U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28107138

Date: OCT. 19, 2023

Appeal of Vermont Service Center Decision

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

The Petitioner seeks immigrant classification of the Derivative, his daughter, as a qualifying family member under section 245(m)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(m)(3).

The Director of the Vermont Service Center (Director) initially approved the Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant (U immigrant petition). The Director reopened the U immigrant petition and issued a Notice of Intent to Deny (NOID) informing the Petitioner that the Derivative turned 21 years old while her Form I-485, Application to Adjust Status or Register Permanent Residence (U adjustment application) was pending, and no longer met the definition of a "child" under the Act. The Director subsequently denied the U immigrant petition, concluding that the Derivative was not eligible for the benefit sought because she was no longer a qualifying family member as required under section 245(m)(3) or 8 C.F.R. 245.24(g).

On appeal, the Petitioner submits a brief reasserting the Derivative's eligibility for the benefit sought. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office reviews the questions in this matter de novo. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

A U-1 nonimmigrant who has applied for, or gained, his 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 and adjustment of status to a

lawful permanent resident (LPR) or issuance of an immigrant visa. 8 C.F.R. § 245.24(g)(2).

II. ANALYSIS

The Derivative was born in Honduras in [redacted]2000. The Petitioner, her father, was granted U nonimmigrant status and subsequently became an LPR in August 2019. He filed the instant U immigrant petition on behalf of the Derivative in October 2019. USCIS approved the U immigrant petition in December 2020. The Derivative filed her U adjustment application in March 2021. While her U adjustment application was pending, the Derivative turned 21 years old. At that point, the Director reopened and denied the U immigrant petition because the Derivative was no longer a qualifying family member under section 245(m)(3) of the Act.

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 her U adjustment application. *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 and continue to exist through the adjustment or issuance of the immigrant visa for the qualifying family member)."

On appeal, the Petitioner contends that the Derivative should be afforded the same age-out protections under the Child Status Protection Act (CSPA) extended by Congress to children of other categories of applicants. Specifically, he notes that the Violence Against Women Act (VAWA) was amended in 2013 so that the children of VAWA principals whose applications were filed while unmarried and under the age of 21 would remain eligible for benefits. However, the 2013 amendments specifically only amended section 214(p) of the Act to provide age-out protection to children of U-1 nonimmigrants who file a derivative U 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 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 adjustment of status as the qualifying family member of a U-1 principal applicant.

Next, the Petitioner contends that USCIS's decision to reopen and deny the U immigrant petition was based, among other things, on a failure to consider the substantial similarity of protections offered to other similarly situated children in violation of the Derivative's equal protection under the Constitution.[1] He maintains that the Derivative has suffered significant injury which can only be remedied by reopening and granting her U immigrant petition. We note however, that we have no authority to entertain constitutional challenges to the Act and its implementing regulations. *Cf Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002) (the Board of Immigration Appeals lacks authority to rule on constitutionality of statutes it administers).

Lastly, the Petitioner claims that the Derivative "suffered material adverse effects as a result of USCIS's unconscionable processing times and detrimentally relied upon the approval of the I-929 which USCIS arbitrarily reopened and denied." He states that the Derivative worked as quickly as possible to gather the necessary documents, complete the medical exam, and file her U adjustment application in March 2021. While we acknowledge these contentions on appeal, we reiterate that the Act and regulations required the adjudication of the Derivative's U immigrant petition and U adjustment application prior to her twenty-first birthday. In this case, the Derivative turned 21 years of age 17 days after she filed her U adjustment application in March 2021. As a result, she did not meet the definition of a "child" under the Act, at the time of the adjudication of her U adjustment application in March 2023. Accordingly, 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.

ORDER: The appeal is dismissed.

[1] In support of his contention, the Petitioner cites *Wong Wing v. United States*, 163 US 228 (1896), *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), *Califano v. Westcott*, 443 U.S. 76, 89, 99 (1979), *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150 (1891), and *Yeung v. INS*, 76 F.3d 337, 339 (11th Cir. 1995).