U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: KIM, JI YOUNG **A77-828-503**

Date of this notice: 12/20/2004

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

Sincerely,

F. F. Krider

Frank Krider
Chief Clerk

Enclosure

Panel Members:
COLE, PATRICIA A.
FILPPU, LAURI S.
HESS, FRED

File: A77 828 503 - Cleveland

Date:

DEC 20 2004

In re: JI YOUNG KIM

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kenneth J. Robinson, Esquire

ON BEHALF OF DHS: G. Michael Wick
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - Nonimmigrant - remained longer than permitted

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

APPLICATION: Adjustment of status; voluntary departure

In a decision dated December 4, 2002, an Immigration Judge found the respondent removable only as charged under section 237(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(B), found her statutorily ineligible for adjustment of status and voluntary departure, and ordered her removed from the United States to the Republic of Korea. The respondent appeals from that decision. The record will be remanded for further proceedings.

The respondent contests the Immigration Judge's denial of the application for adjustment of status on the basis that she did not qualify as a derivative beneficiary of her father's employment-based visa petition, inasmuch as she had "aged out," by being over 21 years old at the time the adjustment of status application was considered, and that she failed to show that she "sought to acquire" lawful permanent resident status within a year after her eligibility. The respondent contends that the Immigration Judge erred in finding that under section 3 of the Child Status Protection Act, Pub. L. No. 107-20, 116 Stat. 927 (2002) ("CSPA"), now codified at section 203(h)(1)(A) of the Act, 8 U.S.C. § 1153(h)(1)(A), she did not retain her "child" status at the time her application for adjustment of status was finally adjudicated. Further, she argues that the Department of Homeland Security ("DHS," formerly the Immigration and Naturalization Service) and the Immigration Court failed to expedite the hearing in her case. As a result, she reached the age of 21 during the pendency of these proceedings and prior to the time her application for adjustment of status was finally considered by the Immigration Judge. In the alternative, the respondent contends that she is

presently eligible to seek adjustment of status under former section 245(i) of the Act, 8 U.S.C. § 1255(i), based on the conversion of her employment-based visa petition to a family preference petition as the unmarried daughter of a lawful permanent resident and the retention of her priority date pursuant to section 204(a)(1)(D)(i)(III) of the Act, 8 U.S.C. § 1154(a)(1)(D)(i)(III).

Section 3 of the CSPA addresses the treatment of unmarried sons and daughters seeking status as family-sponsored, employment-based, and diversity immigrants. Section 3 amended section 203 of the Act with respect to an alien child who is a derivative beneficiary of an employment-based visa petition. It offers a formula to determine whether the derivative is a "child" as defined in the Act. Specifically, a determination whether an alien satisfies the age requirement of Section 101(b)(1) shall be 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 one year of such availability, reduced by the number of days in the period during which the applicable petition was pending. *See* CSPA §3.

There is no dispute that the respondent's father's employment-based visa petition (Form I-140) has a priority date of August 28, 1989, and was approved on May 11, 1998 (Exh. 4). At that time, the respondent, who was born on May 2, 1980, was 18 years of age and eligible for derivative benefits on her father's visa petition as his "child." The respondent's application for adjustment of status based on the approved visa petition was filed with DHS on October 12, 1999, over 17 months later (Exhs. 2, 4). The respondent was still eligible for derivative benefits as she was only 19 years of age. On February 3, 2000, the respondent, her parents, and her sibling were placed in removal proceedings. At the time their applications for adjustment of status were finally adjudicated by the Immigration Judge on July 16, 2002, the respondent was over age 21. The Immigration Judge granted adjustment of status to her family members (Tr. at 77, 78). However, he denied such relief to the respondent.

In denying adjustment of status the Immigration Judge found that the respondent was over age 21 at the time the application for adjustment of status was finally considered and that under section 3 of the CSPA she failed to show that she "sought to acquire" lawful permanent resident status within a year of her eligibility for such status. The Immigration Judge interpreted the phrase "sought to acquire" to mean the "filing" of the Application to Register Permanent Residence or Adjust Status (Form I-485) (I.J. at 6-7). The Immigration Judge considered the respondent's argument that her parents had retained counsel and were preparing their applications for permanent residence status within the one-year after the visa petition had been approved. However, he concluded that Congress did not include such "elasticity" in its drafting of the statute, and could have included the language of "filing" for lawful permanent residence within a "reasonable period," but did not do so (I.J. at 7). The Immigration Judge determined that as the respondent failed to file the application for adjustment of status within a year of her eligibility, she was not protected in retaining her status as a "child."

