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RODRIGUEZ TOVAR V. SESSIONS: THE NINTH CIRCUIT HOLDS THAT A CHILD SPONSORED BY A LAWFUL PERMANENT RESIDENT SHOULD NOT BE PENALIZED FOR THE LPR PARENT'S NATURALIZATION

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Becoming a U.S. citizen is often thought of as an admirable act, something that our immigration and naturalization laws encourage qualified applicants to do. According to the Board of Immigration Appeals (BIA), however, in at least one relatively common fact situation, our immigration laws actually discourage naturalization, by penalizing children of the naturalized parent. The BIA held in *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011), that an applicant for adjustment of status was ineligible for that relief essentially because of his mother's naturalization, which the BIA believed led to less favorable treatment of his case under the Child Status Protection Act (CSPA) than would have occurred if his mother had remained a Lawful Permanent Resident (LPR). In *Rodriguez Tovar v. Sessions*, however, the Court of Appeals for the Ninth Circuit recently rejected *Matter of Zamora-Molina* and held that an otherwise CSPA-protected child did not lose that protection due to his LPR parent's naturalization.

This author and Cyrus D. Mehta have frequently blogged in the past about the CSPA (see also here, here, and the tagged lists here and here), and I will not seek to describe here the entire statute and all of the provisions that it introduced into the Immigration and Nationality Act (INA). However, some brief background regarding the portions of the CSPA involved in *Zamora-Molina* and *Rodriguez Tovar* is necessary in order to appreciate the Ninth Circuit's decision.

Certain categories of visa petition apply to a "child" as defined in INA §101(b)(1), that is, "an unmarried person under twenty-one years of age" who meets one

of several other criteria with respect to the petitioning parent. Under INA §203(h)(1) as added by the CSPA, the age of a beneficiary of a Family 2A preference petition filed for a child of an LPR under INA §203(a)(2)(A), or the age of the derivative beneficiary child under INA §203(d) of other types of petitions, is determined by taking the child's age on the date when a visa number became available (as long as the child seeks to acquire LPR status within one year of that date), and subtracting the number of days during which the petition was pending with USCIS. Another way to look at it is that it is as though the child stops getting older when the petition is filed, and only starts again after the petition is approved, and then stops getting older once again when a visa number becomes available. If this adjusted age is under 21, then the child, as long as he or she is unmarried, can continue to be processed in the Family 2A preference (or as a derivative beneficiary), because he or she is still a "child" under the definition at INA §101(b)(1). The waiting time for an available visa number under the Family 2A preference for under-21-year-old children of LPRs is generally shorter than the waiting time for an available visa number under the Family 2B preference for over-21-year-old sons and daughters of LPRs, as shown in the State Department's Visa Bulletin, so there is a significant advantage in that context to remaining a "child".

The question is what happens to such a beneficiary of a Family 2A preference petition when the sponsoring parent becomes naturalized as a U.S. citizen. According to INA §201(f)(1) of the INA, also added by the CSPA, the age of a child who is the beneficiary of a petition as the immediate relative of a U.S. citizen (a category for which there are an unlimited number of visas available and thus no Visa Bulletin waiting line) is generally determined on the date the petition is filed. However, the next paragraph of the statute provides that

> In the case of a petition . . . initially filed for an alien child's classification as a family-sponsored immigrant under section 203(a)(2)(A), based on the child's parent being lawfully admitted for permanent residence, if the petition is later converted, due to the naturalization of the parent, to a petition to classify the alien as an immediate relative . . . the determination described in paragraph (1) shall be made using the age of the alien on the date of the parent's naturalization.

INA §201(f)(2). That is, when an LPR parent who has filed a petition for their child later naturalizes, the child's age is frozen as of the date of the parent's naturalization. But the question then arises, is the statute's reference to "the

age of the alien on the date of the parent's naturalization" a reference to the child's biological age, or to the child's adjusted age under INA §203(h)(1)?

In *Matter of Zamora-Molina*, the BIA opted for the former answer, holding that the child's biological age was the relevant age under INA §201(f)(2). Daniel Edgar Zamora-Molina had been biologically 22 when his mother naturalized, but it had previously taken more than two and a half years for the petition filed on his behalf to be approved. Thus, his CSPA-adjusted age at the time of naturalization was less than 20, under INA §203(h)(1), but his biological age at that time was over 21. The BIA held that Mr. Zamora-Molina could not adjust status as an immediate relative of his mother, but would need to proceed under the Family 1st Preference category for sons and daughters, over age 21, of U.S. citizens. The BIA also refused Mr. Zamora-Molina's request to opt out of the conversion of his case to the Family 1st Preference under INA §204(k), which allows certain family preference beneficiaries to opt out of the effect of their parent's naturalization, because the BIA held that §204(k) only allowed opting-out that resulted in becoming a beneficiary under the Family 2B category for sons and daughters over age 21 of LPRs. Since no visa numbers were available for Mr. Zamora-Molina's priority date in either the Family 1st Preference category or the Family 2B preference category, given the length of the waiting lines under those categories, the BIA upheld the Immigration Judge's decision that denied Mr. Zamora-Molina's application for adjustment of status and instead granted him only permission to depart voluntarily rather than being removed.

