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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

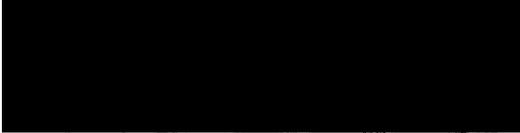
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U.S. Citizenship
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FILE:



Office: BALTIMORE Date:

SEP 26 2005

IN RE:

APPLICATION:

Refugee/Asylee Relative Petition Filed Pursuant to Section 208(b)(3)(A) of the
Immigration and Nationality Act, 8 U.S.C. § 1158(b)(3)(A)

ON BEHALF OF APPLICANT:



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, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Refugee/Asylee Petition previously approved on behalf of the petitioner's spouse was revoked by the District Director, Baltimore (district director), and is now before the Administrative Appeals Office (AAO) on certification. The district director's decision will be affirmed.

The petitioner is a twenty-seven-year-old native and citizen of the Democratic Republic of Congo who submitted a Refugee/Asylee Petition (Form I-730), on December 23, 1997, seeking to have his spouse obtain asylum on the basis of following to join the petitioner pursuant to section 208(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1158(b)(3), as an alien who is a refugee within the meaning of section 101(a)(42)(A) or the spouse or child of such a refugee. The petition was approved on October 23, 2000. During the course of adjudicating other applications submitted by the beneficiary, the district director discovered that the parties had divorced, and that the beneficiary had remarried. On August 18, 2005, the district director issued a decision revoking the approval of the petition as of the date of approval, and certified the decision to the AAO. *Decision of the District Director*, dated August 18, 2005.

On certification, the record consists solely of the record that was before the district director, as well as a letter submitted by the petitioner in response to the notification from the district director that the case was being certified to the AAO. That letter, states in pertinent part, "My response to this matter is that I'm no longer with the person, it has been almost 4 years, and I don't even know what happened to her, so I respect your decision." *Petitioner's Statement Submitted to the AAO on Certification*, dated August 22, 2005. The entire record was reviewed and considered in rendering a decision.

Factual Background

Before addressing the specific issues raised, the AAO will review the facts of the case. The record reflects that the petitioner is a twenty-seven-year-old native and citizen of the Democratic Republic of Congo (formerly Zaire). The petitioner originally entered the United States on November 17, 1989, as the dependent of a government official under a diplomatic A-2 non-immigrant visa. He remained past his period of authorized stay and was ultimately placed in removal proceedings during which he sought asylum and withholding of deportation. The petitioner was granted asylum and withholding of deportation pursuant to an immigration judge's decision dated September 28, 1999.

During this same period, the beneficiary, a twenty-nine-year-old native and citizen of the Democratic Republic of Congo, had also encountered the United States immigration system following her admission on October 7, 1990. The record reflects that like the petitioner, the beneficiary had also entered the United States as the dependent of an A-1, diplomat from Zaire; in the beneficiary's case, a military attached to the Zairian Embassy in the United States. She was admitted for duration of status, which ended upon the overthrow of the government in May of 1997. Prior to the expiration of her status, the beneficiary filed an application for asylum (Form I-589) on October 27, 1994, with the Arlington Asylum Office. She was scheduled for an interview on the application for May 4, 1995, but it appears she did not appear on that date due to confusion on her part regarding the interview date. On May 5, 1995, she requested that the interview be rescheduled. She was subsequently rescheduled in 1998 and again in May 2005.

The record reflects that in the intervening time period, the petitioner and the beneficiary were married on April 28, 1997. One month later, on May 31, 1997, the beneficiary's duration of status expired. As

previously noted, the petitioner's status had likewise expired, and he was granted asylum and withholding of deportation by an immigration judge on September 28, 1999. Following the grant of asylum, the petitioner filed the I-730 petition on the beneficiary's behalf on January 6, 2000, in order to accord her status as a following-to-join derivative asylee. The petition was approved on October 24, 2000. It was during this same time period that the beneficiary had been rescheduled for an interview on her asylum application before the Arlington, Virginia asylum office after the submission of an amended asylum application. The asylum office referred the matter to an immigration judge, and the beneficiary was placed in removal proceedings on April 11, 2000. The proceedings were terminated with the approval of the Immigration and Naturalization Service attorney, on November 24, 2000, based upon the approved I-730 petition, which accorded the beneficiary asylee status.

