



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: CISNEROS, RICARDO

A 075-789-006

Date of this notice: 12/6/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Kendall Clark, Molly

Userteam: Docket

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Falls Church, Virginia 22041

File: A075-789-006 – Atlanta, GA

Date: **DEC - 6 2018**

In re: Ricardo CISNEROS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carlos M. Polanco, Esquire

ON BEHALF OF DHS: Jack D. Spencer
Assistant Chief Counsel

APPLICATION: Adjustment of status

The respondent has filed an appeal from the Immigration Judge's decision denying the respondent's application for adjustment of status. The Department of Homeland Security (DHS) has filed a motion for summary affirmance. The record will be remanded.

We review the Immigration Judge's findings of fact in this matter for clear error. Questions of law, discretion, and judgment, and all other issues are reviewed de novo. *See* 8 C.F.R. § 1003.1(d)(3)(i), (ii).

The Immigration Judge denied the respondent's application for adjustment of status based on insufficient affidavits of support. The Immigration Judge determined that the respondent did not submit affidavits of support from his substitute sponsor or his joint sponsor that demonstrated income of at least 125% of the federal poverty line. *See* 8 C.F.R. §§ 213a.1, 213a.2(c)(2)(ii)(C).

On appeal, however, the respondent argues that he was not required to have a substitute sponsor or an affidavit of support because his United States citizen wife, who was his original sponsor, died after filing the Form I-130 visa petition on the respondent's behalf. As the respondent explains on appeal, a Form I-130 visa petition automatically converts to a widower's petition upon the United States citizen spouse's death if, on that date, the widower meets the requirements of section 201(b)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i). Furthermore, a widower's petition does not require a Form I-864 substitute affidavit of support. *See* sections 201(b)(2)(A)(i), 204(a)(1)(A)(ii), 212(a)(4)(C)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(ii), 1182(a)(4)(C)(i)(I); 8 C.F.R. §§ 204.2(b), 204.2(i)(1)(iv), 205.1(a)(3)(i)(C), 213a.2. Instead, the widower must file a Form I-864W (Request for Exemption for Intending Immigrant's Affidavit of Support). *See* 8 C.F.R. § 213a.2(a)(1)(i)(B).

The respondent observes that an explanation of the requirements is found in the summary section of a final rule, "Affidavits of Support on Behalf of Immigrants" published in the Federal Register. *See* 71 Fed. Reg. § 35,731, §35,735 (June 21, 2006), which provides:

The final rule also adopts a special rule for cases in which the alien beneficiary was, before the petitioner's death, the spouse of a citizen. Under section 201(b)(2)(A)(i) of the Act, if an alien was married to a citizen for at least 2 years at the time of the citizen's death, the alien may file a petition on his or her own behalf, so long as the alien does so within 2 years of the citizen's death, and has not remarried. Section 212(a)(4)(C)(i)(I) of the Act, in turn, relieves that alien of the affidavit of support requirement, once USCIS approves the new petition. The final rule provides that it will not be necessary for the beneficiary to file a new petition (Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant) as the widow(er) of a citizen. Instead, the final rule provides for automatic conversion of the citizen's spousal Form I-130, Petition for Alien Relative, to a widow(er)'s petition upon the citizen's death if, on that date, the widow(er) meets the requirements of section 201(b)(2)(A)(I) of the Act as it relates to widow(er)s petitions. This automatic conversion will apply whether the citizen spouse dies before or after approval of the Form I-130. Since the alien spouse will then immigrate as the widow(er) of a citizen, it will not be necessary to submit a Form I-864 from a substitute sponsor.

The applicable regulatory and statutory provisions were not addressed in the proceedings below. The record shows that the respondent's attorney expressed his understanding that no affidavit of support was required but was informed by the DHS attorney and the Immigration Judge that such an affidavit of support was necessary (Tr. at 29).¹ The record does not show that the special rules for widows and widowers were discussed or that any factual findings were made as to whether the respondent benefitted from those rules.

Furthermore, while the Immigration Judge noted in a footnote that he would deny the application for adjustment in discretion if the respondent were eligible, the footnote does not include a balancing of positive and negative factors. *See Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978). Additionally, the Immigration Judge's decision does not include sufficient fact-finding as to the positive and negative factors such that the Board could conduct a meaningful review. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (providing that the Board may not engage in fact-finding in the course of deciding appeals).

For these reasons, we will remand the record for further proceedings in which to consider the respondent's application for adjustment of status.

¹ The respondent's attorney did not cite at the hearing to the provisions that have been cited on appeal. Nor did the respondent file a Form I-864W (Request for Exemption for Intending Immigrant's Affidavit of Support). Nevertheless, we find it appropriate to remand the record for consideration of the applicable law.

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

Molly J. Clark
FOR THE BOARD