No. 13-2610

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Jorge Argenis Velasquez-Garcia (aka Velazquez-Garcia),

Petitioner-Appellant,

v.

Eric H. Holder, Jr., United States Attorney General,

Respondent-Appellee.

On Appeal From The Board of Immigration Appeals

BRIEF *AMICUS CURIAE* OF THE AMERICAN IMMIGRATION COUNCIL IN SUPPORT OF PETITIONER'S PETITION FOR REVIEW

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September 30, 2013

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Appellate Court No: 13-2610

Short Caption: Velasquez-Garcia v. Holder

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I. INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The Child Status Protection Act (CSPA) Pub. L. No. 107-208, 116 Stat. 927 (2002), is an ameliorative statute which provides age-out protection for derivative child beneficiaries adversely affected by administrative delays in the adjudication of immigrant petitions. *Tovar v. U.S. Attorney General*, 646 F.3d 1300, 1304-05 (11th Cir. 2011); *see also Arobelidze v. Holder*, 653 F.3d 513, 521 (7th Cir. 2011) ("CSPA was meant to be an ameliorative statute applying to as many parties as practicable"). The CSPA includes a formula for offsetting the age of child against the time the agency spent processing the visa petition. Under this formula, a child's age will be determined on the date that a visa becomes available for the underlying petition, minus the number of days that the petition was pending before the United States Citizenship and Immigration Service (USCIS). 8 U.S.C. § 1153(h)(1). If this calculation reduces the age of the beneficiary to under 21, then he or she will remain a "child" for purposes of the visa petition, provided the third step in the statutory formula is satisfied. *Id.* Under this last step, the beneficiary must have "sought to acquire the status of a lawful permanent resident within one year of such [visa] availability." *Id.* A beneficiary can gain lawful permanent resident status in one of two ways: by applying for an immigrant visa with the Department of State (DOS) at a U.S. Consulate in his or her home country (commonly referred to as "consular processing"); or, if in the United States, by

applying to adjust his or her status to that of a lawful permanent resident with the USCIS. *See* 8 U.S.C. §§ 1202 and 1255.

The specific question before the Court is the meaning of the phrase "sought to acquire" as found in the final step of the age-preservation formula. The Eleventh Circuit, agreeing with the analysis of unpublished decisions of the Board of Immigration Appeals (Board or BIA), found this language to be plain and to require only that the beneficiary have taken a substantial step towards filing a relevant application for lawful permanent residence within the one year period. *Tovar*, 646 F.3d at 1304-05. In a subsequently issued precedent decision, the BIA rejected this interpretation and adopted a narrow reading that was not based on the words "sought to acquire." *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012).

Because the Board's interpretation is unfaithful to the plain language chosen by Congress, *Matter of O. Vasquez* is not entitled to deference. Instead, *amicus curiae* urges this Court to follow the lead of the Eleventh Circuit and interpret "sought to acquire" broadly, consistent with the ameliorative nature of the CSPA.

Amicus curiae American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, and to protect the legal rights of our nation's noncitizens. The American Immigration Council has appeared as amicus curiae before this Court before, most recently in the case *Papazoglou v. Holder*, 725 F.3d 790 (7th Cir. 2013). The American

Immigration Council has a longstanding concern about the fair implementation of the CSPA and has appeared as amicus curiae in cases involving application of the CSPA before the Board and federal courts. *See, e.g.*, *De Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012) (*en banc*) (cert. granted *Mayorkas v. De Osorio*, 133 S.Ct. 2853 (June 24, 2013)); *Feimei Li v. Renaud*, 654 F.3d 376 (2d Cir. 2011); *In re Jose Jesus Murillo*, No. A99 252 007, 2010 WL 5888675 (BIA Oct. 6, 2010).

