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MATTER OF O. VAZQUEZ: BIA ISSUES PRECEDENTIAL DECISION ON "SOUGHT TO ACQUIRE" UNDER THE CHILD STATUS PROTECTION ACT

Posted on June 12, 2012 by Cyrus Mehta

In *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012), the first precedential decision on this issue, the Board of Immigration Appeals has clarified the "sought to acquire" provision 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. Thus, the meaning of the term "sought to acquire" permanent residency has been hotly litigated in recent times. Does it encompass only a filing of an application or can it encompass something less than a filing of an application for immigration status?

According to the BIA in *Matter of O. Vazquez*, an alien may satisfy the "sought to acquire" provision of section 203(h)(1)(A) of the Immigration and Nationality Act ("Act") by filing an application for adjustment of status or by showing that there are other extraordinary circumstances in the case, particularly those where the failure to timely file was due to circumstances beyond the alien's control. The BIA further elaborated that the "sought to acquire" requirement could still be met if the applicant filed an adjustment application, but was rejected for technical reasons, such as the absence of a signature. With respect to a showing of extraordinary circumstances, the BIA indicated that an applicant could show that he or she paid an attorney to prepare an application prior to the one year deadline, but the attorney then failed to take the ministerial step of actually filing the application, thus effectively depriving the aged out child

from the protection of the CSPA for no fault of its own.
While the BIA did provide examples of "sought to acquire" just short of a filing; unfortunately, the BIA's interpretation in *Matter of O. Vazquez* is more restrictive than its earlier interpretations in unpublished decisions discussed in a prior blog, BIA Continues To Reaffirm Broad "Sought To Acquire" Standard Under CSPA. The BIA stopped short of holding that the term can encompass other actions not associated with the filing of an adjustment application, such as seeking the advice of an attorney or other similar sorts of efforts. In *Matter of O. Vazquez*, the "aged out" child argued that he sought to acquire permanent residency by consulting a notario organization within one year of the visa availability. The BIA held that such an action did not fall under the "sought to acquire" definition. Given that the CSPA is a remedial statute to ameliorate the hardships caused to children who age out, the facts in this case were also sympathetic as the alien was wrongly advised by an organization not authorized to practice law in the first place, and thus deprived of the chance to be protected under the CSPA.

As a background, 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 *Matter of O. Vazquez*.

The BIA unfortunately arrived at this more restrictive interpretation by agreeing with DHS's position that the reason for Congress not including the term "filed" is because § 203(h) applies to the Department of Homeland Security (DHS) and Department of State (DOS), both of which adjudicate requests for immigration status. The DHS adjudicates applications for adjustment of status from within the US while the DOS adjudicates applications for immigrant visas from outside the US. Under DOS immigrant visa processes, one generally does not "file" an

immigrant visa application, DS-230, but rather, the DOS regulations use the word "submit" or "submission" rather than "file" when referring to a DS-230 visa application. *See* 22 C.F.R. § 42.63 and 22 C.F.R. § 42.63(c). The "filing" of an application in DOS occurs after it is submitted and much later in the process, the BIA noted. *See* 22 CFR § 42.67(b). According to the BIA, it was due to the difference in the usage of terms in the DOS and DHS regulations that Congress compelled Congress to use the term "sought to acquire" permanent residency rather than to allow for broader actions such as consulting with a notario organization, as was done in *Matter of O. Vasquez*, to satisfy the "sought to acquire" definition.

Still, it can be argued that the discussion in *Matter of O. Vazquez* of the use of the word "filing" in DOS regulations, and the multi-step DOS process more generally, does seem to leave room for the possibility that something other than submission of a DS-230 can qualify as seeking to acquire permanent residence for CSPA purposes. *Matter of O. Vazquez* holds that "it is reasonable to expect the proper filing of an application, when it comes to DHS cases, as a way to unquestionably satisfy the 'sought to acquire' element of the Act." 25 I&N Dec. at 820. This holding is limited by its terms to "DHS cases", in which the formal application process is in the ordinary case more unified into a single step of filing an application form (or that single filing step plus an interview). The taking of any substantial step in the multistage DOS immigrant-visa process, such as the payment of the immigrant visa fee, as we pointed out in State Department Takes Broader View Of "Sought To Acquire" Provision Under CSPA, or the making of a written request that a particular derivative child be added to a consular case, should arguably still be sufficient to meet the "sought to acquire" requirement even under *Matter of O. Vasquez*.

Another aspect worth exploring further may be footnote 3 of the decision, on page 821. The BIA analogizes its "extraordinary circumstances" standard to that applicable to termination-of-registration cases under INA 203(g). In practice, DOS has not applied the 203(g) standard as strictly as, say, some IJs apply the asylum one-year "extraordinary circumstances" standard. If that is so, the linkage of the new *Matter of O. Vazquez* CSPA sought-to-acquire standard to the 203(g) standard may be significant: the *Matter of O. Vazquez* standard for extraordinary circumstances is apparently supposed to be interpreted no more strictly than 203(g).

In the view of this author, Congress probably intended the "sought to acquire"

requirement to apply more broadly than interpreted in *Matter of O. Vazquez*. In a prior unpublished decision *In re Jose Jesus Murillo*, A099 252 007 (October 6, 2010), the BIA interpreted the legislative history behind the CSPA as being expansive, which is worth reproducing here:

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).

However, since Matter of O. Vazquez is a precedential decision, we will need to now live and work with it when dealing with instances under which our clients have "sought to acquire" permanent residency in order to protect their age under the CSPA.

(The author thanks David A. Isaacson for his thoughtful input)