

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave, N.W. Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

C1

PUBLIC COPY



FILE: [Redacted] Office: BOSTON Date: FEB 07 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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, Chief
Administrative Appeals Office

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

The applicant is a 19-year-old native and citizen of Cape Verde. She seeks classification as a special immigrant juvenile (SIJ) pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4).

The District Director found that the applicant failed to show that she continues to be dependent on a juvenile court and eligible for long-term foster care in the State of Massachusetts, as required by 8 C.F.R. § 204.11(c)(5). The petition was denied accordingly.

On appeal, counsel for the applicant contends that the decision of the District Director is based on an erroneous interpretation of section 101(a)(27)(J) of the Act and related regulations. *Brief in Support of Appeal*, dated September 25, 2007. Counsel contends that the District Director's decision constitutes a change in USCIS policy, and as the applicant relied on previous policy, the District Director's decision violates fundamental principles of due process and fairness. *Id.* at 3.

The record contains, in pertinent part, a brief from counsel; a copy of a dependency order from the Commonwealth of Massachusetts Trial Court, Probate and Family Court Department ("juvenile court"), dated March 1, 2007; a copy of a guardianship order from the juvenile court, dated March 1, 2007; a copy of an order from the juvenile court titled "Findings of Fact and Rulings of Law" relating to the applicant's guardianship, dated January 30, 2007; a copy of a petition for adoption filed by the applicant's adoptive parents, dated January 24, 2007; a copy of an adoption certificate reflecting that the applicant was adopted on June 19, 2007; copies of the applicant's passport, Form I-94, and B-2 visa; a copy of a school record for the applicant; a copy of the applicant's mother's death certificate, and; documentation that reflects that the applicant's father irrevocably surrendered custody of the applicant on January 12, 2007. The entire record was considered in rendering a decision on the current appeal.

Applicable Law

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 chapter

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;
- (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 regulation at 8 C.F.R. § 204.11(a) provides the following:

Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in [a] guardianship situation after having been found

dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care.

Facts and Procedure

The record reflects that the applicant was born in Cape Verde on March 25, 1989. The applicant entered the United States in B-2 status on April 16, 2000 to join her mother while her mother sought medical treatment. The applicant's mother died on February 15, 2001. The applicant's father indicated that he lacked the resources or desire to care for the applicant, and he executed a surrender form before the juvenile court, relinquishing his parental rights over the applicant. *Surrender Form*, dated January 12, 2007.

On March 1, 2007, 24 days before the applicant's 18th birthday, the juvenile court issued an order finding that the applicant was dependent on the court due to neglect and abandonment. *Juvenile Court Dependency Order*, dated March 1, 2007. The juvenile court deemed the applicant eligible for long-term foster care, and found that it was not in the applicant's best interest to return to Cape Verde. *Id.* at 1. The juvenile court indicated that it was in the best interests of the applicant to remain in the United States. *Id.* In a separate order, the juvenile court placed the applicant under the guardianship of her aunt and uncle. *Guardianship Order*, dated March 1, 2007.

The applicant filed the present petition for SIJ status on March 16, 2007, nine days prior to her 18th birthday. The applicant reached 18 years of age on March 25, 2007. On June 19, 2007, the applicant's aunt and uncle adopted her.

The District Director found that the applicant failed to show that she continues to be dependent on a juvenile court and eligible for long-term foster care in the State of Massachusetts, as required by 8 C.F.R. § 204.11(c)(5). The District Director stated that "[w]ith a few limited exceptions; a child is no longer dependent upon the juvenile court in Massachusetts upon reaching the age of majority, determined to be age 18." *Decision of the District Director* at 4, dated August 1, 2007. Thus, the District Director found that the applicant was no longer dependent on the juvenile court once she reached age 18. The District Director declined to discuss what exceptions exist, or to analyze whether the applicant met any of the referenced exceptions.

Counsel's Assertions on Appeal

On appeal, counsel contends that the decision of the District Director is based on an erroneous interpretation of section 101(a)(27)(J) of the Act and related regulations. *Brief in Support of Appeal* at 1-3. Counsel asserts that the applicant meets the requirements of section 101(a)(27)(J)(i) of the Act, as the juvenile court declared her dependent on the court due to neglect and abandonment, she was found eligible for long-term foster care, and the juvenile court determined that it was not in her best interests to return to Cape Verde. *Id.* at 1. Counsel observes that section 101(a)(27)(J)(i) of the Act is written in the past tense, and asserts that the applicant need only show that she met its requirements "at some time." *Id.* at 1-2.

