and travel documents while the I 526E is still pending. This option is available under INA section 203(b) (5)(F)(iv), added by the RIA.

## 5. Can anything be done after a child has aged out?

There is no appeal, waiver, or discretionary relief for aging out. Once the CSPA adjusted age exceeds 21, the child loses derivative eligibility permanently under that petition. The child must pursue an independent immigration pathway, such as a student visa, employment based visa, or a separate family based petition filed by the parent after receiving permanent residence. An EB 5 attorney can advise on available alternatives based on the child's individual circumstances.

## 6. Should I choose a project specifically to protect my child from aging out?

If your child is approaching 21, project selection should account for aging out risk. Rural TEA set aside projects offer the strongest protection because they maintain immediate visa availability, allowing concurrent filing and maximizing the CSPA formula benefit. Your EB 5 attorney should model the CSPA calculation under different project types and processing scenarios before you commit to an investment.

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