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U.S. Citizenship
and Immigration
Services

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FILE:



Office: MIAMI

Date:

MAR 17 2005

IN RE: Petitioner:
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:



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 denied the special immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on certification. The AAO withdraws the decision of the district director and grants the petition.

The petitioner is a native and citizen of Haiti who 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 denied the petition on December 20, 2004. The district director found that the petitioner was more than 18 years of age, and therefore was no longer dependent upon a juvenile court for the State of Florida, and no longer eligible for long-term foster care.

On certification, counsel for the petitioner has submitted a brief in support of a finding that the petitioner has established eligibility for SIJ status, asserting that the district director of Citizenship and Immigration Services (CIS), had erroneously determined that the petitioner had attained his 18th birthday.

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;
- (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 petitioner, Ernso Joseph, is a native and citizen of Haiti. He was apprehended on October 29, 2002, as part of a group of Haitian immigrants who traveled to the United States by boat. The group reached land at Key Biscayne, Florida. At the time that he was arrested, the petitioner stated that he was born on December 5, 1984, making him a minor who was a little over one month short of his 18th birthday. *See Form Record of Deportable/Inadmissible Alien (Form I-213)*, dated October 29, 2002.

The then Immigration and Naturalization Service (INS) issued a Notice to Appear, (NTA) against the petitioner on October 29, 2002, placing him into removal proceedings before the Immigration Court in Miami, Florida. The petitioner was scheduled for hearings in regard to both his custody and immigration status at which he was represented by counsel. The petitioner withdrew his request to be released on bond at a hearing held on November 14, 2002, at which time his counsel indicated that additional documents were being gathered in order to allow them to proceed on that request. The petitioner sought asylum and withholding of removal and a hearing was held on January 29, 2003. The immigration judge granted the application on the basis that the petitioner had demonstrated past persecution and a well-founded fear of persecution on account of his membership in a particular social group, i.e., Haitian orphans. The INS appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). The BIA found the immigration judge erred in determining that Haitian orphans are a particular social group and reversed the decision. *See Decision of the Board of Immigration Appeals*, dated August 21, 2003.

During the course of the immigration court proceedings, the petitioner testified inconsistently as to his age. Initially the petitioner testified at a November 2002 hearing that he would be 18 years old in December of that year, consistent with the date of birth provided at his apprehension and in his asylum application. At a subsequent hearing on the asylum application, the petitioner testified that he was born on January 4, 1985.

The record reflects that the petitioner was returned to custody following the BIA's decision, and there were various attempts by counsel to secure his release from custody. These attempts were ultimately successful, and the bureau of Immigration and Customs Enforcement (ICE), the successor agency to the INS for custodial purposes among others, ultimately released the petitioner from custody on an order of supervision on January 16, 2004.

Counsel asserts: "DHS Secretary Tom Ridge, after extensive review of the same evidence, had already determined that Ernso is a juvenile when he decided to release Ernso from detention and grant consent for Ernso to pursue dependency in state juvenile court." *See Counsel's Brief in Response to Notice of Certification*, dated February 11, 2005. The AAO does not agree with counsel's assertions regarding the

effect of any actions taken by the Department of Homeland Security (DHS). The record contains a letter dated January 28, 2004, addressed to David Shahoulian, co-counsel to the attorneys from the Florida Immigrant Advocacy Center (FIAC) with respect to this case. That letter specifically addressed the issue of consent by DHS to the jurisdiction of a state juvenile court over the custody issue so that the petitioner could pursue special immigrant juvenile (SIJ) status. The letter to counsel granted consent to the jurisdiction of the state juvenile court "for the limited purpose of allowing [the petitioner] to pursue an SIJ classification." The letter goes on to state that while the state court could decide whether to declare the client dependent on the court and/or commit him to the custody of a state agency, the grant of consent:

does not constitute a finding or an endorsement on any substantive issue relating to SIJ status. It merely constitutes a decision by ICE that sufficient evidence exists to consent to the jurisdiction of a state juvenile court to make independent findings, relating to potential SIJ status. This consent to jurisdiction of the state court will automatically terminate if: (1) the state court declines to either issue a dependency order or legally commit your client to, or place your client under, the custody of an agency or department of the state, or your client is denied SIJ status by the Bureau of Citizenship and Immigration Services (CIS).

Consequently, no binding determinations have been made by DHS officials as to the petitioner's status as a juvenile for SIJ purposes.

The AAO will next turn to the evidence in the record bearing on the petitioner's date of birth, which, in turn, will have a bearing on his eligibility for treatment as a dependent by the Florida courts and on his eligibility for SIJ status. The AAO will organize its discussion according to the type of evidence contained in the record, i.e., testimonial, documentary, and medical evidence.

Testimonial Evidence

The first category of evidence that exists in the record is what the AAO will refer to in general terms as testimonial evidence, and includes statements made by the petitioner orally to immigration officials or in applications or petitions submitted on his behalf. This decision has previously noted that the petitioner at the time of his apprehension or during the course of his immigration court hearing had provided his date of birth as either December 1984 or January of 1985 both in his oral statements and in the written applications filed on his behalf.

In addition, the file also contains a sworn statement made by the petitioner on November 27, 2004, in connection with the petition for SIJ status. The petitioner was asked specifically why he had originally claimed to have been born on January 4, 1985. The petitioner's explanation was that he had never seen his birth certificate prior to having it shown to him by his attorney who had obtained it for him. He further stated that when his mother died, his aunt told him that he was nine years old. When arrested, he was asked to provide his date of birth, and stated that he didn't know the year of his birth so he "just gave a date." See *Affidavit/Sworn Statement of Ernsso Joseph*, dated November 22, 2004.

