U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: VELAZQUEZ-GARCIA, JORGE A... **A 097-563-851**

Date of this notice: 4/29/2015

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:
Guendelsberger, John
Malphrus, Garry D.
Geller, Joan B

Userteam: Docket

File: A097 563 851 – Chicago, IL Date: APR 29 2015

In re: JORGE ARGENIS VELAZQUEZ-GARCIA a.k.a. Jorge Argenis Velasquez a.k.a. Jorge Argenis Velasquez Garcia a.k.a. George Velasquez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Khalil J. Khalil, Esquire

APPLICATION: Adjustment of status; waiver of inadmissibility

In a decision dated June 25, 2013, this Board dismissed the respondent's appeal from an Immigration Judge's decision finding him ineligible for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). The respondent thereafter filed a petition for review with the United States Court of Appeals for the Seventh Circuit, which has now remanded the matter to us for further proceedings. *Velasquez-Garcia v. Holder*, 760 F.3d 571 (7th Cir. 2014), *reh'g denied* (Oct. 10, 2014). In view of the Seventh Circuit's decision, the respondent's appeal will be sustained and the record will be remanded.

The respondent, a native and citizen of Mexico, concedes that he is removable from the United States pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(6)(A)(i) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1182(a)(6)(A)(i). Thus, the only issue before us is whether he qualifies for adjustment of status under section 245(i) of the Act.

In our prior decision, we affirmed the Immigration Judge's determination that the respondent is ineligible for adjustment of status because he did not demonstrate that an immigrant visa is "immediately available" to him as required by section 245(i)(2)(B) of the Act. To be precise, we held that although the respondent was the beneficiary of an F-2A immigrant visa petition classifying him as the "child" of a lawful permanent resident, a visa was not immediately available to him in that preference category because he had "aged out" (i.e., turned 21 years old) before his priority date became current.

Before the Immigration Judge and on appeal, the respondent argued that his status as a "child" of a lawful permanent resident—and, by extension, his eligibility for F-2A preference status—was preserved by the Child Status Protection Act, Pub. L. No. 107-20, 116 Stat. 927 (2002) ("CSPA"). Under section 3 of the CSPA, whether a beneficiary of an approved F-2A visa petition qualifies as a "child" of the petitioner is to be determined by reference to "the age of the alien on the date on which an immigrant visa number becomes available for such alien . . . , 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* section 203(h)(1)(A) of the Act (codifying CSPA § 3). According to the respondent, application of the foregoing formula results in a determination that he is still the petitioner's "child" for F-2A preference purposes.

The Immigration Judge concluded that the respondent could not benefit from the CSPA because he had not "sought to acquire the status of an alien lawfully admitted for permanent residence within one year" after a visa became available to him in the F-2A category, as required by section 203(h)(1)(A) of the Act. As the Immigration Judge determined, an F-2A visa became available to the respondent on March 1, 2011, and therefore to preserve his status as a "child" under section 203(h) the respondent must have "sought to acquire" LPR status by March 1, 2012. The Immigration Judge determined that the respondent did not satisfy that requirement because he did not file an application for adjustment of status (Form I-485) with the Immigration Court (or any other agency) until May 10, 2012.

On appeal to this Board, the respondent conceded that he did not "file" his adjustment of status application within 1 year after a visa became available to him in the F-2A preference category, but he contended that he engaged in other actions within the relevant 1-year period—for instance, retaining a lawyer to help him complete his application materials and filing a Freedom of Information Act ("FOIA") request with the DHS—which showed that he nevertheless "sought to acquire" LPR status during that period.

The Immigration Judge and this Board found the respondent's argument to be foreclosed by *Matter of O. Vazquez*, 25 I&N Dec. 817 (BIA 2012), in which we concluded that an alien has "sought to acquire" LPR status within 1 year after a visa number became available to him only if he: (1) properly applied for such status during the 1-year period; (2) submitted an application for such status to the appropriate agency during the 1-year period, but had the submission rejected "for a technical or procedural reason, such as the absence of a signature"; or (3) attempted to apply for such status within the 1-year period but was prevented from doing so by "extraordinary circumstances." *See id.* at 821-22. In arriving at that conclusion, we cautioned that "actions that do not approximate the filing of an application or extraordinary circumstances, such as contacting an attorney about initiating the process for obtaining a visa that has become available, are insufficient to meet the requirements of section 203(h)(1)(A) of the Act." *Id.* at 822. Applying this precedent to the facts of the respondent's case, we and the Immigration Judge concluded that the respondent's acts of retaining counsel and filing a FOIA request were not sufficient to establish that he "sought to acquire" LPR status within the relevant 1-year period.

Upon judicial review, the Seventh Circuit concluded that *Matter of O. Vasquez, supra*, embodies a reasonable interpretation of an ambiguous statute, thereby entitling it to *Chevron* deference. *See Velasquez-Garcia v. Holder*, 760 F.3d 571, 578 (7th Cir. 2014). Nevertheless, the Seventh Circuit concluded that the rule announced in *O. Vasquez* could not be applied "retroactively" to the respondent because it represented an "abrupt departure" from the Board's prior "established practice" in such cases, under which the "sought to acquire" concept was interpreted more liberally. *Id.* at 582-83.

Relying on certain unpublished Board decisions issued before publication of *O. Vasquez*, the *Velasquez-Garcia* court found that under the Board's prior established practice the "sought to acquire" requirement was deemed satisfied, whether or not the applicant had actually "filed" his adjustment of status application within the requisite 1-year period, so long as the applicant had taken "substantial steps" toward filing during that period. *Id.* Thus, the court remanded the

record to us with instructions to reconsider the respondent's eligibility for section 245(i) adjustment under the "substantial steps" test. *Id.* at 584.

Based on this standard, the respondent remains the "child" of an LPR for purposes of visa preference allocation and has an immigrant visa immediately available to him within the meaning of section 245(i)(2)(B) of the Act. The Immigration Judge's determination to the contrary will be vacated.

As the respondent is not ineligible for section 245(i) adjustment by virtue of the absence of an immediately available visa, we will sustain his appeal and remand the record to the Immigration Judge for further proceedings. We express no present opinion as to whether the respondent is otherwise eligible for adjustment of status or deserving of such relief in discretion.

ORDER: The appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD