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BIA CONTINUES TO REAFFIRM BROAD "SOUGHT TO ACQUIRE" STANDARD UNDER CSPA

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In a recent unpublished decision, the Board of Immigration Appeals, in *In re Jose Jesus Murillo*, A099 252 007, October 6, 2010, http://drop.io/oucv5fe, reaffirmed its broadened "sought to acquire" standard under the Child Status Protection Act (CSPA). The CSPA artificially freezes the age of a child below 21 years of age so that he or she is not deprived of permanent residency when the parent is granted the same status. One of the requirements is for the child to seek permanent residency within one year of visa availability. Often times, a CSPA protected child falls through the cracks by failing to meet the prevailing rigid filing requirements within the one-year deadline.

The Board in *In re Jose Jesus Murillo* held that the term "sought to acquire" includes substantial steps towards the filing of the relevant application, although these steps may fall short of an actual filing or submission to the relevant agency. The Board's interpretation will provide further relief to children who are otherwise protected by the CSPA but unable to comply with or navigate the complex bureaucratic requirements to file within one year. It should be noted that *In re Jose Jesus Murillo* is an unpublished decision, devoid of any precedential authority, and does not bind the DHS or the DOS. Still, it follows closely on the heels of other unpublished Board decisions that have applied the same "sought to acquire" standard and thus provides more ammunition to those who need to make similar arguments. *See In re Kim*, 2004 WL 3187209 (BIA Dec. 20, 2004), (the child beneficiary "sought to acquire" LPR status within one year of visa approval because her parents hired an attorney to start preparing the adjustment application within the one-year period); *In re Castillo-Bonilla*, 2008 WL 4146759 (BIA Aug 20, 2008) (the respondent "sought to

acquire" LPR within the one-year period when, during this time, he informed both the Immigration Judge and the Board that he wished to file an adjustment application, even though the application was not actually filed within one year).

INA §203(h), introduced by Section 3 of the CSPA, provides the formula for determining the age of a derivative child in a preference petition even if the child is older than 21 years. To qualify as a child under INA §101(b)(1), one must be below the age of 21 and unmarried. The age is determined by taking the age of the alien on the date that a visa first became available (i.e. the date on which the priority date became current and the petition was approved, whichever came later) and subtracting the time it took to adjudicate the petition (time from petition filing to petition approval). Based on this formula, if the child's age falls below 21, the child is protected under the CSPA. Specifically, §203(h)(1)(A) also requires the alien to have "sought to acquire" LPR status within one year of visa availability. It is the interpretation of the term "sought to acquire" that was the subject of the Board's holding in *In re Jose Jesus Murillo*.

Both the Department of Home Security (DHS) and the Department of State (DOS) have interpreted the phrase "sought to acquire" narrowly. DHS limits this phrase to filing an I-485 application for adjustment of status. See "Revised Guidance for CSPA" (April 30, 2008), http://www.uscis.gov/files/nativedocuments/CSPA_30Apr08.pdf. The DOS too has interpreted "sought to acquire" narrowly and indicated that in consular processing cases, the date that a child seeks to acquire LPR status is the date Form DS 230, Part I, is submitted by the child, or by the child's parent on the child's behalf to the National Visa Center (NVC). See "Child Status Protection Act: ALDAC 2" (January 17, 2003), http://travel.state.gov/visa/laws/telegrams/telegrams_1369.html. In cases where the principal beneficiary parent adjusts status in the US, and the child will be applying for the visa overseas, the DOS requires the principal to file Form I-824 to initiate the child's follow-to-join application. The DOS has also indicated that since Form I-824 is not the only way to initiate the process, posts may seek advisory opinion in cases in which some other "concrete" step has been taken.

We question why the DHS and DOS sought and continue to seek the most restrictive interpretation of what is clearly a remedial statute. Here is the legislative history of the CSPA, which is worth reproducing from the Board's decision in *In re Jose Jesus Murillo*:

The congressional. intent in enacting the CSPA was to "bring families together" (Rep. Sensenbrenner, 148 Congo 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 R4992); see also, Rep. Jackson-Lee, "where we can correct situations to bring families together, this is extremely important.'.' ld. atH4991. 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.4 5, I 07th 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).

