U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28652727

Date: NOV. 3, 2023

Appeal of Vermont Service Center Decision

Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant

The Petitioner, who was granted lawful permanent residency based on her "U-1" nonimmigrant status, seeks immigrant classification of the Derivative, her son, as a qualifying family member. The U-1 classification affords nonimmigrant status to victims of certain crimes who assist authorities investigating or prosecuting the criminal activity. Immigration and Nationality Act (the Act) sections 101(a)(15)(U) and 214(p), 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p). The U-1 nonimmigrant may later apply for lawful permanent residency. Section 245(m) of the Act, 8 U.S.C. § 1255(m). A U-1 nonimmigrant who gains their lawful permanent residency may seek the same on behalf of a qualifying family member who has never held derivative U nonimmigrant status, if granting the status would avoid extreme hardship. Section 245(m)(3) of the Act.

The Director of the Vermont Service Center denied the Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant (U immigrant petition). The Director concluded that the Petitioner had not established, as required, that the Derivative was a qualifying family member for purposes of seeking lawful permanent residency under section 245(m)(3) of the Act because he was no longer a "child" at the time of the adjudication of his U immigrant petition.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and asserts that the "extreme and unreasonable delay" in adjudicating the U immigrant petition (causing the family relationship to no longer exist at the time of adjudication), contradicts the statute's "immediacy" requirement that United States Citizenship and Immigration Service (USCIS) issue an immigrant visa to qualifying family members *upon* approval of the U principal's adjustment. *See* 8 U.S.C. § 1255(m)(3). Similarly, the Petitioner argues that USCIS violates the Administrative Procedures Act (APA) at 5 U.S.C. § 706(2)(a) because the sole reason given for the denial was created by USCIS, that is, the failure of USCIS to process the U immigrant petition in a timely manner, and consequently, the decision to deny was arbitrary and capricious. The Petitioner further argues that the AAO has the authority to exercise equitable estoppel despite our usual reliance on *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991), which we cite as authority for our inability to grant relief. Finally, the Petitioner requests that we grant equitable estoppel and approve the U immigrant petition *nunc pro tunc*, or issue humanitarian parole to the Derivative.

Upon de novo review, we will dismiss the appeal.

I. LAW

A U-1 nonimmigrant who has applied for, or gained, their lawful permanent residency may seek lawful permanent residency on behalf of a qualifying family member who has never held U nonimmigrant status, if granting the status would avoid extreme hardship. Section 245(m)(3) of the Act.

The term "qualifying family member" is defined as "a U-1 principal applicant's spouse, child, or, in the case of [a U-1 principal who is a] child, a parent who has never been admitted to the United States as a nonimmigrant under sections 101(a)(15)(U) and 214(p) of the Act." 8 C.F.R. § 245.24(a)(2). The term "child" is defined as "an unmarried person under [21] years of age " Section 101(b)(1) of the Act, 8 U.S.C. § 1101(b). The qualifying family relationship must exist at the time of the U-1 principal's adjustment of status to lawful permanent residency and continue to exist through the adjudication of the qualifying family member's U immigrant petition. 8 C.F.R. § 245.24(g)(2).

II. ANALYSIS

The Derivative was born in El Salvador in [redacted] 2001. The Petitioner, his mother, was granted U nonimmigrant status and subsequently became a lawful permanent resident in June 2020.[1] She filed the instant U immigrant petition on behalf of the Derivative in September 2019. The Derivative turned 21 years of age in [redacted] 2022, while his U immigrant petition was pending. The Director denied the U immigrant petition in January 2023, finding that the Derivative no longer qualified as the child of a U-1 principal applicant.[2]

On appeal, the Petitioner has not overcome the Director's ground for denial of the U immigrant petition. In order to establish eligibility as a qualifying family member under 245(m)(3) of the Act, the Derivative must meet the definition of a "child" at the time of the Petitioner's adjustment of status to lawful permanent residency continuing through to the adjudication of his U immigrant petition. *See* section 101(b)(1) of the Act (defining child as "an unmarried person under [21] years of age"); 8 C.F.R. § 245.24(g)(2) (stating that the qualifying parent-child relationship must exist at the time of the U-1 principal's adjustment of status through the adjudication of the U immigrant petition). Here, the Derivative was over 21 years of age, and accordingly did not meet the definition of a "child" under the Act, at the time of the adjudication of his U immigrant petition in January 2023. For these reasons, the Derivative is not eligible for lawful permanent resident status as the qualifying family member of a U-1 principal applicant under section 245(m)(3) of the Act.

We note that the Derivative is not afforded the same age-out protection extended by Congress to children of U-1 petitioners under the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), thus preserving his status as a "child" as of the September 2009 date that the Petitioner filed his U petition. Furthermore, the VAWA 2013 amendments specifically amended only section 214(p) of the Act to provide age-out protection to children of U-1 nonimmigrants who file a derivative U

[1] The record reflects that a Form I-918, Supplement A, Petition for Qualifying Family Member of U-1 Recipient was filed by the Petitioner on behalf of the Derivative in February 2013, and denied in October 2015.

