File: A099 252 007 - Philadelphia, PA Date: OCT 06 2010

In re: JOSE JESUS MURILLO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Philippe Weisz, Esquire

AS *AMICUS CURIAE*: Mary A. Kenney, Esquire
American Immigration Council

ON BEHALF OF DHS: John B. Carle
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Adjustment of status

FACTS AND BACKGROUND

The Department of Homeland Security ("DHS") appeals the Immigration Judge's February 25, 2008, decision granting the respondent's application for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255. The appeal will be dismissed.

The issue in this case is whether the respondent is eligible for adjustment through derivative status with respect to his father's approved visa petition under the Child Status Protection Act ("CSPA"), Pub. L .No. 107-208, 116 Stat. 927 (2002). In her decision, the Immigration Judge found the respondent eligible under the CSPA based upon her conclusion that the adjustment of status application did not necessarily have to be timely "filed" by the derivative child alien to meet the "sought to acquire" lawful permanent resident status language in section 203(h) of the Act, 8 U.S.C. § 1153(h)(1). The Immigration Judge determined that the phrase "sought to acquire" could, in certain cases, be satisfied by circumstances short of filing the adjustment application. According to the Immigration Judge, the "sought to acquire" element was satisfied here because the record establishes that the respondent hired an attorney to prepare his adjustment of status application in April 2004, within a year of his immigrant number becoming available, he filed his application within a reasonable period thereafter (20 months), and he was still under the age of 21 (I.J. at 7).

The CSPA addresses the treatment of unmarried sons and daughters seeking status as family-sponsored, employment-based, and diversity immigrants. The CSPA amended section 203(h) of the

Act which provides for "age-out" protection for certain individuals who were classified as "children" at the time that a visa petition or application for adjustment of status was ultimately processed. *See* section 3 of the CSPA. It offers a formula to determine whether the derivative is a "child" as defined by the Act. Specifically, a determination whether an alien satisfies the age requirement of section 101(b)(1) of the Act, 8 U.S.C. § 101(b)(1), is made using 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 1 year of such availability, reduced by the number of days in the period during which the applicable petition was pending. *See* section 3 of the CSPA.

There is no dispute that the respondent's father's visa petition has a priority date of October 16, 1995, and was approved on August 8, 1996 (Exh. 2). At that time, the respondent, who was born on May 2, 1984, was 12 years of age and eligible for derivative benefits as the "child" of the beneficiary-spouse, his mother. *See* sections 101(b)(1) and 203(d) of the Act. A visa became available on June 1, 2003, when the respondent was 19 years old and thus still a "child" under the Act. The respondent is now over 21 years old and must be classified as a "child" under the CSPA in order to be eligible to adjust his status. Therefore, the issue is whether the respondent "sought to acquire" adjustment of status within a year of June 1, 2003. The record reflects that the respondent's application for adjustment of status based on the approved visa petition was filed with DHS on February 1, 2005, over 20 months later (Exh. 2). However, the respondent established that he retained the services of an attorney to file for adjustment of status in April 2004, less than a year after he became eligible (Exh. 2). At that time, the respondent was still eligible for derivative benefits. On this basis, the Immigration Judge found the respondent eligible under the CSPA.

LEGAL POSITIONS OF THE PARTIES

After supplemental briefing, the DHS contends that the "sought to acquire" language in section 3 of the CSPA contemplates only the actual filing of an application. *See* DHS's Supplemental Brief at 5. In this regard, the DHS points out the differing language used by both it and the Department of State ("DOS") in describing the "filing" of an application including "filing," "submitting," and "making an application," and argues that Congress's use of the phrase "sought to acquire" seeks to incorporate these various mechanisms used in respect to both immigrant visas and adjustment of status into a single phrase.[1] *See id.* at 6; *see also* section 222(a) of the Act (noncitizens "applying for an immigrant visa" shall "make application therefore"); 203(g) of the Act (termination of registration of a noncitizen who fails to "apply for an immigrant visa"); section 245 of the Act (noncitizen is to "make an application" for adjustment of status); 22 C.F.R. § 42.63(a) (2010) ("make application"); 22 C.F.R. § 42.67(b) ("filing" an application"). The DHS also cites to its and the DOS's guidance on the issue which each requires the filing of an application and/or certain documents in order to meet the "sought to acquire" requirement. Finally, the DHS asserts that any other construction of the phrase would frustrate the strict 1-year time limit because it would result in uncertainty as to what steps need to be taken to establish the requirement. *See* DHS's Brief at 6-9.

[1] The DOS declined to issue a formal opinion and/or submit a supplemental brief in this case.

