File: A78 706 954 - Baltimore

Date: JUN 07 2006

In re: KI NA KIM

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Juan Lorenzo Rodriguez, Esquire

ON BEHALF OF DHS Nelson A. Vargas-Padilla
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Adjustment of status; voluntary departure

In a Memorandum of Decision and Order dated October, 18, 2004, the Immigration Judge concluded, upon review of the legal memorandum filed by the Department of Homeland Security (DHS),[1] and the Child Status Protection Act, Pub. L. 107-208, 116 Stat. 927 (August 6, 2002) ("CSPA"), that the respondent is not eligible to adjust status as a "child" and denied the adjustment application. *Id.* at 1. On January 14, 2005, the Immigration Judge issued his order denying the respondent's adjustment of status application under section 245 of the Act, 8 U.S.C. § 1255, and granting the respondent voluntary departure pursuant to section 240B(c) of the Act, 8 U.S.C. § 1229b(c) until March 15, 2005. The record will be remanded.

The DHS notes in its Memorandum of Law, upon which the Immigration Judge relied, that the CSPA was enacted on August 6, 2002. Section 8 of that law, entitled "Effective Date", provides that the amendments made by this Act shall take effect on the date of the enactment of this Act. The DHS argued that this law is not retroactive, and it applies to aliens with applications either pending on the date of enactment, or filed thereafter. It notes that the respondent's adjustment of status application was formally denied on April 19, 2002, before the enactment date of the CSPA. It was denied because the respondent turned 21 years of age on February 1, 2002. Since the respondent aged-out before the enactment date of the CSPA, and a final determination on her adjustment application was also made before the enactment date of the CSPA, the DHS argued that the respondent may not benefit from the CSPA.

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[1] We note that the respondent, through counsel, failed to file a brief, in accordance with the briefing schedule set by the Immigration Judge, on the issue of whether she may benefit from the provisions of the Child Status Protection Act, so as to be eligible for adjustment of status.

The respondent argues on appeal that the Immigration Judge erred in his interpretation of the CSPA, INA section 201(8), subsection (3). She claims that the unequivocal language of that provision applies to any alien who is a derivative beneficiary of a petition for immigrant classification which is pending before the Department of Justice or the Department of State on or after the date of enactment (August 6, 2002). She asserts that her adjustment of status application was renewed before the Immigration Court after August 6, 2002, and was therefore pending before the Department of Justice, within the meaning of that section of the CSPA. She avers that the regulations clearly provide that an alien, who is not an arriving alien, may renew an application for adjustment of status before the Immigration Judge once the alien is placed in removal proceedings, as was done in her case, citing 8 C.F.R § 245.2(a)(5). She contends that the decision of the director denying her adjustment application is therefore not a "final determination" within the meaning of INA 201(8), subsection 1, and she can accordingly benefit under the CSPA.

The respondent also claims that she qualifies to be considered a "child" under the formula for determining the age of a derivative child beneficiary, as set out in section 3 of the CSPA. She asserts that her mother's Form I-140 had a priority date of October 19, 1999, and was approved on July 26, 2000. This petition was pending for a total of 166 days, from February 11, 2000, to July 26, 2000. The employment visa was current, and thus was immediately available. Therefore, the operative date for determining the respondent's age for CSPA purposes is October 19, 1999, at which time the respondent was 18 years and 260 days of age. She applied for adjustment of status on September 19, 2000, less than 1 year later. Under these circumstances, the respondent asserts that her age was locked in under CSPA at 18 years, 94 days. Since she sought to acquire the status of a lawful permanent resident within 1 year of the date that the visa became available, the respondent claims that she was eligible for derivative benefits as a "child".

We find the respondent's arguments to be persuasive. The respondent's adjustment application was pending before the Immigration Court after August 6, 2002, the date of enactment of the CSPA, and her case therefore falls within section (8), subsection(3) of the CSPA. *See Padash v. INS*, 358, F.3d 1161 (9th Cir. 2004)(if term "final determination" in section 8 (1) of the CSPA, meant only a final agency determination, subsection 3 would be rendered redundant; CSPA applies where application pending before Department of Justice or Department of State on or after date of enactment of CSPA). In addition, we agree with the respondent's analysis that she qualifies under the formula provided in section 3 of the CSPA to be considered a "child" so as to be eligible apply for adjustment of status as a derivative beneficiary.

Accordingly, we will remand to the Immigration Judge for consideration of the respondent's application for adjustment of status.

ORDER: The record is remanded for proceedings consistent with the foregoing opinion.

FOR THE BOARD