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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

OCT 17 2008

IN RE:

Petitioner:
Beneficiary:



APPLICATION: Form I-730 Refugee/Asylee Relative Petition under section 208(b)(3) of the
Immigration and Nationality Act, 8 U.S.C. § 1158(b)(3).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the Refugee/Asylee Relative Petition and certified his decision to the Administrative Appeals Office (AAO.) The director's decision will be withdrawn and the petition will be approved.

The petitioner is a native and citizen of China who was granted asylum in the United States on July 5, 2004 by the Executive Office for Immigration Review Immigration Court in Orlando, Florida. He now seeks to classify his son as a derivative asylee pursuant to section 208(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(3).

The director concluded that the petitioner has not shown that he is a custodial parent of the beneficiary. *Decision of the Director*, dated July 7, 2008. Therefore, the director denied the petition as a matter of discretion and certified the denial to the AAO. *Id.*

The petitioner did not submit additional explanation or documentation to supplement the record on certification.

The record contains a copy of the petitioner's divorce decree; a copy of a birth record for the beneficiary; a copy of a statement from the mother of the beneficiary (the petitioner's ex-wife) attesting that she consents to the beneficiary resettling in the United States with the petitioner, and; documentation relating to the petitioner's asylee status. The entire record was reviewed and considered in rendering this decision.

Section 208(b)(3) of the Act provides, in pertinent part:

(A) IN GENERAL- A spouse or child (as defined in section 101(b)(1)(A) , (B) , (C) , (D) , or (E)) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) CONTINUED CLASSIFICATION OF CERTAIN ALIENS AS CHILDREN- An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 209(b)(3) , if the alien attained 21 years of age after such application was filed but while it was pending.

Section 101(b) of the Act states, in pertinent part:

(b) As used in titles I and II-

(1) The term "child" means an unmarried person under twenty-one years of age who is-

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation

The director determined that the petitioner was not awarded custody of the beneficiary by a foreign court, yet the petitioner is eligible to petition for the beneficiary to receive derivative asylee status. *Decision of the Director* at 3. However, the director assessed a statement from the beneficiary's mother (the petitioner's ex-wife) purporting to transfer custody to the petitioner, and determined that the statement did not effectively transfer custody under the laws of China. *Id.* at 3-4. The director denied the petition on discretion as a result. *Id.* at 4.

Upon review, the AAO agrees with the director that the petitioner is eligible to petition to have the beneficiary classified as a derivative asylee despite the fact that he has not clearly shown that he is a custodial parent. However, the AAO does not find that the petitioner's custody status constitutes a basis for failing to favorably exercise discretion based on the record.

The director cited section 101(b)(1)(C) of the Act that includes a reference to the custody status of a child. Specifically, a child born out-of-wedlock must show that he has been in the custody of his father as a requirement of becoming legitimated. Section 101(b)(1)(C) of the Act.

The beneficiary's parents were not legally married under the laws of China as of the date of his birth, January 13, 1989. The petitioner and the beneficiary's mother legally registered their marriage on November 26, 1992, when the beneficiary was three years old. The record reflects that the beneficiary then resided with his mother and the petitioner. Accordingly, the beneficiary was legitimated and he met the definition of "child" in section 101(b) of the Act. *See* section 101(b)(1)(C) of the Act. There is no requirement in the Act for a child to continue to be in the custody of his parent in order to continue to qualify as such parent's child. *See, e.g.,* section 101(b) of the Act.

Section 208(b)(3) of the Act does not include custody restrictions when defining the eligibility requirements for an asylee to petition for a derivative child. Thus, the petitioner's unclear custody status does not affect his eligibility to petition on behalf of his child. The petitioner has shown that he and the beneficiary meet all of the requirements of section 208(b)(3) of the Act.¹

The director found that the petitioner did not warrant a favorable exercise of discretion due to the fact that he did not show that he has legal custody of the beneficiary. However, the director cited no provision of the Act or regulations that permit him to deny the present petition on a discretionary basis when all eligibility criteria

¹ It is noted that the record does not indicate that the beneficiary is ineligible for asylee status under sections 208(b)(2)(A)(i)-(v) of the Act. 8 C.F.R. § 208.21(a).

have been met. The director does not contest that the petitioner has established the beneficiary's eligibility for derivative asylee status.

Nor has the director explained how the petitioner's custody status negatively impacted his decision to deny the petition based on discretion. It is noted that the record contains a statement from the beneficiary's mother in which she consents to the beneficiary's relocation to the United States with the petitioner. She purports to formally transfer custody of the beneficiary to the petitioner. While her statement may not have served to legally transfer custody of the beneficiary to the petitioner under the laws of China, her statement constitutes a clear intent to allow the beneficiary to reside with the petitioner in the United States. Nothing in the record calls into question the authenticity of this document or the beneficiary's mother's intent to let him resettle in the United States. Thus, the record does not suggest that the beneficiary's relocation to the United States as a derivative asylee would be against a custodial parent's rights or interests, or against the laws of China.

Based on the foregoing, the AAO finds that the petitioner is eligible to petition on behalf of the beneficiary for derivative asylee status, and that the petitioner and beneficiary meet all requirements under section 208(b)(3) of the Act. Accordingly, the decision of the director will be withdrawn and the petition will be approved.

In proceedings for derivative asylee status under section 208(b)(3) of the Act, the burden of proving eligibility remains entirely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The decision of the director is withdrawn and the petition is approved.