In opposition, the respondent and amicus curiae[2] argue that Congress's use of the term "sought to acquire," a phrase not used in any other section of the Act or regulations, necessarily contemplates a broader meaning than the words "file," "submit," or "apply." According to the respondent and amicus, had Congress intended to limit section 203(h) to the filing of the relevant application, it would have used a term such as "file," "submit," or "apply" as it has consistently done in statute and regulation and in several other sections of the CSPA itself. *See* CSPA section 8 ("application for an immigrant visa or adjustment of status"); section 101(a)(4) of the Act ("application for issuance of an immigrant [] visa"); section 204(j) of the Act ("applications for adjustment of status"); section 204(l)(1) of the Act ("application for adjustment of status"). Amicus and the respondent further argue that the respondent's actions in this case meet the "sought to acquire" element such that he is eligible.

DISCUSSION

This Board has held that in interpreting a statute we look first to the language of the statute. *Matter of Nolasco*, 22 I&N Dec. 632, 635-36 (BIA 1999). "The paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole." *Id.* citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *see also Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998). Where the language is clear, we must give effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. V Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Further, "[where] Congress includes a particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (internal citations omitted); *see also Negusie v. Holder*, 129 S.Ct. 1159, 1179 (2009) (noting, in regard to the persecutor-bar of section 208 of the Act, "Congress has evidenced its ability to both specifically require voluntary conduct and explicitly exclude involuntary conduct in other provisions of the [Act]"); *Matter of Guzman-Gomez*, 24 I&N Dec. 824, 827 (BIA 2009) ("[W]hen Congress wants the term 'child' to encompass stepchildren for some purpose under the Act, it knows how to make its intention clear in that regard); *Matter of Avila-Perez*, 24 I&N Dec. 78, 82 (BIA 2007) (finding significant Congress's inclusion of the word "pending" in one subsection of the CSPA but its omission in another).

In section 203(h)(1)(A) of the Act, Congress chose to use "sought to acquire," rather than "file," "submit," or "apply." In this regard, the term "file" means "to deliver a legal document to the court clerk or the record custodian for placement into the official record" and the term "apply" means "to make application." *Black's Law Dictionary* 25 (8th ed. 2004); *Merriam-Webster's Collegiate Dictionary* 1124 (11th ed. 2003); 8 C.F.R. §§ 204(b)-(d) (DHS requirements for filing a visa petition). The term "submit" means "to present for approval, consideration, or decision of another or others: to submit a plan; to submit an application." *Merriam-Wester's Collegiate Dictionary, supra.*; *see also* 22 C.F.R. § 40.1(l) (DOS regulation defining "make or file an application" as "submitting"). Thus, the terms "file," "submit," and "apply" are somewhat synonymously used by Congress in the Act each referring to the presentation of an application to relevant officials. In contrast, the plain meaning of "seek" or "sought" includes "to try to acquire or gain" or "to make an attempt." *Merriam-Webster's Collegiate Dictionary, supra.* The term "acquire" is defined as

[2] We express our appreciation for the thoughtful brief it submitted.

"to gain possession or control of; to get or obtain." *Black's Law Dictionary, supra.* The plain meaning of these words indicates that Congress intended that the alien must "make an attempt to get or obtain" status as a lawful permanent resident within 1-year of such availability, lesser actions than contemplated by the use of the terms "file," "submit," and "apply."

In ascertaining the plain meaning of a statutory provision, we construe the language in harmony with the wording and design of the statute as a whole. *Matter of Nolasco, supra,* at 636. As previously noted, Congress has used the terms "file," "submit," and "make application" in various sections of the Act to mean essentially the same act, but nowhere else have we found the phrase "sought to acquire." *See, e.g.*, sections 208(a)(2)(B) and 245(a) of the Act. Congress explicitly employed the term "filed" or "filing" within each section of the CSPA. However, Congress omitted the term with respect to section 203(h)(1)(A) of the Act. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotations omitted). Congress intentionally and purposefully used the language "sought to acquire" rather than "filed," "submitted," or "apply." When Congress has desired the filing of a petition or application, it has expressly required such action. *See* section 208(a)(2)(B) of the Act (application for asylum must be "filed within 1 year" of arrival in the United States).[3]

