U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Lawrence E. Rushton, Esquire
5909 West Loop South, Ste 150
Bellaire, TX 77401-0000

Office of the District Counsel/HOU
126 Northpoint Drive
Houston, TX 77060

Name: GARCIA, MARIA T. *

A79-001-587

Date of this notice: 06/16/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

F.F.K.

Frank Krider
Chief Clerk

Enclosure

Panel Members:
COLE, PATRICIA A.
O'Leary, Brian M.
PAULEY, ROGER

File: A79 001 587 - Houston

Date: JUN 16 2006

In re: MARIA T. GARCIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lawrence E. Rushton, Esquire

ON BEHALF OF DHS: Gerrie Zhang
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Adjustment of status

The respondent appeals from an Immigration Judge's February 11, 2005, decision denying her application for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). The Department of Homeland Security (the "DHS"), formerly the Immigration and Naturalization Service (the "INS"), opposes the appeal. The appeal will be sustained in part and the record will be remanded to the Immigration Judge for further proceedings.

The respondent, a 32-year-old native and citizen of Mexico, concedes that she is inadmissible to the United States as charged, but claims that she is eligible to adjust her status to that of a lawful permanent resident pursuant to section 245(i) of the Act. Section 245(i)(1) provides, in pertinent part, that certain aliens who are beneficiaries of immigrant visa petitions filed on or before April 30, 2001, may apply to the Attorney General for adjustment of status upon payment of $1,000. Upon receiving the alien's application and the required sum, the Attorney General is authorized to adjust the alien's status to that of a lawful permanent resident if, among other things, "an immigrant visa is immediately available to the alien. . . ." Section 245(i)(2)(B) of the Act.

The respondent contends that a visa is immediately available to her as a derivative beneficiary of a visa petition, filed in 1983, that classified her mother as a fourth-preference family-based immigrant (i.e., as the sister of a United States citizen). *See* section 203(a)(4) of the Act, 8 U.S.C. § 1153(a)(4). According to the respondent's appellate brief, her aunt filed a visa petition on behalf of her mother on January 13, 1983, when the respondent was 9 years old, and a visa number became available to her mother on the basis of the petition in June of 1996, when the respondent was 22 years old. Although the respondent is now 32 years old, she asserts that she remains her mother's "child," for purposes of establishing her derivative status under the aforementioned visa petition, by

operation of section 3 of the Child Status Protection Act, Pub. L. No. 107-20, 116 Stat. 927 (2002) ("CSPA"), codified at section 203(h) of the Act, 8 U.S.C. § 1153(h).

Section 203(h)(1) of the Act provides in pertinent part that a determination as to whether a derivative beneficiary of a visa petition continues to qualify as a "child" (i.e., as a person under 21 years of age) is to be made by reference to "the age of the alien on . . . the date on which an immigrant visa number became available for the alien's parent[], but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by . . . the number of days in the period during which the applicable petition . . . was pending." According to the respondent, applying the formula set forth at section 203(h)(1) results in a determination that she is 17 years old and still her mother's "child" for purposes of establishing derivative status.

Alternatively, the respondent contends that even if she is 21 years old or older within the meaning of section 203(h)(1), a visa is nonetheless immediately available to her by operation of section 203(h)(3) of the Act, which provides that "[i]f the age of an alien is determined under [section 203(h)(1)] to be 21 years of age or older . . . , the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." The respondent asserts that if she is 21 years old or older, then the "appropriate category" to which she was "automatically . . . converted" is the second-preference category of family-based immigrants (i.e., the unmarried daughter of her mother, a lawful permanent resident). Section 203(a)(2) of the Act. Indeed, in 1997 the respondent's mother actually filed a visa petition on the respondent's behalf, classifying her in that preference category. Furthermore, the respondent contends that under section 203(h)(3) she "retains" her mother's original January 1983 priority date for purposes of establishing her eligibility for a visa in the second-preference category.

The Immigration Judge concluded that the respondent was no longer her mother's "child" for purposes of section 203(h)(1) because she did not file her application for adjustment of status within 1 year after a visa number became available in connection with her mother's visa petition. Furthermore, the Immigration Judge concluded that the 1983 fourth-preference petition did not automatically convert to a second-preference petition with respect to the respondent because section 203(h)(3), which provides for such automatic conversion, did not yet exist in 1997 (when the respondent's mother filed a second-preference petition on the respondent's behalf).

On appeal, the respondent argues that the Immigration Judge misconstrued section 203(h)(1) of the Act when she interpreted the phrase "sought to acquire the status of an alien lawfully admitted for permanent residence" as referring to the formal "filing" of an application for adjustment of status. Furthermore, she claims that she is eligible for automatic conversion to the second-preference category pursuant to section 203(h)(3) because the affirmative application for adjustment of status that she filed on the basis of her approved second-preference petition was still pending before the former INS when the CSPA went into effect in August of 2002.

As a threshold matter, we conclude that we need not address the first issue raised by the respondent on appeal, i.e., whether the Immigration Judge erred by equating the statutory phrase "sought to acquire the status of an alien lawfully admitted for permanent residence" with the concept

of "filing" a formal application for adjustment of status. For the following reasons, we conclude that the respondent would have failed to retain the status of her mother's "child," within the meaning section 203(h)(1) of the Act, *even if* she had applied for adjustment of status within 1 year after a visa number became available to her mother.