Counsel emphasizes that the applicant was adopted after the juvenile court issued its dependency order. *Id.* at 2-3. Counsel asserts that, under the authority of 8 C.F.R. § 204.11(a), "a child who has been adopted or

placed in a guardianship situation remains eligible for special immigrant status beyond dependency on the juvenile court.” *Id.* at 2.

Counsel further asserts that the definition of a special immigrant juvenile is analogous to the definition of “child” in the Act. *Id.* at 3. Counsel states that “[t]he notion that a minor child’s eligibility for a particular immigration benefit may depend on one circumstance having taken place prior to the child’s eighteenth birthday, with the benefits extending beyond that birthday until the age of twenty-one, is fully in keeping with other provisions of the [Act].” *Id.* Thus, counsel suggests that once the juvenile court issued the dependency order, the applicant remained eligible for SIJ status regardless of any changes in her circumstances, until such time that she reaches age 21.

Counsel asserts that the U.S. Citizenship and Immigration Services (USCIS) Boston District Office “has recognized that children between the ages of eighteen and twenty-one could continue to be eligible for special immigrant juvenile status as long as they were declared dependent on the juvenile court prior to their eighteenth birthday and remained eligible for long-term foster care.” *Id.* Counsel contends that the applicant filed the present application in reliance on past practice on the Boston District Office, and that to apply a new policy would violate fundamental principles of due process and fairness. *Id.*

Analysis

The primary issue in the present proceeding is whether the applicant has shown that she meets the requirements of section 101(a)(27)(J)(i) of the Act and the regulation at 8 C.F.R. § 204.11(c)(5).

The regulation at 8 C.F.R. § 204.11(c)(5) requires that an applicant show that she “*continues* to be dependent upon the juvenile court” 8 C.F.R. § 204.11(c)(5) (emphasis added). The AAO observes that no such requirement is explicitly stated in the Act. Section 101(a)(27)(J)(i) of the Act merely requires that an applicant show that she is an individual 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” Section 101(a)(27)(J)(i) of the Act (emphasis added). Counsel suggests that the Act is satisfied where an applicant establishes that, at some point prior to applying for SIJ status, she has been declared dependent on a juvenile court. Counsel contends that an applicant remains eligible for SIJ status even if she is no longer dependent on a juvenile court.

The AAO acknowledges that the regulations at 8 C.F.R. § 204.11(c)(3) and (5) differ from the Act with respect to the requirement that an applicant show dependency on a juvenile court. As quoted above, section 101(a)(27)(J) of the Act requires that an applicant show that she is an individual 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” Section 101(a)(27)(J)(i) of the Act (emphasis added). Thus, section 101(a)(27)(J)(i) of the Act may be satisfied by showing that a juvenile court has legally committed the applicant to, or placed the applicant under the custody of, an agency or department of a State, without the need to show that the applicant has been declared dependent on a juvenile court. *Id.* The regulations at 8 C.F.R. § 204.11(c)(3) and (5) require that an applicant has been declared dependent upon a juvenile court, and that she continues to be so dependent, without providing for the alternatives found in

section 101(a)(27)(J)(i) of the Act of showing that a juvenile court has legally committed her to, or placed her under the custody of, an agency or department of a State.

Regulations are enacted to govern the application of statutes according to the intent of Congress. Where requirements found in a statute conflict with those in a regulation, the requirements of the statute trump the regulation. Thus, while the regulations at 8 C.F.R. § 204.11(c)(3) and (5) indicate that an applicant must be declared dependent and continue to be dependent upon a juvenile court, the AAO must give effect to the alternative requirements of section 101(a)(27)(J)(i) of the Act. Accordingly, where an applicant has shown that a juvenile court has legally committed her to, or placed her under the custody of, an agency or department of a State, and she continues to maintain that status, she is not also required to establish that she has been declared dependent, and that she continues to be dependent, on a juvenile court. *See* section 101(a)(27)(J)(i) of the Act.

The construction of 8 C.F.R. § 204.11(c)(5) serves to require that an applicant continue to be dependent on a juvenile court or to need State-managed assistance at the time of adjudication of the petition for SIJ status. Essentially, 8 C.F.R. § 204.11(c)(5) requires that the conditions described in section 101(a)(27)(J)(i) of the Act continue at the time of adjudication. Special immigrant juvenile status was created to offer relief to children who are victims of abuse, neglect, or abandonment, not merely as a means to lawful permanent resident status. *See, e.g., H.R. Rep. No. 105-405, at 130 (1997). It is a reasonable interpretation of Congressional intent in creating the SIJ program that an applicant should continue to be dependent upon a juvenile court or to require State-managed assistance at the time of adjudication of the petition for SIJ status. Id.* If such a requirement was not imposed, one can envision factual scenarios that would contravene the spirit of protection embodied in the SIJ program. For example, an abused child placed into foster care at an early age may meet all requirements for SIJ status at that time. Yet, changed circumstances may result in successful reunification of the child with her parents. Under counsel's interpretation of the Act, such child would continue to be eligible for SIJ status based on her prior status as a child in need of State assistance, despite the fact that she no longer requires such assistance. The AAO does not find such an interpretation to be congruent with Congressional intent in enacting the SIJ provisions of the Act. *See, e.g., H.R. Rep. No. 105-405, at 130 (1997).*

