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MAR 15 2005

[Redacted]

FILE:

[Redacted]

Office: MIAMI

Date:

IN RE: Petitioner:

[Redacted]

Beneficiary:

PETITION: Petition for Special Immigrant Juvenile Pursuant to Section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(J) of the Act, 8 U.S.C. § 1101(a)(27)(J)

ON BEHALF OF PETITIONER:

[Redacted]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The District Director, Miami revoked the special immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The beneficiary is a twenty-year-old native and citizen of Honduras who seeks classification as a special immigrant juvenile pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4).

The district director issued a decision on August 17, 2004, notifying the beneficiary of the automatic revocation of the petition.

On appeal, the beneficiary asserts that the automatic revocation of the petition was an abuse of the district director's authority, as Citizenship and Immigration Services (CIS) did not adjudicate the petition within a reasonable time.¹

Section 203(b)(4) of the Act provides classification to qualified special immigrant juveniles as described in section 101(a)(27)(J) of the Act, which pertains to an immigrant who is present in the United States—

- (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;
- (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and
- (iii) in whose case the Attorney General [Secretary of Homeland Security] expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that—
 - (I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction; and
 - (II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act

Pursuant to 8 C.F.R. § 204.11(c), an alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien:

- (1) Is under twenty-one years of age;
- (2) Is unmarried;

¹ The AAO notes that the Notice of Appeal (Form I-290B) has been submitted by the beneficiary and not by counsel. The AAO is nonetheless sending this decision to the beneficiary's counsel of record, as there is no indication in the record that counsel has withdrawn or that the beneficiary has released counsel as his representative.

- (3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court;
- (4) Has been deemed eligible by the juvenile court for long-term foster care;
- (5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and
- (6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents

The record reflects that the beneficiary entered the United States without inspection on July 16, 2000, near Brownsville, Texas. He was placed into removal proceedings in New Orleans, Louisiana, but sought and was granted a change of venue to Miami, Florida after he was released to the custody of his older brother, [REDACTED]. Various continuances of the immigration court proceedings were obtained, and the beneficiary, with the assistance of counsel, ultimately filed a Petition for Special Immigrant Juvenile status (SIJ) by filing Form I-360 on March 4, 2002.

In support of the petition, counsel submitted various records filed with or issued by the Florida state court. Among the records is an order of the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, Family Division, dated January 10, 2002. The order is entitled, Order Regarding Minor's Eligibility for Special Immigrant Status, and states that: the beneficiary was found to be dependent upon the court based upon his parents' consent to the petition alleging that they had abandoned and neglected their child; the beneficiary was eligible for long term foster care due to the court's acceptance of jurisdiction and determination that family reunification was no longer a viable option; and it was not in the beneficiary's best interest to be returned to Honduras, but rather to remain in the United States.

The record reflects that on May 22, 2003, the applicant was scheduled for an interview on the petition and was asked to provide additional documentation. The interview was held on or about June 2, 2003.² The petition was subsequently approved on August 28, 2003, and counsel thereafter sought and obtained a termination of the beneficiary's removal proceedings in order to allow him to pursue an Application for Adjustment of Status (Form I-485). The application was subsequently filed on March 11, 2004.

On August 17, 2004, the district director sent the beneficiary a Notice of Automatic Revocation. The notice stated that pursuant to 8 C.F.R. § 205.1, the approval of a petition under section 204 of the Act would be revoked as of the date of approval, in the case of a special immigrant juvenile, if any of the following circumstances occurred before the beneficiary or self-petitioner's journey to the United States commences or, if the beneficiary or self-petitioner is an applicant for adjustment of status to that of a permanent resident, before the decision on his or her application becomes final:

² At the time of the interview, the applicant was eighteen years of age, having turned eighteen on August 18, 2002, five months after the I-360 was filed.

(iv) *Special immigrant juvenile petitions*. Unless the beneficiary met all of the eligibility requirements as of November 29, 1990, and the petition requirements as of November 29, 1990, and the petition for classification as a special immigrant juvenile was filed before June 1, 1994, or unless the change in circumstances resulted from the beneficiary's adoption or placement in a guardianship situation:

- (A) Upon the beneficiary reaching the age of 21;
- (B) Upon the marriage of the beneficiary;
- (C) Upon the termination of the beneficiary's dependency upon the juvenile court
- (D) Upon the termination of the beneficiary's eligibility for long-term foster care; or
- (E) Upon the determination in administrative or judicial proceedings that it is in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents.

The district director's decision found that the petition became subject to automatic revocation due to the fact that the beneficiary was no longer eligible for long-term foster care upon reaching his eighteenth birthday on August 18, 2002 pursuant to Florida law. *See Notice of Automatic Revocation*, dated August 17, 2004. The Florida statutes contained at Title V, Chapter 39, referenced by the district director provide as follow:

39.01(12) "Child" or "youth" means any unmarried person under the age of 18 years who has not been emancipated by order of the court.

39.013(2) The circuit court shall have exclusive original jurisdiction of all proceedings under this chapter, of a child voluntarily placed with a licensed child-caring agency. . .

When the court obtains jurisdiction of any child who has been found to be dependent, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 18 years of age.

The district director found that because the beneficiary had reached the age of majority under Florida law, he was no longer under the jurisdiction of the family court system by virtue of having aged out of its jurisdiction. Consequently, he was no longer eligible for special immigrant status. *See Notice of Automatic Revocation*, dated August 17, 2004.

