

1. Age and Marital Status of the Child and Validity of the Adoption

a. Age and Marital Status Requirement

Unlike the criteria for the orphan and Convention visas, the adopted child visa does not require that the visa petition be filed before a child reaches the age of 16 (or 18, if the biological sibling of a qualifying adoptee). Instead, 8 U.S.C. 1101(b)(1)(E) requires that the finalization of a valid adoption occur by the child's sixteenth birthday (or by the child's eighteenth birthday if the child is a biological sibling of another child adopted before the age of sixteen). The Petition for Alien Relative, Form I-130, must then be filed by a U.S. citizen petitioner while the child is still under the age of twenty-one and unmarried.⁷⁵ A U.S. citizen whose adopted child is over twenty-one or married, but who otherwise satisfies the criteria of 8 U.S.C. § 1101 (b)(1)(E), may file an I-130 to obtain a family-sponsored first preference visa for an unmarried adult adoptee and a third preference visa for a married adoptee.⁷⁶

The age requirement has been scrutinized in a series of decisions regarding “retroactive adoptions,” most recently in the Fourth Circuit case of *Ojo v. Lynch*, 813 F.3d 533 (4th Cir. 2016). Two weeks after his lawful entry to the United States from Nigeria at the age of six, Ojo's uncle, a U.S. citizen, became his legal guardian. When Ojo was sixteen, his uncle and aunt filed a petition to adopt him, which was finalized in 2001 by a Maryland state court when he was seventeen. In deportation proceedings brought by the Department of Homeland Security following two drug-related offenses many years later, Ojo was adjudicated by the immigration judge and the Bureau of Immigration Appeals (BIA) to be removable because his adoption was not finalized until he was seventeen, and thus he did not derive citizenship under 8 U.S.C. § 1431 (See Section III below). Ojo's uncle then applied for and received a nunc pro tunc order from the Maryland state court, making his adoption effective on the day before Ojo turned sixteen. The Bureau of Immigration Appeals denied Ojo's petition to reopen, relying on its decision in *Matter of Cariaga*, 15 I. & N. Dec. 716 (BIA 1976) precluding consideration of nunc pro tunc orders entered after the relevant birthday, and in *Matter of Drigo*, 18 I & N. Dec. 223 (BIA 1982), affirming the rule in *Cariaga* and requiring strict construction of the statutory age.

The Fourth Circuit found the BIA's refusal to open removal proceedings to be arbitrary, capricious, and an abuse of discretion. In so ruling, the Fourth Circuit in *Ojo* noted that multiple federal district courts have cast doubt on the *Cariaga/Drigo* rule,⁷⁷ as well as the Ninth Circuit

⁷⁵ USCIS, *Other Adoption-Related Immigration*, at 8 U.S.C. 1101(b)(1)(E)

⁷⁶ See USCIS, *Green Card for Family Preference Visas*, at <https://www.uscis.gov/greencard/family-preference>.

⁷⁷ The Fourth Circuit cited *Cantewell v. Holder*, 995 F.Supp.2d 316 (S.D. N.Y. 2014); *Hong v. Napolitano*, 772 F. Supp. 2d 1270 (D. Haw. 2011), and *Gonzalez-Martinez v. DHS*, 677 F. Supp. 2d 1233 (D. Utah 2009) as examples of lower courts rejecting BIA interpretation.