As noted previously, the respondent's age for purposes of section 203(h)(1) is equal to her actual age on the date when a visa number became available to her mother, reduced by whatever number of days comprised "the period during which the applicable petition . . . was pending." It is undisputed that a visa number became available to the respondent's mother in June of 1996, when the respondent was 22 years old. Furthermore, the record reflects that the underlying visa petition was approved by the former INS on the day it was filed–January 13, 1983. (See attachment "A" to the DHS' Brief on Respondent's Ineligibility for Adjustment of Status, filed in Immigration Court on January 21, 2005). Applying the section 203(h)(1) formula to this set of facts yields the conclusion that the respondent is 22 years old (i.e., her age in June of 1996 (22 years)), reduced by the number of days in the period during which the visa petition was pending (i.e., 0 days)). Accordingly, the respondent is no longer deemed to be her mother's "child" for purposes of establishing her status as a derivative beneficiary of her mother's visa petition.

The respondent's assertion that she is 17 years old for purposes of section 203(h)(1) appears to derive from her assumption that the statutory reference to "the period during which the applicable petition . . . was pending" refers to the period of time between the filing of the visa petition and the date when a visa number became available to her mother. But that assumption is mistaken. In fact, the relevant period is the period between the filing of the visa petition *and its approval*; a visa petition that has been approved by the DHS is no longer "pending" for any purpose within the meaning of the CSPA. In this connection, it must be kept in mind that the CSPA was enacted to prevent alien children from "aging out" as a result of unnecessary administrative processing delays by the DHS. Yet the 161-month delay between January 1983 (when the former INS approved the fourth-preference visa petition filed on behalf of the respondent's mother) and June 1996 (when a visa number became available to the respondent's mother on the basis of that petition) was not attributable to unnecessary administrative processing delays at the former INS, but was instead a function of the fact that the respondent's mother had been approved for classification as an immigrant in an oversubscribed preference category that was (and remains) subject to restrictive annual numerical limits. The CSPA was not intended to override these annual numerical limits or otherwise alter the preference allocation for family-sponsored immigrants, which are set by statute. *See generally* section 203(a) of the Act. Because there was no administrative processing delay in the approval of her mother's fourth-preference visa petition, there is simply no basis for "reduc[ing]" the respondent's age below that which she actually possessed when a visa number became available to her mother. Having concluded that the respondent is not presently entitled to a visa number as a derivative beneficiary of her mother's fourth-preference visa petition, we now turn to the question whether a visa is immediately available to her by operation of the automatic conversion provision at section 203(h)(3) of the Act.

As previously noted, section 203(h)(3) provides that "[i]f the age of an alien is determined under [section 203(h)(1)] to be 21 years of age or older . . . , the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon

receipt of the original petition." We have determined that the respondent is 21 years of age or older for purposes of section 203(h)(1), and therefore our present task is to ascertain the "appropriate category" to which her petition is automatically converted. We agree with the respondent that where an alien was classified as a *derivative* beneficiary of the original petition, the "appropriate category" for purposes of section 203(h)(3) is that which applies to the "aged-out" derivative vis-a-vis the *principal beneficiary* of the original petition.[1]

In this instance, the principal beneficiary of the original petition was the respondent's mother, who became a lawful permanent resident of the United States once a visa number became available to her in 1996. The respondent was (and remains) her mother's unmarried daughter, and therefore the "appropriate category" to which her petition was converted is the second-preference category of family-based immigrants, i.e., the unmarried sons and daughters of lawful permanent residents. Furthermore, the respondent is entitled to retain the January 13, 1983, priority date that applied to the original fourth-preference petition, and therefore a visa number under the second-preference category is immediately available to the respondent.[2]

As noted previously, the Immigration Judge declared that section 203(h)(3) was inapplicable to the respondent because the CSPA, from which section 203(h)(3) is derived, was not intended to apply retroactively to petitions for classification filed before August 6, 2002, the CSPA's effective date. In this regard, the Immigration Judge apparently focused on the respondent's eligibility for a visa number through the visa petition that her mother filed on her behalf in 1997. However, the respondent's entitlement to a visa number under section 203(h)(3) does not derive from the 1997 visa petition, but rather from the original 1983 petition, which is "automatically . . . converted" to a second-preference petition upon an administrative determination that she is 21 years old or older for purposes of section 203(h)(1).

Furthermore, the CSPA expressly provides that the amendments made therein "apply to any alien who is a . . . beneficiary of . . . a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) approved before [August 6, 2002] but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition." CSPA § 8. The present respondent was a beneficiary of her mother's fourth-preference petition, which was approved prior to August 6, 2002, and the respondent's subsequent application for adjustment of status was filed with the DHS in 1997 but *remained pending* until 2004, after the CSPA had become effective. Thus, section 203(h)(3) was applicable with respect to the respondent's original adjustment application and remains effective to the renewed application that she has filed in removal proceedings.

---

[1] Where the aged-out beneficiary was the principal beneficiary of the original petition, the appropriate category is that which applies to the beneficiary vis-a-vis the original *petitioner*.

[2] According to the State Department's visa bulletin, second-preference family-based visas are currently available to the unmarried daughters of Mexican lawful permanent residents whose priority dates precede November 1991. (http://travel.state.gov/visa/frvi/bulletin/bulletin_2924.html).

In conclusion, we have determined that an immigrant visa is not immediately available to the respondent as a derivative beneficiary of her mother's fourth-preference visa petition, but that such a number is available to her in the second-preference category by virtue of section 203(h)(3) of the Act. Accordingly, a visa is immediately available to the respondent within the meaning of section 245(i)(2)(B) of the Act. Therefore, the respondent's appeal will be sustained in part and the Immigration Judge's decision pretermitting her application for section 245(i) adjustment will be vacated. The record will be remanded for further consideration of the respondent's adjustment application and for entry of a new decision.

ORDER: The appeal is sustained in part and the Immigration Judge's decision is vacated to the extent that it pretermitted the respondent's application for adjustment of status.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing decision and for entry of a new decision.

FOR THE BOARD