It is further noted that 8 C.F.R. § 204.11(c) contains other requirements that are not explicitly stated in the Act. For example, 8 C.F.R. § 204.11(c)(1) requires that an applicant be under twenty-one years of age. While such a requirement does not appear in the Act, it is a reasonable interpretation of Congressional intent to limit special immigrant juvenile status to those under a certain age. Thus, the fact that 8 C.F.R. § 204.11(c) includes requirements that are not explicitly stated in the Act does not render the provisions of 8 C.F.R. § 204.11(c) in conflict with the Act or invalid.

Based on the foregoing, in order to establish that she is eligible for SIJ status, an applicant must show that she is an individual "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." Section 101(a)(27)(J)(i) of the Act. In accord with congressional intent, as reflected in 8 C.F.R. § 204.11(c)(5), the applicant must show that the conditions described in section 101(a)(27)(J)(i) of the Act continue as of the time that the petition for SIJ status is adjudicated.

The record clearly shows that, on March 1, 2007, the applicant was deemed dependent on the juvenile court and eligible for long-term foster care in the State of Massachusetts. However, the applicant reached 18 years of age 24 days later on March 25, 2007. The court order, as well as the record, do not support a finding that the juvenile court maintained jurisdiction over the applicant beyond her eighteenth birthday, or that it had legal authority to do so under Massachusetts law.

The juvenile court did not indicate that it intended to retain jurisdiction over the applicant past her eighteenth birthday, at such time that she would reach the age of majority under Massachusetts law. M.G.L.A. ch. 4 § 7 (defining “age of majority”); M.G.L.A. 231 § 85P (defining “age of majority”). Nor did the juvenile court cite any provision of Massachusetts law that would provide it with the authority to maintain jurisdiction over the applicant beyond her eighteenth birthday.¹ Moreover, Massachusetts law provides that a guardianship terminates by law when a child reaches age 18. *See* M.G.L.A. Chapter 201 § 4.

The AAO makes no finding regarding whether the juvenile court would have had authority to continue its jurisdiction over the applicant beyond her eighteenth birthday for the purpose of maintaining her dependency upon the juvenile court. In the absence of such an affirmative order or action by the juvenile court, the applicant has not established that the juvenile court’s jurisdiction continued beyond her eighteenth birthday, such that the applicant remained dependent upon the juvenile court as of March 25, 2007.

As discussed above, as an alternative to showing continued dependency on the juvenile court, the applicant may show that a court has legally committed her to, or placed her under the custody of, an agency or department of a State. Section 101(a)(27)(J)(i) of the Act. The record does not reflect that the applicant was legally committed to, or under the custody of, an agency or department of the State of Massachusetts. *Id.* The applicant was placed under the guardianship of her aunt and uncle on the same day that the juvenile court issued its dependency order, on March 1, 2007.

Counsel emphasizes that the applicant was adopted after the juvenile court issued its dependency order. Counsel asserts that, under the authority of 8 C.F.R. § 204.11(a), “a child who has been adopted or placed in a guardianship situation remains eligible for special immigrant status beyond dependency on the juvenile court.” *Brief in Support of Appeal* at 2.

It is noted that the applicant was adopted after she reached age 18. As previously discussed, the applicant has not submitted sufficient evidence to show that she was dependent on a juvenile court beyond her eighteenth birthday, or that she was legally committed to, or under the custody of, an agency or department of the State of Massachusetts. Section 101(a)(27)(J)(i) of the Act. Thus, as presently constituted, the record does not

¹ Juvenile court jurisdiction in the State of Massachusetts ended upon a child attaining the age of 18. *See* M.G.L.A. Chapter 119 § 24 (setting forth procedure to commit a child under the age of 18 to custody or other disposition). However, the AAO recognizes that some exceptions exist regarding criminal actions against a juvenile. *See* M.G.L.A. Chapter 119 § 72. Yet, as the present matter does not involve criminal proceedings against the applicant, the extension of juvenile court jurisdiction provided in M.G.L.A. Chapter 119 § 72 does not apply.

reflect that the applicant was eligible for SIJ status at the time that she was adopted. The AAO does not find that the operation of 8 C.F.R. § 204.11(a) may serve to revive the applicant's eligibility for SIJ status as of the date she was adopted once she has already become ineligible.