[2] Prior to issuing a denial, the record reflects that the Director issued two Requests for Evidence (RFEs), and the Petitioner responded to both RFEs.

petition and for the duration of the period that the U petition and/or the derivative U petition remains pending. *See* VAWA 2013, Pub. L. 113- 4, 127 Stat. 54, 112 (providing that a child derivative who "seeks to accompany, or follow to join, a parent granted status under section []101(a)(15)(U)(i) of this title, and who was under 21 years of age on the date on which such parent petitioned for such status, shall continue to be classified as a child for purposes of section []101(a)(15)(U)(ii) of this title, if the alien attains 21 years of age after such parent's U nonimmigrant petition was filed but while it was pending") (codified at section 214(p)(7) of the Act); *see also* USCIS Policy Memorandum PM-602-0102, Violence Against Women Reauthorization Act of 2013: Changes to U Nonimmigrant Status and Adjustment of Status Provisions 4, http://www.uscis.gov/laws/policy-memoranda (for purposes of U nonimmigrant derivatives, when a principal petitioner for U nonimmigrant status properly files his or her principal U nonimmigrant petition, the age of the derivative U nonimmigrant is established upon the date on which the principal properly filed for his or her principal U nonimmigrant status). Although Congress could have made a similar amendment to section 245(m)(3) of the Act, it did not do so, and we presume that this decision was intentional on its part. *See,* e.g., *Lorillard v. Pons*, 434 U.S. 575, 580 (1977) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations and citation omitted) ("Where Congress includes particular language in one section of a statute but omits it [from] another, . . . it is generally presumed that Congress acts intentionally and purposed in the disparate inclusion or exclusion"); *Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 166 (3d Cir. 2015) (internal quotations omitted) ("[W]e have concluded that we must read the statute as written, giving meaning to distinctions between statutory provisions, rather than rely on implicit assumptions of intent"). Absent any binding authority extending the age-out protections of VAWA 2013 to section 245(m)(3) of the Act, the Derivative remains ineligible for lawful permanent residency as the qualifying family member of a U-1 principal applicant.

We acknowledge the Petitioner's assertion that delays in the adjudication of the U immigrant petition caused the Derivative to age out prior to adjudication of the U immigrant petition. However, we lack authority to waive the requirements of the statute, as implemented by the regulation. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (holding that both governing statutes and their implementing regulations hold "the force of law" and must be adhered to by government officials).

Contrary to the Petitioner's argument, we have no authority to apply the doctrine of equitable estoppel. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-39 (BIA 1991). Although federal courts may apply the doctrine against USCIS, we may not. *Id.; see also Chang v. United States*, 327 F.3d 911, 924 (9th Cir. 2003). While the Petitioner is correct in her assertion that *Matter of Hernandez-Puente, supra,* does not specifically reference the AAO, but instead discusses the Board of Immigration Appeals' authority, as an appellate body with comparable authority over immigration matters, we must nonetheless take note. Moreover, we may not act unless we are doing so under authority delegated to USCIS by the Secretary of the Department of Homeland Security (DHS). Therefore, because we have not been specifically authorized to grant equitable estoppel, we are prohibited from considering it here.

The Petitioner characterizes the Director's denial as arbitrary and capricious and asserts that it is barred by the Administrative Procedures Act (APA). She claims that the U immigrant petition was erroneously denied because USCIS delayed in adjudicating the U immigrant including issuing RFEs, being unresponsive to case inquiries and expedite requests; and informing the Petitioner that the case

was being worked on when no action was taken on the case for long periods of time. The Petitioner argues that the statute creating this benefit, 8 U.S.C. § 1255(m)(3), reads that "upon approval" of a U principal's adjustment, DHS may issue an immigrant visa to qualifying family members. Consequently, the Petitioner argues that the statute does not state that USCIS may do this *after* approval of the U principal's adjustment, but rather must do so *upon* approval. And the use of "upon" indicates an immediacy for USCIS to decide whether to grant the qualifying family member's benefit. However, when Congress has sought to put a time limit on USCIS' adjudicative actions they have done so explicitly.[3] In this instance, Congress's use of the word "upon" does not create a timeframe for adjudication other than to indicate that the adjudication of the U immigrant petition cannot occur before the adjudication of the U-1 nonimmigrant's adjustment of status. Moreover, the APA provides a cause of action for parties adversely affected by agency action and permits review of agency action in federal courts. The Petitioner does not demonstrate that the issue of whether the Petitioner possesses a viable cause of action in federal courts is relevant to these proceedings.

The Petitioner argues that the U immigrant petition should be adjudicated *nunc pro tunc* as an exercise of the USCIS' procedural discretion in light of the prolonged delay and cost-prohibitive policies, and resulting separation of the Derivative from the Petitioner who is in poor health. The Petitioner also expresses concern that the Derivative could be harmed in El Salvador due to gang violence. We acknowledge the health and safety concerns of the Petitioner and the Derivative; however, the Petitioner has not provided any case law or other authority for USCIS to adjudicate her U immigrant petition *nunc pro tunc*. Therefore, this argument is unavailing. In addition, we lack the authority to grant humanitarian parole outright, as the Petitioner requests. Moreover, humanitarian parole requires the filing of a Form I-131, Application for Travel Document along with the required supplemental forms and fee, or fee waiver. *See* https://www.uscis.gov/humanitarian/humanitarian_parole.

Because the Derivative had already reached the age of 21 years at the time of adjudication of the U immigrant petition, he was no longer a "child" under the Act. Accordingly, the Petitioner no longer has a qualifying relationship with her son as defined under 8 C.F.R. § 245.24(a)(2) and has not established the Derivative's eligibility under section 245(m)(3) of the Act as a qualifying family member of a U-1 principal applicant.

ORDER: The appeal is dismissed.

[3] For example, instructing USCIS to expeditiously process Special Immigrant Juvenile petitions in 180 days. *See* Trafficking Victims Protection Reauthorization Act § 235(d)(2).