After she was granted status as an asylee, the beneficiary submitted an application for a Refugee Travel Document (Form I-131), which was granted on December 13, 2001. The record reflects that the beneficiary and the petitioner obtained a divorce on December 26, 2001, and the beneficiary married her second spouse, [REDACTED] several months later on July 9, 2002. Following her second marriage, the beneficiary filed an Application for Replacement/Initial Nonimmigrant Arrival-Departure Document (Form I-102), on October 25, 2003, seeking a corrected Form I-94, on the basis that the original document had been issued with incorrect information. A letter accompanying the application from the beneficiary's representatives stated that she was requesting a new I-94 to reflect her name change following her re-marriage. *See Letter from the Beneficiary's Representatives*, dated October 17, 2003. In the course of reviewing the applicant's eligibility, the district director re-examined the applicant's status as a derivative asylee, and issued the instant decision revoking her status as a derivative asylee.

The district director's decision described the basis for the reopening and revocation of the previously approved I-730 petition, as the termination of the spousal relationship between the petitioner and the beneficiary. According to the district director, the termination of the spousal relationship rendered the approval of the I-730 no longer valid in accordance with 8 C.F.R. § 208.21(c). *Decision of the District Director*, dated August 18, 2005.

The Statutory Framework

Before addressing the issues in detail, it is useful to set forth the relevant statutes and regulatory provisions section 208(b)(3)(A), and 8 C.F.R. § 208.21. These provisions set forth the treatment of the spouse and children of principal asylum applicants and the availability of following to join status for such derivative aliens.

Sections 208 of the Act at issue before the district director provide as follows:

Section 208(b)(3) Treatment of Spouse and Children.—A spouse or child (as defined in section 101(b)(1)(A), (B), (C), (D), or (E) [1101]) 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.

Title 8, Code of Federal Regulations, part 208.21 provides:

- (a) Eligibility. In accordance with section 208(b)(3) of the Act, a spouse, as defined in section 101(a)(35) of the Act, 8 U.S.C. 1101(a)(35), or child, as defined in section 101(b)(1) of the Act, also may be granted asylum if accompanying, or following to join, the principal alien who was granted asylum, unless it is determined that the spouse or child is ineligible for asylum under section 208(b)(2)(A)(i), (ii), (iii), (iv) or (v) of the Act for applications filed on or after April 1, 1997, or under § 208.13(c)(2)(i)(A), (C), (D), (E), or (F) for applications filed before April 1, 1997.
- (b) Relationship. The relationship of spouse and child as defined in sections 101(A)(35) and 101(b)(1) of the Act must have existed at the time the principal alien's asylum application was approved and must continue to exist at the time of filing for accompanying or following-to-join benefits and at the time of the spouse or child's subsequent admission to the United States. If the asylee proves that the asylee is the parent of a child who was born after asylum was granted, but who was in utero on the date of the asylum grant, the child shall be eligible to accompany or follow-to-join the asylee. The child's mother, if not the principal asylee, shall not be eligible to accompany or follow-to-join the principal asylee unless the child's mother was the principal asylee's spouse on the date the principal asylee was granted asylum.
- (c) Spouse or child in the United States. When a spouse or child of an alien granted asylum is in the United States, but was not included in the asylee's application, the asylee may request accompanying or following-to-join benefits for his/her spouse or child by filing for each qualifying family member a separate Form I-730, Refugee/Asylee Relative Petition, and supporting evidence, with the designated Service office regardless of the status of that spouse or child in the United States.

The approval of the Form I-730 shall remain valid for the duration of the relationship to the asylee and, in the case of a child, while the child is under 21 years of age and unmarried, provided also that the principal's status has not been revoked. However, the approved Form I-730 will cease to confer immigration benefits after it has been used by the beneficiary for admission to the United States as a derivative of an asylee.

(Emphasis supplied.)

Reasoning Underlying the District Director's Decision and AAO Analysis of the Decision

In the applicant's case the district director concluded that the approval of the petition should be revoked due to the termination of the relationship through the couple's divorce. The decision provides, "As the spousal

relationship between you and [REDACTED] no longer legally exists, the approval of the Form I-730 is no longer valid in accordance with 8 CFR 208.21(c). Accordingly, the Refugee/Asylee Relative Petition that you filed in behalf of [REDACTED] is revoked as of the date of approval, as [REDACTED] no longer qualifies as the spouse of an alien granted asylum." *Decision of the District Director*, dated August 18, 2005.