Mr. Zamora-Molina argued to the BIA that it was "fundamentally unfair" to apply this law to him, because he would have been eligible for adjustment of status under the Family 2A preference category if his mother had not naturalized. In effect, he was being penalized for his mother's naturalization. The BIA, however, interpreted this as a constitutional argument, which it held that it lacked authority to address.

In the case that came before the Ninth Circuit in *Rodriguez Tovar v. Sessions*, Margarito Rodriguez Tovar faced a similar fact pattern to Daniel Edgar Zamora-Molina. Mr. Rodriguez Tovar's father had filed a petition for Margarito in April 2001 when Margarito was 17 or 18 years old, which was not approved until more than four years later in 2005, and had then naturalized in July 2006. At the time his father naturalized, Mr. Rodriguez Tovar's biological age was 23, but his adjusted age was under 21 for purposes of his Family 2A petition according

to the CSPA-adjusted age calculated under INA §203(h)(1), since subtracting more than four years from a biological age of 23 left him with an adjusted age of only 19. Moreover, had his father not become a citizen, Mr. Rodriguez Tovar would have become eligible for a visa number in the Family 2A category less than a year later, in July 2007, when his CSPA-adjusted age was still only 20.

The BIA, however, held in reliance on *Matter of Zamora-Molina* that because Mr. Rodriguez Tovar was biologically over 21 when his father naturalized, and his father had indeed naturalized, he was only eligible for a visa number in the Family 1st preference or the Family 2B preference, neither of which were available. As the Ninth Circuit summarized the resulting conundrum:

> Everyone agrees that if Rodriguez Tovar's father had remained an LPR instead of becoming a citizen, Rodriguez Tovar would have been eligible for a visa in the F2A category on June 1, 2007, at which point his age under the statute would have been 20. Similarly, had he been afforded his statutory age when his father became a citizen, he would have been eligible for a visa immediately. However, the government's position is that because his father decided to become a citizen when he did, Rodriguez Tovar was not eligible for either visa and may now be deported forthwith and must wait in the F1 line abroad.

Rodriguez Tovar, slip op. at 9.

The Ninth Circuit rejected the BIA's interpretation of the statute which had led to this "irrational" result. *Rodriguez Tovar*, slip op. at 12. Looking at the statute as a whole, the Ninth Circuit held that the reference to "the age of the alien on the date of the parent's naturalization" in INA §201(f)(2) was unambiguously a reference to the age as calculated under INA §203(h)(1), that is, the CSPA-adjusted age. Although §203(h)(1) and §201(f)(2) do not explicitly cross-reference one another, the Ninth Circuit held, those two provisions are tied together by INA §203(a)(2)(A), which each of them does reference, and the three provisions together "form a cohesive whole." *Rodriguez Tovar*, slip op. at 14-15. Moreover, the conversion provisions of the statute and regulations, and the absence of an opt-out under INA §204(k) for CSPA-protected F2A beneficiaries to remain in the F2A category, both make more sense if read with the background understanding that Congress expected CSPA-protected F2A petitions to convert to immediate relative cases upon the petitioner's naturalization.

The Ninth Circuit also justified its interpretation of the interlocking CSPA provisions by reference to the canon of interpretation that statutes should be interpreted to avoid absurd results. As it explained:

> Our interpretation of 8 U.S.C. § 1151(f)(2) makes sense within the context of the whole CSPA. Anyone who is treated as a minor child of a lawful permanent resident for purposes of an F2A petition is treated as a minor child of a citizen when the parent naturalizes, and no one is penalized just because his parent became a citizen. The government's interpretation leads to the absurd result that Rodriguez Tovar's father's naturalization causes the deportation of his son, who is then compelled to wait for decades in a foreign land before he can return—despite the fact that had his father simply remained an LPR, Rodriguez Tovar would have been eligible for a visa within a year. That can hardly have been Congress's intent.
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> "nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Accordingly, we conclude "that Congress had a clear intent on the question at issue," *The Wilderness Soc'y*, 353 F.3d at 1059: children of LPRs may take advantage of the age calculation formula in 8 U.S.C. § 1153(h)(1) for purposes of converting to immediate relative status under § 1151(f)(2) when their parents naturalize.

Rodriguez Tovar, slip op. at 21.

Hopefully, the Ninth Circuit's compelling arguments may convince other Courts of Appeals, and ultimately perhaps even the BIA or, if the issue is brought there, the Supreme Court. In the meantime, only those who reside within the jurisdiction of the Ninth Circuit (that is, California, Nevada, Arizona, Washington, Oregon, Idaho, Montana, Alaska, Hawaii, Guam, and the Northern Mariana Islands), and perhaps others whose cases are being processed there such as at the California Service Center, are likely to be able to take advantage of *Rodriguez Tovar* without going to federal court themselves, and even in those cases there will be some uncertainty regarding the precise conditions under which USCIS will be willing to apply *Rodriguez Tovar* until we see how they behave in practice. In cases in which the *Zamora-Molina* / *Rodriguez Tovar* issue arises, however, applicants for adjustment of status and their attorneys should consider whether litigation in federal court is an appropriate option. Other

Article III judges, like the Ninth Circuit panel in *Rodriguez Tovar*, may be less willing than the BIA to read the CSPA to produce the absurd result of penalizing children for the naturalization of their LPR parents.