Based on the foregoing, the applicant has not shown that she was dependent on a juvenile court beyond her eighteenth birthday, or that she was legally committed to, or under the custody of, an agency or department of the State of Massachusetts. Section 101(a)(27)(J)(i) of the Act. For this reason, the applicant has not established that she is eligible for SIJ status. *Id.*

Counsel contends that the District Director's decision constitutes a change in USCIS policy without notice to the public, and that the applicant relied on previous policy to her detriment. However, the applicant has not submitted any examples of specific petitions that were granted based on the same or similar facts as the present matter.

Further, even had the applicant established that her reliance on a changed USCIS Boston District Office SIJ policy caused her to age out of eligibility for SIJ status, the AAO would lack authority to apply the doctrine of equitable estoppel to approve the petition. The BIA's decision in *Matter of Hernandez-Puente* addressed the doctrine of equitable estoppel.² As noted by the BIA, the United States Supreme Court has opened the possibility that equitable estoppel might be applied against the government based upon the actions of its agents in situations where it is found that those agents engaged in "affirmative misconduct." See *INS v. Hibi*, 414 U.S. 5 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961). However, it has not specifically ruled that affirmative misconduct would be sufficient to prevent the government from enforcing the immigration laws. *INS v. Miranda*, 459 U.S. 14 (1982); see also *Matter of Tuakoi*, 19 I&N Dec. 341 (BIA 1985); *Matter of M/V "Solemn Judge"*, 18 I&N Dec. 186 (BIA 1982). It is observed that some federal courts have found affirmative misconduct in certain situations and have imposed the doctrine of equitable estoppel against the government. See, e.g., *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2d Cir. 1976). Yet, the question of whether a federal court may apply the doctrine of equitable estoppel against the government is different from whether the AAO has the authority to apply the doctrine in this, or any other case. That question was answered in the negative by the BIA, which assessed its own equitable estoppel authority as follows:

[A]lthough the Fifth Circuit may have accepted the availability of estoppel against the Service, the Board itself and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Service so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. Equitable estoppel is a judicially devised doctrine that precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or a defense, regardless of its substantive validity. *M.D. Phelps v. Fed. Emergency Management Agency*, 785 F.2d 13 (1st Cir. 1986). Estoppel is an equitable form of action and only equitable rights are recognized. *Keado v. United States*, 853 F.2d 1209 (5th Cir. 1988). By contrast, this Board, in considering

² The AAO notes that although *Matter of Hernandez-Puente* did not involve an SIJ petition, it involved a similar factual scenario of an individual who aged out of eligibility for derivative status. Additionally, the facts involved the agency's failure to adjudicate the petition over a period of at least two years, during which time the beneficiary's family purportedly made numerous inquiries and received various assurances.

and determining cases before it, can only exercise such discretion and authority conferred upon the Attorney General by law. 8 C.F.R. § 3.1(d)(1) (1991). Our jurisdiction is defined by the regulations and we have no jurisdiction unless it is affirmatively granted by the regulations. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985); *Matter of Zaidan*, 19 I&N Dec. 297 (BIA 1985).

Matter of Hernandez-Puente, supra at 338-39.

The AAO finds that it likewise derives its authority from the regulations and lacks authority to apply a remedy not explicitly granted by the regulations. Moreover, even if it were determined that the AAO had such authority, the facts in the instant case do not lend themselves to a finding of affirmative misconduct by the District Director, or detrimental reliance by the applicant upon a changed policy.

The AAO further notes that if the District Director discovers that a provision of the Act or regulations has been misapplied in prior matters, it is his or her duty to ensure that such provision is correctly applied in all future matters. Prior errors do not serve as binding precedent, irrespective of an applicant's reliance on the previous misapplication of the Act or regulations. *Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Conclusion

Based on the foregoing, the applicant has not shown that she remained dependent on a juvenile court after her eighteenth birthday, or that she remained legally committed to, or under the custody of, an agency or department of the State of Massachusetts. Section 101(a)(27)(J)(i) of the Act. Nor has the applicant established that the AAO has the authority to apply the doctrine of equitable estoppel in the present matter, or that if such authority existed, it would be warranted based on the current facts. Accordingly, the applicant has not established that she is eligible for SIJ status.

In visa petition proceedings, the burden of proof is on the applicant to establish eligibility for the benefit sought by a preponderance of the evidence. *Matter of Brantigan*, 11 I&N Dec. 493 (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 applicant has not shown eligibility for the benefit sought. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.