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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
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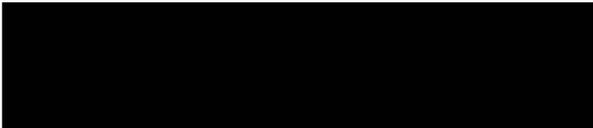
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FILE: [REDACTED] Office: MEXICO CITY (CIUDAD JUAREZ) Date: **FEB 19 2010**
CDJ 2004 823 060

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v),
of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED] is a citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II), of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant is the stepson of [REDACTED] a citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to immigrate to the United States. In an undated decision the director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant filed a timely appeal.

On appeal, counsel states that the applicant was approximately six years old when he came to the United States with his mother. Counsel states that the applicant's mother married a U.S. citizen, [REDACTED] when the applicant was 17 years old, and that according to section 101(b)(1) of the Act, the applicant was considered a "child" of a U.S. citizen stepfather when his mother married. Counsel states that the applicant qualifies for benefits under the Child Status Protection Act (CSPA), and that applying section 212(a)(9)(B) of the Act conflicts with the purpose of the CSPA, which was the preservation of benefits for children who turn 21 years old before adjudication of their application. Counsel states that even though unlawful presence does not accrue before a person's 18th birthday, after he or she turns 18 years old unlawful presence begins to accrue, which is against the spirit of the CSPA. Counsel states that there are safe guards against aging out in the Violence Against Women Act (VAWA), and for children of asylees and derivative beneficiaries. Counsel states that the applicant was not 21 years old at the time of his immigrant visa interview, and that application of the unlawful presence provisions destroys the benefits conferred to the applicant by the CSPA. Counsel states that section 204(a)(1)(D)(iii) of the Act states that "[n]othing in the amendments made by the Child Status Protection Act shall be construed to limit or deny any right or benefit provided under this subparagraph." Counsel states that section 212(a)(9)(B) of the Act conflicts with the purpose of the CSPA by depriving minor beneficiaries of the CSPA's provisions.

The AAO will first address the finding of inadmissibility. Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(iii) Exceptions

(I) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

U.S. Citizenship and Immigration Services (USCIS) records reflect the following facts. The applicant was born on March 10, 1986. He entered the United States without inspection in May 1993. The applicant's mother married [REDACTED] on December 1, 2003 in Texas. The applicant was 17 years old when they married. The applicant's stepfather filed the Immediate Relative Petition, Form I-130 on the applicant's behalf on January 7, 2004. The applicant turned 18 years old on March 10, 2004. He left the United States in February 2006. On February 27, 2006, a consular officer at the American Consulate General in Ciudad Juarez, Mexico, refused the applicant an immigrant visa as he was found inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Counsel states that the applicant qualifies for benefits under the CSPA. The CSPA was enacted on August 6, 2002. It amended the Act to provide "age-out" protection for certain individuals who were classified as "children" at the time that a visa petition or application for permanent residence was filed on their behalf, but who turned 21 before their petition or application was ultimately processed. The relevant provision of the CSPA in this case is section 2, which is codified at section 201(f)(1) of the Act, 8 U.S.C. § 1151(f)(i) (Supp. II 2002).

Section 201(f) states:

(f) Rules for Determining Whether Certain Aliens are Immediate Relatives

- (1) Age on petition filing date . . . for purposes of subsection (b)(2)(A)(i), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using the age of the alien on the date on which the petition is filed with the Attorney General under section 204 to classify the alien as an immediate relative under subsection (b)(2)(A)(i).

The term “Immediate Relative” is defined under section 201(b) of the Act. That section states:

(b) Aliens Not Subject to Direct Numerical Limitations.

Aliens described in this subsection, who are not subject to the world wide levels or numerical limitations of subsection (a), are as follows:

(1)(A) Special immigrants . . .

(2)(A)(i) Immediate relatives. For purposes of this subsection, the term “immediate relatives” means the children, spouses, and parents of a citizen of the United States . . .

The term “child” is defined under section 101(b)(1) of the Act. That section states:

- (1) The term “child” means an unmarried person under twenty-one years of age who is –
 - (A) a child born in wedlock;
 - (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

Section 201(f) of the Act provides that an alien's status as a child is determined as of the date on which a visa petition to classify him as an immediate relative is filed. Thus, under the provisions of the CSPA if the beneficiary of a visa petition is under the age of 21 at the time of filing, he retains his status as a “child,” even after he turns 21. *See* section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1) (2000).

In this case, the applicant retained his status as a child because he was 17 years old and unmarried when his U.S. citizen stepfather filed the visa petition on his behalf. *See* sections 101(b)(1), 201(b)(2)(A)(i), (f)(1) of the Act. When the visa petition was approved, the applicant had an immigrant visa immediately available to him as an IR under section 201(b)(2)(A)(i) of the Act. Consequently, the CSPA provisions apply to this case.

Even though the applicant qualifies for benefits under the CSPA, he must be admissible to the United States. Grounds of inadmissibility are set forth under section 212(a) of the Act. Unlawful presence is a ground of inadmissibility. *See* section 212(a)(9)(B) of the Act. The applicant entered the United States without inspection in May 1993. He began to accrue unlawful presence from March 10, 2004, the date on which he turned 18 years old, until February 2006, when he left the country and triggered the ten-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

Counsel cites to section 204(a)(1)(D)(iii) of the Act to demonstrate that the applicant's "child" status under the CSPA should not be limited or denied. That section states that "[n]othing in the amendments made by the Child Status Protection Act shall be construed to limit or deny any right or benefit provided under this subparagraph." A close reading of section 204(a)(1)(D)(iii) of the Act conveys that it is the CPSA that shall not limit or deny any benefit provided under the subparagraph, which benefit relates to the VAWA, the Battered Immigrant Women Protection Act of 2000, and the Department of Justice Reauthorization Act of 2005.

Although the applicant qualifies for benefits under CSPA, counsel has cited to no authority to establish that the applicant will not accrue unlawful presence pursuant to section 212(a)(9)(B) of the Act. He is, consequently, inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

There is no claim made on appeal of extreme hardship to a qualifying relative.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.