

Stepchild qualifies as relative for purposes of cancellation of removal

Matter of Portillo-Gutierrez (BIA 2009)

By Max Nuyen

The Board of Immigration Appeals ruled a stepchild meets the definition of a child for purposes of qualifying for cancellation of removal. This should come as a relief to many persons who are now in the country unlawfully, because cancellation of removal is one of the few avenues for legalization available to them. It is difficult to qualify for, and nearly impossible to be granted, because of the high standards which must be met. It is truly the remedy of last resort because the only time a person may petition for it is during removal/deportation proceedings.

The applicant, a citizen of Mexico, illegally entered the U.S. in 1996. In 2007, he married a lawful permanent resident (LPR), who had two children from a prior relationship. The children, one of whom had "special needs" were also lawful permanent residents. After marrying his wife, the applicant never moved to adopt his stepchildren, even though he was the primary caretaker.

The applicant was detained by Immigration and Customs Enforcement (ICE) for his undocumented status and applied for cancellation of removal through Immigration Court. To be granted cancellation of removal, one must establish the removal/deportation from the U.S. would create "exceptional and extremely unusual hardship" to a qualifying relative, a U.S. citizen or LPR. For the purposes of the immigration law, a qualifying relative must be a "child."

The question presented in this case was whether "child" meant the applicant's own blood children, or may include his stepchildren. If it includes stepchildren, the applicant could argue the stepchild with special needs would face an "exceptional and extremely unusual hardship" with the applicant's removal. Immigration courts are reluctant to send special needs children to countries without the resources available to provide appropriate care for them. For this reason, courts are more likely to permit a parent of a special needs child to remain in the U.S.

However, the immigration judge did not consider his stepchild to be a qualifying relative because he never adopted the child. The Board of Immigration Appeals overruled the judge. The immigration laws define a "child" as "an unmarried person under 21 years of age." The definition includes a stepchild, as long as the child has not reached 18 years of age at the time of the marriage which created the stepchild relationship. There is no requirement the stepchild be legally adopted. Because the applicant married his wife, while his stepchild was still a minor, the stepchild was considered a qualifying "child" for purposes of cancellation of removal. Thus, the applicant may use the special needs of his stepchild as a basis for establishing "exceptional and extremely unusual hardship" to a family member.