II. ARGUMENT

A. "Sought to acquire" has a plain meaning.

At issue in this case is the meaning of the phrase "sought to acquire" as it is used in the sentence in 8 U.S.C. § 1153(h)(1)(A), which ends: "…. but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence" within one year of the date on which a visa became available. Under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), this Court first will look to the text of the provision, for the "plain language of the statute is the most instructive and reliable indicator of [ ] Congressional intent." *Papazoglou v. Holder*, 725 F.3d 790, __ (7th Cir. 2013).

The phrase "sought to acquire" is unambiguous, frequently used, and well understood. Because it is not defined in the Immigration and Nationality Act (INA), this Court should apply its "plain, ordinary meaning." *Familia Rosario v. Holder*, 655 F.3d 739, 747-48 (7th Cir. 2011) (citation omitted) (considering

dictionary definition of several terms); *see also Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1325 (7th Cir. 1997) (noting that a term is not ambiguous simply because it is undefined in a statute and then considering the dictionary definition of the term). "Sought" is the past tense of "seek," the relevant definition which is "to make an attempt: try – used with *to* and an infinitive." *Merriam-Webster.com*. 2013. http://www.merriam-webster.com (September 26, 2013). The word "acquire" is defined as "to get as one's own: a: to come into possession or control of often by unspecified means." *Id.* Thus, "sought to acquire" lawful permanent resident status means "to make an attempt to come into possession of" lawful permanent residence status.

To date, the only Court of Appeals to have interpreted § 1153(h)(1)'s use of the phrase found that its meaning was plain. *Tovar v. U.S. Attorney General*, 646 F.3d 1300, 1304-05 (11th Cir. 2011). In reaching this conclusion, *Tovar* relied upon and specifically agreed with the analysis of the BIA as set forth in unpublished decisions.[1] *Id.* For example, the court explained that in *In re Jose Jesus Murillo*, No. A99 252 007, 2010 WL 5888675 (BIA Oct. 6, 2010), the Board found that the "plain meaning" of § 1153(a)(1) was for the beneficiary "to make an attempt to obtain status as a lawful permanent resident within one year of such availability in order to maintain child status under the CSPA." *Tovar*, 646 F.3d at

[1] The BIA had not yet published its precedent decision, *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012).

1304. Similarly, the court noted that, in *In re Kim*, No. A77 828 503, 2004 WL 3187209 (BIA Dec. 20, 2004), the

> BIA examined the text and reasoned that Congress had purposely used 'sought to acquire' rather than 'filed,' and that the plain meaning of 'sought to acquire' required only an attempt to get or obtain.

Tovar, 646 F.3d at 1305.[2]

Tovar also agreed with the Board that such an interpretation was consistent with congressional intent. *Id.* Consequently, the court concluded that "sought to acquire" as used in § 1153(h)(1) was "broad enough to encompass substantial steps taken toward the filing of the relevant application during the relevant time period, but does not require that the alien actually file or submit the application." *Id*.

Consistent with the Eleventh's Circuit's conclusion that the phrase "sought to acquire" has a plain meaning, this Court has used this phrase dozens of times in a wide variety of contexts, without ever finding it necessary to define. *See, e.g*., *Frontier Ins. Co. v. Hitchcock*, 712 F.3d 1036, 1037 (7th Cir. 2013) (insurance company "sought to acquire" funds from guarantors); *Olufunmi v. Mukasey*, No. 07-1028, 256 Fed. App'x. 806, 808-09 (7th Cir. Nov. 28, 2007) (unpublished)

[2] A third unpublished Board decision cited by the court reached the same result, although without analyzing the meaning of the statute. *Id.* (citing *In re Castillo Bonilla*, No. A98 282 359, 2008 WL 4146759 (BIA Aug. 20, 2008)). As the court explains, the Board found in that case that the beneficiary "sought to acquire" lawful permanent resident status when he made a request in briefing to the Board within the one year period, even though he did not file his adjustment application until fourteen months after his visa became available).

(immigration agency alleged that petitioner had "sought to acquire citizenship through a fraudulent marriage"); *Shaikh v. City of Chicago*, 341 F.3d 627, 628 (7th Cir. 2003) (City of Chicago "sought to acquire" apartment building); *United States v. De Felippis*, 950 F.2d 444, 448 (7th Cir. 1991) (defendant "sought to acquire" goods and services by fraudulent means). In each of these and many other instances, the plain meaning of the phrase is self-evident – that is, that a person or entity made an attempt to come into possession of something. The same meaning applies equally to the phrase as used in § 1153(h)(1).

B. *Matter of O. Vasquez* is entitled to no deference because the Board ignores the statute's plain meaning and instead concludes, without textual analysis, that "sought to acquire" is ambiguous.

In 2012, the Board reversed course from the unpublished decisions cited in *Tovar*, and in a precedent decision held that the phrase "sought to acquire" was ambiguous. *Matter of O. Vasquez*, 25 I&N 817, 820 (BIA 2012). However, "'[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" *Akram v. Holder*, 721 F.3d 853, 859 (7th Cir. 2013) (quoting *Chevron*, 467 U.S. at 843 n.9). Because "sought to acquire" has a plain meaning, there is no need for agency interpretation, and thus no need for deference. *Chevron*, 467 U.S. at 842-43. This is particularly true here, because the Board's analysis of "sought

to acquire" is deeply flawed; it failed altogether to address the text of the statute and then put forward a justification that was without substance.

1. *Matter of O. Vasquez* impermissibly disregards the text of the statute.

Nowhere in *Matter of O. Vasquez* does the Board address the meaning of the words "sought to acquire." Instead, after citing the proper standard for statutory interpretation, including the need to determine if the language is plain, the Board ignores this instruction and instead concludes – with no discussion of the actual text – that "Even when considered in light of the statutory context, the phrase 'sought to acquire' does not have a plain and unambiguous meaning." *Matter of O. Vasquez*, 25 I&N Dec. at 819. The Board cannot "skip the textual analysis," *Bass*, 111 F.3d at 1325, simply to reach its desired conclusion of ambiguity.

2. The Board's justification for finding ambiguity is without substance.

In *Matter of O. Vasquez*, the Board attempts to justify the alleged ambiguity in "sought to acquire" by contending that Congress was concerned with using language that would be appropriate for both the visa petition process employed by DOS and the adjustment of status process employed by USCIS. 25 I&N Dec. at 819. It cites no legislative history in support of this, but instead merely references DOS regulations using the term "submit" with respect to immigrant visa applications, rather than the term "file." *Id*. at 819-20. From this, the Board concludes that Congress chose "sought to acquire" because it wanted to avoid

using “file” and thereby ensure that the DOS application was also covered. *Id*. at 820.

The problem with this analysis is that it addresses a nonexistent issue. Congress has a standard method for referring to requests for immigration status, one that it employs in both the immigration visa and adjustment of status contexts: that a person may “make an application for” or “apply for” such a benefit. For example, in 8 U.S.C. § 1202(a), Congress specified that noncitizens “applying for an immigrant visa” shall “make application therefor” in a form, manner and place as prescribed by regulations. *See also* 8 U.S.C. § 1153(g) (discussing termination of registration of a noncitizen who fails to “apply for an immigrant visa” within the designated time). Similarly, in 8 U.S.C. § 1255(a), Congress specified that a non-citizen is to “make [ ] an application” for adjustment of status.

"[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972)). Had Congress intended to require a specific act – such as the presentation of an application – it easily could have used the term “make an application.” This is especially true since Congress knew how to refer to both an application for an immigrant visa and an application for adjustment of

status within the same sentence or provision, without needing to resort to the phrase "sought to acquire." Thus, for example, in another section of the CSPA, Congress specified that the Act's effective date depended, in part, on whether a final determination had been made on "the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence." CSPA § 8, Pub. L. No. 107-208, 116 Stat. 927 (2002); *see also* 8 U.S.C. §§ 1101(a)(15)(V)(ii)(II) (discussing V visa eligibility for those whose "application for an immigrant visa" or "application for adjustment of status" remains pending); 1184(q)(1)(B)(ii) and (iii) (discussing impact of the denial of an application for an immigrant visa or an application for adjustment of status on a V visa-holder); 1184(r)(3)(B) and (C) (discussing impact of the denial of an application for an immigrant visa or an application for adjustment of status on a K visa-holder).

Because Congress clearly knew how to recognize both processes for awarding immigration status without deviating from its standard terminology, it must be presumed that this was not its intent when, in § 1153(h)(1), it used a phrase with an entirely different meaning.

C. Even were there some ambiguity in the phrase, the Board's interpretation is not reasonable.

Even were there ambiguity in "sought to acquire," which there is not, the Board's interpretation is not a reasonable one and thus not entitled to deference. *See Batanic v. INS*, 12 F.3d 662, 665-666 (7th Cir. 1993) ("Deference does not

mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so . . . only if the administrative *interpretation is reasonable*." (emphasis added in original) (citation omitted)). After strenuously presenting a case as to why Congress could not have chosen the word "file," the Board adopts a definition of "sought to acquire" that primarily equates it with the "filing" of an adjustment of status application.[3] It allows only two very limited exceptions to this "filing" rule: when filing has been attempted but rejected for a procedural or technical reason; and when an applicant is unable to file due to extraordinary circumstances, particularly those beyond his or her control. *Id*. at 821.

Neither the Board's general rule nor the limited exceptions are based on the language of the statute. As discussed, "sought to acquire the status of a lawful permanent resident" indicates that an individual has made an attempt to obtain lawful residency status. An attempt does not equate with any one particular act – such as filing. Had Congress intended such a specific act, it would have used the standard language "make an application" that it used for both adjustment of status and immigrant visa applications.

The Board attempts to bolster its adoption of very limited exceptions to the general filing rule by reference to two other immigration provisions, neither of

[3] Presumably, the Board limited this portion of its decision to the adjustment context because the case involved an adjustment application.

which is comparable. Specifically, the Board references 8 C.F.R. § 1208.4(a)(5)(v) in support of the limited exception for a filing that could not be completed for procedural or technical reasons. *Matter of O. Vasquez*, 25 I&N at 821. This is an asylum regulation, however. It implements a statutory bar to asylum eligibility where the application was not "filed" within one year of the applicant's arrival in the United States. 8 U.S.C. § 1158(a)(2)(B). Because "sought to acquire" does not mean "file," a regulation that implements a mandatory *filing* requirement is not a comparable provision. The same is true with respect 8 U.S.C. § 1153(g), which the Board cites in support of its adoption of the "exceptional circumstances" limitation. This provision first specifies a period in which an individual is to "apply" for an immigrant visa and then allows the individual an opportunity to demonstrate "exceptional circumstances" for the failure to have met this deadline. In § 1153(h)(1), Congress did not set a firm filing deadline nor did it limit exceptions to "exceptional circumstances." Thus, this section also is not relevant to an interpretation of "sought to acquire."

Neither the agency nor this Court can read into the term "sought to acquire" a specific filing rule or specific, narrow exceptions to this rule, where no such limits exist. *See Bass*, 111 F.3d at 1325. Even were this Court to find some ambiguity in the phrase, it should not defer to the Board's narrow interpretation.

III. CONCLUSION

For all of the reasons cited, amicus curiae urges this Court to reverse the decision of the Board, reject the reasoning provided by the Board in *Matter of O. Vasquez*, and instead follow the lead of the Eleventh Circuit. As an ameliorative statute, the CSPA should be interpreted broadly, including the phrase "sought to acquire."

September 30, 2013

Respectfully submitted,

s/_Mary Kenney_____

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(1)(7)(B) because this brief contains 2,864 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/_Mary Kenney_____

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