We find that the Immigration Judge's interpretation of the statute, although reasonable, should not apply in the instant case. This Board has held that in interpreting a statute we look first to the precise 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); *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). Congress chose to use "sought to acquire," rather than "filed" in section 203(h)(1)(A) of the Act. The plain meaning of seek or "sought" includes "to try to acquire or gain" or "to make an attempt." *Merriam-Webster's Collegiate Dictionary* 1124 (11th ed. 2003). The term "acquire" is defined as "to gain possession or control of; to get or obtain." *Black's Law Dictionary* 25 (8th ed. 2004). In other words, the alien must "make an attempt to get or obtain" status as a lawful permanent resident within one-year of such availability. By contrast, the plain meaning of "file" is "to deliver a legal document to the court clerk or the record custodian for placement into the official record." *Black's Law Dictionary* 660 (8th ed. 2004). *See, e.g.*,8 C.F.R. § 204.1(b)-(d) (2004) (the DHS requirements for filing a visa petition).

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. Congress has used the term "filed" in various sections of the Act, but no where 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. "[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." *INS v. Cardoza-Fonseca, supra*, at 432 (quotations omitted). Congress intentionally and purposely used the language "sought to acquire," rather than "filed." 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 this country).

We observe that there have been no precedential decision or regulatory provisions addressing this issue. The DHS, in its internal memorandum, has interpreted "sought to acquire" to mean the filing of the I-485 or application for lawful permanent residence or to adjust status. *See* INS Memorandum for Regional Directors- CSPA-Memorandum Number 2 (HQADN 70/6.11) at 4 n.4 (Feb. 14, 2003) located at http: //uscis.gov/graphics/lawsregs/handbook/CSPA2-pub.pdf. Similarly, the Department of State ("DOS"), in its cables to consular offices and embassies, has concluded that the language sought to acquire "generally" means the "filing" of the required application within a year of obtaining eligibility. *See* DOS Second Cable on the CSPA 015049 at paras. 15-25 (Jan. 17, 2003), located at: http://travel.state.gov/visa/state015049.html. This Board, however, is not bound by the interpretation of the DHS or the DOS as to the statutes which we administer. *See Matter of M/V Seru*, 20 I&N Dec. 592, 595 (BIA 1992). From a practical administrative and adjudicative standpoint, we recognize that the interpretation of "sought to acquire" as "filed" provides a date certain upon which to determine whether the alien qualifies for protection as a "child" under section 203(h)(1)(A). However, Congress could have easily used the term "filed" to accomplish this objective, but chose not to. We find support for a broad interpretation of this language in the legislative history of the CSPA.

The clear congressional intent in enacting the CSPA was to "bring families together." 148 Cong. Rec. H4989-01, H49991, July 22, 2002, statement by Rep. Sensenbrenner. Congress desired to "provide relief to children who lose out when [the administrative agency] takes too long to process their adjustment of status applications." *Id.* at H4992, statement by Rep. Gekas. The overriding concern was 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) 2001 WL 406244 (Leg. His.). 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) (interpreting "pending final determination" under CSPA § 8 to include those applications for lawful permanent residence which were on petition for review to the federal court of appeals).

For the foregoing reasons, we conclude that Congress intended the term "sought to acquire" lawful permanent residence at section 203(h)(1)(A) to be broadly interpreted within the context of the statute, and not limited to the filing of the application. Under the facts of this case, where the record demonstrates that the alien's parents had hired counsel to prepare the application for adjustment of status within a year of the approval of the employment based visa petition, the application for adjustment of status to lawful permanent residence was actually filed within a reasonable period thereafter, and the alien child was still under the age of 21 at the time the application for adjustment of status was filed, we find that the respondent 'sought to acquire" lawful permanent residence within a year of her eligibility for such status. To conclude otherwise 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 that the respondent retained her "child" status under the CSPA for purposes of adjudicating her application for adjustment of status based on her father's employment-based visa petition. Thus, there is no reason to address her alleged eligibility to adjust her status as the unmarried daughter of a lawful permanent resident. We observe that the Immigration Judge remarked that had he found the respondent statutorily eligible for adjustment of status, that he would have granted such relief in the exercise of discretion (I.J. at 8). However, given the passage of time and an issue raised by the DHS on appeal as to whether the respondent requires a waiver of inadmissibility, we find that a remand is appropriate to evaluate the respondent's eligibility to adjust her status. Accordingly, the following orders will be entered:

ORDER: The appeal is sustained.

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

FOR THE BOARD