On appeal, the beneficiary has not submitted a brief but asserts in the brief statement accompanying the Notice of Appeal (Form I-290B) that CIS abused its authority in revoking the approval of the petition. He contends that CIS failed to adjudicate the petition for SIJ status within a reasonable time. The beneficiary notes that the I-360 was filed on February 16, 2002, pursuant to the state court order of January 10, 2002. The beneficiary asserts that while CIS approved the petition on August 28, 2003, it did not adjudicate the Form I-485 until August 17, 2004, which the beneficiary asserts was unreasonable and an abuse of authority in light of the beneficiary's circumstances. *See Form I-290B*, dated September 15, 2004. According to the beneficiary, the failure to adjudicate the applications in a timely manner led to an unjust result for the beneficiary.

A review of beneficiary's position on appeal reveals that he does not take issue with the district director's conclusion that the beneficiary no longer qualified for SIJ status as a matter of law, but rather, takes issue with the timeliness of the adjudication and contends that unreasonable delays in the adjudication resulted in the unjust denial of the petition. The beneficiary offers no authority in support of his contention that the period of time involved in the adjudication of his case was unreasonable. Nevertheless, the AAO will examine the facts of the case to address the beneficiary's claim of unreasonable delay.

As noted, the SIJ petition was filed on February 16, 2002. Although the beneficiary's complaint appears to focus on the delay relating to the adjustment of status application, the AAO will address the timeline for the adjudication of the SIJ petition as well in order to address the overall processing of the beneficiary's case. Following the receipt of the petition, CIS acknowledged its receipt, and advised that the normal processing time was between 120 to 180 days. The notice also provided a telephone number by which case status inquiries could be made 24 hours a day. The SIJ petition was approved on August 28, 2003. While the petition was adjudicated more than a year after it was filed, it appears from a review of the file that some delay was attributable to questions raised as to the beneficiary's true age. It appears from the file that the beneficiary provided a different date of birth at the time he was apprehended by the Border Patrol. The date of birth provided at that time was January 1, 1982. This information conflicted with the beneficiary's statement on the Form I-360 that he was born on August 18, 1984. Were the 1982 date found to be the beneficiary's true date of birth, that would have made him twenty years old at the time of filing the petition, and twenty-one during the course of its adjudication, thus making him statutorily ineligible for SIJ status. In order to resolve the discrepancy concerning his age, the beneficiary was asked to provide additional evidence, including evidence of his true age. The beneficiary alleges that the delay in the adjudication of the adjustment of status application following approval of the petition was unreasonable; presumably he contends that an adjudication closer in time to August 18, 2003, would have allowed the beneficiary to retain his eligibility for SIJ status. This contention of undue delay is unwarranted for several different reasons.

First, CIS is not in a position to adjudicate an application that has not yet been filed, and no application for adjustment of status was filed with the I-360 petition in February 2002. The record reflects that it was only after the approval of the SIJ petition on August 18, 2003, that the beneficiary's counsel submitted an application for adjustment of status. Moreover, this application was not filed until March 4, 2004, nearly seven months after the approval of the I-360. Second, once the adjustment of status application was filed, CIS adjudicated it in just over five months, a period of time that cannot be deemed unreasonable as it was even faster than the projected time periods.³ Third, if the beneficiary, his guardian, or his counsel were concerned about the length of the adjudicatory process, there is no evidence of that concern. The file does not contain a record of any inquiries, requests to expedite, or other manifestations of concern regarding the status of the petition. Finally, and most importantly, the beneficiary turned eighteen, and thus was no longer a child under Florida law, on August 18, 2002, less than six months after the SIJ petition was filed. Thus, in order for the beneficiary to have been accorded SIJ status, all issues regarding the beneficiary's case, including issues regarding his age, necessary medical, criminal, and other checks would have to have been completed within less than six months from the date of the filing. While it is reasonable to believe that CIS would have made every effort to adjudicate the applications within that period, had both applications been filed, and had the beneficiary's counsel urged expedited action, there is simply no basis upon which to assert that CIS's inability

³ An examination of the projected processing times for the Miami District Office, as reflected on the CIS website, indicates that as of March 2, 2005, that office was adjudicating I-485s filed in February 2004—a month before the petitioner's application was filed.

to adjudicate the applications within five months constitutes an abuse of authority. Furthermore, due to the failure of the beneficiary to even have submitted the necessary adjustment of status application concurrently with the I-360, the failure to adjudicate the applications before the applicant's eighteenth birthday cannot be attributed to CIS. This is particularly so when one considers that the beneficiary arrived in the United States in July of 2000 at the age of fifteen, and failed to expeditiously pursue any possible SIJ status, notwithstanding the designation of a guardian, and the retention of counsel. No filings related to the SIJ petition were made until the beneficiary had been in the United States more than one-and-a-half years after his entry.

In visa petition proceedings, the burden of proof is on the petitioner to establish eligibility for the benefit sought by a preponderance of the evidence. *Matter of Brantigan*, 11 I&N Dec. 151 (BIA 1965). The issue "is not one of discretion but of eligibility." *Matter of Polidoro*, 12 I&N Dec. 353 (BIA 1967). In this case, the petitioner has not proven eligibility for the benefit sought.

ORDER: The appeal is dismissed.