In reaching this conclusion, the district director relied upon the language of the regulation, which explicitly conditions the period of validity of the approval of the I-730 to the continuation of the relationship to the principal asylee. The record clearly establishes that the petitioner and beneficiary have divorced. It contains copies of the divorce terminating the marriage of the parties on December 26, 2001, and the beneficiary's subsequent marriage to her current spouse on July 9, 2002.

The language of the regulations is clear that the benefits flowing from the approval of the petition exist during the duration of the relationship. In addition to the regulatory language, the AAO has also located an opinion issued by the former Immigration and Naturalization Service that, while in the context of the ability of a divorced beneficiary to adjust status, likewise offers useful guidance in this context due to the similar nature of the statutory and regulatory provisions at issue. Specifically, the opinion is one issued by the INS' Office of the General Counsel (GENCO) [now known as the Office of Chief Counsel (OCC)] and is described below.

GENCO Opinion 89-55 dated July 27, 1989

The question addressed was whether a derivative asylee spouse was eligible to adjust status under section 209(b) of the Act when the marriage had been terminated by divorce. The legal opinion concluded that an alien spouse who received a divorce prior to the adjudication of an adjustment of status application would cease to be eligible for such immigration benefit. In discussing the issue, the legal opinion noted that it had been the position of the INS that alien children seeking adjustment of status would not be eligible for adjustment if they had reached the age of majority before the application was adjudicated. *See Legal Opinion at p.2, citing INS Instructions to all Field Offices, May 18, 1984.* The opinion noted that the remedy in such cases was for the derivative to file his or her own asylum application, which could be favorably considered, based upon a presumption of future persecution due to the alien's relationship to the principal. The opinion reasoned that similarly, the remedy available to a spouse who was divorced prior to the final adjudication was to seek asylum independently and, if granted, then pursue adjustment of status under section 209 of the Act.¹

Consequently, it appears that the legal opinion addressed the issue of the eligibility of the derivative alien to maintain a benefit derived through the relationship to the principal alien. While the statutory provision at issue was not the same as in the instant case, it is reasonable, based upon an examination of the statutory and regulatory provisions involved, to reach a similar conclusion in the instant case.

¹ The AAO notes that the CIS Asylum Office has adopted a practice of issuing nunc pro tunc asylum grants to derivatives in such situations, with the grant of asylum relating back to the date of the asylum grant to the principal asylum applicant, or the date that the derivative's I-730 was approved for derivatives in the United States, or the date that the derivative entered the U.S. on an approved petition. This practice is intended to allow the derivative asylee to adjust status sooner than would be the case if eligibility for adjustment had to be measured from the date of his or her own grant of asylum. *See Affirmative Asylum Procedures Manual, Revised February 2003*

Section 208 of the Act contains the procedures for granting asylum to aliens in the United States. Subsection (b) sets forth the conditions that must be met before an alien qualifies for a grant of asylum. An individual seeking asylum must be a refugee within the meaning of section 101(a)(42)(A) of the Act. If such alien is determined to be a refugee and satisfies the other conditions contained in section 208, he or she may be granted asylum. In contrast, while section 208 provides an avenue for the spouse and children of an alien granted asylum to be afforded similar status, it is predicated on a very different premise; its premise is that it grants asylum status to derivative aliens in order to maintain the family unit recognized by statute, as opposed to granting the status individually to an alien who meets the definition of a refugee and has been recognized as such. While the derivatives may be granted asylum status, and may thereafter be considered to be equivalent for purposes of how they are admitted and categorized, the status is not identical to that of the principal because it was not granted due to the individual's status as a refugee, but rather because of the derivative's relationship to the principal and the desire to allow the spouse or child to join the principal as part of a family unit. The termination of that relationship, therefore affects the eligibility of the following-to-join spouse to maintain benefits flowing from that relationship.

Therefore, it is clear that derivative asylees have an asylum status fundamentally different from that of the principal, and which continues to be linked to the principal in terms of the continuing viability of the relationship. It is the continued existence of that relationship which enables the derivative to maintain the following-to-join asylee status, and its absence which warrants revoking the approval of the petition.

Therefore, given the fact that the principal alien and the applicant have divorced, the applicant no longer merits treatment as a derivative asylee, as her acquisition of that status was dependent upon her relationship to the principal. As such, she is ineligible for continued treatment as an I-730 beneficiary. The AAO notes, however, that it is possible that the applicant may be able to pursue asylee status through alternative avenues, such as renewed proceedings before the immigration court, or through a qualifying relative.

ORDER: The decision of the district director is affirmed and the approval of the I-730 petition is revoked.