We observe that there have been no precedential decisions or regulatory provisions addressing this specific issue as to the CSPA. As the DHS notes in its supplemental brief, its internal memorandum has interpreted "sought to acquire" to mean the filing of the application or petition, the position the DHS posits here. *See* INS Memorandum for Field Leadership Revised Guidance for the Child Status Protection Act (CSPA), *AFM* Update: chapter 21.2(e) The Child Status Protection Act of 2002 (CSPA) (AD07-04) (HQ DOMO 70/6.1) at 4 (April 30, 2008). Similarly, the DOS, in its cables to consular offices and embassies, has concluded that the language "sought to acquire" means "generally" the "filing" of the required application or documentation within a year of acquiring eligibility. *See* Department of State Second Cable on the CSPA 015049 at paras. 15-25 (Jan. 17, 2003). This Board, however, is not bound by the interpretation of the DHS or DOS as to the statutes which we administer. *See Matter of M/V Saru Meru,* 20 I&N Dec. 592, 595 (BIA 1992). We agree with the DHS that, from a practical administrative and adjudicative standpoint, the interpretation of "sought to acquire" as "filed" would provide a date-certain upon which to determine whether the alien qualifies for protection as a "child" under section 203(h)(1)(A) of the Act. However, we are still faced with the inescapable fact that Congress could have easily used the term "filed," or any comparable language, to accomplish this objective, but chose not to do so. In addition to the language used by Congress, we find support for a broad and more flexible interpretation of this language in the legislative history of the CSPA.

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[3] We are unpersuaded by the DHS's contention that Congress's use of a specific time limitation and enumerated exceptions in sections 208(a)(2)(B) and (D) of the Act indicates that it did not intend a more flexible interpretation of "sought to acquire" because section 203(h)(1) does not contain such exceptions. A broader interpretation of "sought to acquire" does not alter the 1-year strict time limitation in section 203(h)(1) of the Act as do the exceptions in section 208 of the Act. Regardless of the definition given to the "sought to acquire" language in section 203(h)(1) of the Act, an alien is still strictly held to the 1-year limitation of the statute.

The congressional intent in enacting the CSPA was to "bring families together" (Rep. Sensenbrenner, 148 Cong. Rec. H4989-01, H49991, July 22, 2002) and to "provide relief to children who lose out when INS takes too long to process their adjustment of status applications" (Rep. Gekas, *id.* at H4992); *see also*, Rep. Jackson-Lee, "where we can correct situations to bring families together, this is extremely important." *Id.* at H4991. In enacting the CSPA, Congress expressed its concern that alien children "through no fault of their own, lose the opportunity to obtain immediate relative status." H.R. Rep. 107-45, H.R. Rep. No. 45, 107th Cong., 1st Sess. 2001, reprinted in 2002 U.S.C.C.A.N. 640, 641 (Apr. 20, 2001). Indeed, the United States Court of Appeals for the Ninth Circuit has held that the CSPA should "be construed so as to provide expansive relief to children of United State citizens and permanent residents." *Padash v. INS*, 358 F.3d 1161, 1172 (9th Cir. 2004).

For the foregoing reasons, we conclude Congress's use of the term "sought to acquire" lawful permanent residence at section 203(h)(1)(A) of the Act is broad enough to include substantial steps taken toward the filing of the relevant application during the relevant time period but which fall short of actual filing or submission to the relevant agency. The question remains whether the respondent's actions in this case constitute substantial steps taken within the relevant time period such that he remains eligible under the CSPA. The respondent did not properly file his application with the DHS until February 1, 2005, outside of the relevant time period as determined by the date of visa availability. However, the respondent and his family hired an attorney to prepare the application in April 2004 and all of the necessary forms were completed and executed that same month (Exh. 2(12)). The respondent also obtained a money order for the filing fee made payable to the necessary agency on April 30, 2004 (Exhs. 2(12) and 2(13)). All of these actions occurred within the relevant time period.

Under these circumstances, we find that the respondent clearly demonstrated an intent to file his application and made such substantial advances toward having the application prepared and filed during the 1-year period that he properly was found to have "sought to acquire" lawful permanent resident status and remains eligible for adjustment.[4] To find otherwise in light of the facts present in this case would undermine the very purpose and intent of the statute, which was to protect an alien "child" from "aging out" due to "no fault of her own." We therefore find no reason to disturb the Immigration Judge's decision finding that the respondent is eligible under the CSPA for purposes of adjudicating his application for adjustment of status.

Accordingly, the DHS's appeal will be dismissed.

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[4] The first attempt to file the respondent's application was made on November 26, 2004, outside the 1-year period but less than 7 months after hiring counsel and completing the necessary paperwork. The application was rejected based on an error in the filing fee and a second application attempt was made almost immediately thereafter on December 18, 2004. While the more than 6-month delay in first attempting to file the application is unexplained, *cf. Matter of T-M-H & S-W-C*, 25 I&N Dec. 193 (BIA 2010), these latter actions in ultimately attempting to file and finally successfully doing so, demonstrate that the respondent's actions occurring within the 1-year period represented a sincere effort to acquire lawful permanent resident status.

ORDER: The DHS's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the DHS the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD