

Falls Church, Virginia 20530

File:

[REDACTED]

Date:

NOV 18 2013

In re:

[REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rachel Wilson, Esquire

ON BEHALF OF DHS: Jeffrey S. Frederick
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: Asylum

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's January 13, 2012, decision denying her request for asylee status as a derivative beneficiary of her husband's asylum application, pursuant to section 208(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(3)(A).¹ The Department of Homeland Security ("DHS") has submitted a brief which does not address the respondent's renewal of her request for derivative asylum benefits. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge granted the respondent's husband's application for asylum under section 208(b)(1)(A) of the Act. Although the respondent's husband had included the respondent as a derivative beneficiary of his asylum application (I.J. at 1), the Immigration Judge held that the respondent could not obtain derivative benefits because she had entered the United States as a nonimmigrant prior to her husband's entry into the United States (I.J. at 35-36). Upon our de novo review of this legal issue, we conclude that the Immigration Judge erred in denying derivative asylum benefits on such basis.

¹ The respondent has not appealed from the denial of her independent application for asylum, withholding of removal, and protection under the Convention Against Torture. These claims have therefore been waived.

[REDACTED]

The Immigration Judge relied on inapplicable regulations in concluding that the respondent could not obtain asylee status as a derivative beneficiary of her husband's asylum application. Specifically, the Immigration Judge looked to regulations concerning the admission of refugees into the United States (8 C.F.R. § 207.7), rather than the regulations dealing with the approval of an asylum application filed by an alien present in the United States (8 C.F.R. § 1208.21). Nothing in the applicable regulations supports the conclusion that the respondent may not derive status through the approval of her husband's asylum application solely because her entry into the United States preceded that of her husband.² Consequently, we will remand the record so that the Immigration Judge may determine if the respondent otherwise qualifies for derivative asylum status under section 208(b)(3)(A) of the Act. Accordingly, the following order shall be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.


FOR THE BOARD

² In that regard, we note that the pertinent regulations explicitly contemplate that aliens who are already present in the United States may receive "accompanying or following-to-join benefits" as the spouse of an alien granted asylum status. See 8 C.F.R. § 1208.21(c). Moreover, to the extent that the Immigration Judge analogized the respondent's case to *Matter of Ascher*, 14 I&N Dec. 271 (BIA 1973), to support the general proposition that "An 'accompanying' relative may not precede the principal alien to the United States" (I.J. at 35-36), we note that in *Matter of Naulu*, 19 I&N Dec. 351 (BIA 1986), the Board held in a comparable context that a derivative beneficiary "accompanying or following to join" a principal alien under section 203(a)(8) of the Act, 8 U.S.C. § 1153(a)(8) (1982), cannot precede the principal alien into the United States *as an immigrant*, but he or she is not barred from later adjusting status to that of a lawful permanent resident due to having preceded the principal alien into the United States *as a nonimmigrant* (emphasis added).