In *In re Jose Jesus Murillo*, the Board rejected the DHS's position that "sought to acquire" means the actual filing of an application or petition. The Board stated that "it is not bound by the interpretation of the DHS or DOS as to the statutes which it administers" (citing *Matter of M/V Saru Meru*, 20 I&N Dec. 592, 595 (BIA 1992)). The Board observed that INA §203(h)(1)(A) includes the unique term "sought to acquire" rather than terms such as "file," "submit" or "apply," which appear in other parts of the INA. While each of these terms require the presentation of an application to relevant officials, the meaning of words such as "seek" or "sought" include "to try to acquire or gain" or "to make an attempt" according to the Board, which referred to the Merriam-Webster's Collegiate Dictionary.

In *In re Jose Jesus Murillo*, the respondent claiming status as a child did not file the I-485 application within one year of visa availability. However, the respondent argued that he still satisfied the "sought to acquire" element because he hired an attorney to prepare his adjustment of status application within one year of the visa numbers becoming available, and he filed his application within a reasonable time thereafter while he was still under the age of 21. The Board held that the respondent child, whose age was otherwise protected under the CSPA, clearly demonstrated an intent to file his application and made substantial advances towards having the application prepared and filed through an attorney within the one-year period. The Board observed that if it had found otherwise, the child would have aged out and would have been unable to seek CSPA protection for no fault of his own. The Board also did not

require a showing that this attorney was ineffective in filing the document within one year.

The Board's decision to broaden the term "sought to acquire" to include steps short of actually filing an application is indeed welcome. There are many situations in which a child protected under the CSPA may not be able to comply with the rigorous filing requirements of the DHS or the DOS within the one-year filing period. Moreover, the Board's ruling would assist those who are in removal proceedings, and who may not be able to obtain a timely hearing with an Immigration Judge in order to file an adjustment application within one-year of the visa number becoming available, and an alternative filing with the clerk of the court is not made within the year or rejected. There may be other situations where the parent may have filed an I-485 adjustment application many years ago, and may not have included the I-824 application with his or her application. It was not usual to attach an I-824 with an unadjudicated I-485 adjustment application prior to the CSPA. Moreover, there have also been situations where the NVC, during the initial processing of a consular visa application, may have erroneously omitted the child's name even though he or she was protected under the CSPA. As a result, the child or the parent of the child may not have complied with the DOS requirement of filing a DS 230, Part I, but may have taken other steps to seek LPR status such as attempting to contact the NVC by letter or telephone to include the child, or took other steps such as seeking the advice of an attorney.

In these situations too, one can demonstrate that the CSPA child "sought to acquire" LPR status within one-year of visa availability. On the other hand, not every step to seek permanent residence in the one year period will be viewed favorably especially when it does not comport with CSPA's purpose, which was to protect an alien child from aging out due to no fault of his own. In *In Re Mario Francisco Cisneros Baron*, 2009 WL 3713334, the respondent asserted that neither did he nor his parents file an adjustment application within one year because of his criminal convictions. He was put into removal proceedings and left voluntarily, and then illegally reentered and lodged an adjustment application in connection with subsequent removal proceedings. The Board, in this case, remained unpursuaded that his parents consulted with a lawyer within one year of the visa availability date since, here, the respondent was himself partially responsible for failing to file an adjustment application "because of a tactical decision resulting from his own criminal behavior."

While none of these are published decisions, those seeking CSPA protection should rely on *In re Kim, In re Castillo-Bonilla* and now *In re Jose Jesus Murillo* to make similar arguments in cases before the DHS, an Immigration Judges, the Board, before US Consuls overseas and even in federal court. We commend the Legal Action Center of the American Immigration Council for filing a winning amicus brief in *In re Jose Jesus Murillo*, and readers will surely profit from its CSPA Practice Advisory, http://www.legalactioncenter.org/practice-advisories/child-status-protection-act. Practitioners should continue to seek to interpret "sought to acquire" in a broadly humane way for their clients to achieve what the Congress intended, a formula for the protection of children and advancement of family unit