Documentary Evidence

The documentary evidence in the record that directly addresses the petitioner's age consists of two documents that appear to be two different types of birth certificates. The first appears to be a birth certificate issued on April 23, 2003, and the other is a separate, but similar document that appears to be an extract or summary of the birth certificate issued on January 30, 2004. Each of these documents is accompanied by a certified translation. The document that appears to be the petitioner's birth certificate is the document with an original looking seal bearing the title "Acte de Naissance" at the top of the document. The separate, extract document bears the phrase "Archives Nationales d'Haiti" at the top. Accompanying each of these documents is a translation submitted by FIAC which is entitled "Translation of a Birth Certificate" and which is certified as being "a true and accurate rendition of the French original of this document." The translation states that the date of birth for the individual identified as [REDACTED] son of [REDACTED] and [REDACTED] is July 16, 1987, and references the certificate number corresponding to each document.

Conflicting Information in the Birth and Death Certificates

In addition to the Haitian birth documents, the record also contains copies of the death certificates of the petitioner's parents, [REDACTED] and [REDACTED]. The death certificates are accompanied by certified translations. The death certificate of the petitioner's father, [REDACTED] states that he died on July 15, 1989, and that the death was reported by [REDACTED] on June 28, 2002. The death certificate of the beneficiary's mother, [REDACTED] states that she died on February 14, 1994, and that the death was reported by [REDACTED] on July 11, 2002. The two certificates appear to have been certified on September 9, 2003.

The information on the death certificates regarding the father's death conflicts with the information in the birth certificate offered for the petitioner. Although the record lacks a full translation of that birth certificate, there appears to be agreement that the petitioner's birth was reported on February 7, 2002, and was issued in Haiti on April 23, 2003. The conflict relates to the fact that the birth certificate states that it was the petitioner's father who, on February 7, 2002, reported the petitioner's birth to the authorities. This is inconsistent with the father's death certificate that states that he had been deceased for nearly thirteen years. Counsel for the petitioner, however, has offered evidence in an effort to explain the conflict and establish the birth certificate's reliability.

First, co-counsel's letter in support of a request that ICE consent to the jurisdiction of the juvenile court indicated that in an effort to verify the authenticity of the birth certificate obtained in April 2003, counsel retained a private investigator. That investigator met with John Wilfrid Bertrand, identified as the Director of the Haitian National Archives. The investigator obtained a certification of authentication from Mr. Bertrand, as confirmation that the signature on the petitioner's birth certificate is authentic. *See Letter from David Shahoulian Referencing Exhibit B*, dated October 6, 2003. In addition, counsel offers a declaration from Mr. Bertrand that states that he is aware of the fact that the birth certificate indicates that it was registered by the father in 2002, when the father had died many years earlier. According to Mr. Bertrand, this erroneous information did not signify to him that it was fraudulent, as, in his experience, there have been numerous instances of a birth being registered by a non-parent, whereas the birth certificate indicates that it was registered by a parent. *See Declaration of John Wilfrid Bertrand*, dated October 15, 2003.

Second, counsel attributes the conflict in the dates contained in the birth and death certificates to elements of Haitian culture. In support of this assertion, counsel offers the declaration of Lucie Tondreau, the investigator

retained by counsel to attempt to verify the authenticity of the birth certificate. Ms. Tondreau, who operates a business relating to document research and translation, explained the steps she took to authenticate the signatures on the birth and death certificates. *See Declaration of Lucie Tondreau*, dated October 21, 2003. Ms. Tondreau further declared that because most Haitian children are not born in hospitals, their birth must be affirmatively registered by others, frequently many years after their birth, and that Haitian birth certificates commonly assert that the birth was registered by the parent, even when the parent is deceased. *Id.*

Third, counsel attributes the conflict between the documentary evidence and the petitioner's previous statements and testimony to his youth, lack of education, and mental state. In support of these assertions, counsel has offered declarations from two individuals. One declaration is from Louis Hearn Marcelin, Ph.D., a researcher at the University of Miami, who states that he is conducting research studies on Haitian adolescents and their families in Miami Dade County. He states that in his experience, it is not uncommon for Haitian youth to be confused about their dates of birth, stating that he has encountered this in the literature and in his own research. He concludes by stating, "the case of Ernso falls clearly within this cultural pattern." *See Declaration of Louis Hearn Marcelin*, dated October 22, 2003.

Counsel also offers the declaration of J. Bryan Page, Ph.D., a professor of Anthropology at the University of Miami. In his declaration, he states that he has studied the Haitian community. He states that in the course of his research, he has found that Haitian children are not aware of their date of birth, particularly illiterate, rural Haitians who do not necessarily celebrate their dates of birth. He states that this phenomena has been encountered in the course of his research and that it is completely unsurprising that someone like the petitioner might not be able to provide his exact age. *See Declaration of J. Bryan Page, Ph.D.*, dated October 24, 2003.

Finally, the petitioner's counsel offers evidence to suggest that the petitioner's mental state may also have contributed to his inconsistent statements regarding his date of birth. In this regard, counsel references a psychological evaluation of the petitioner by Teresa Descilo, who identifies herself as the Executive Director of the Victim Services Center and a certified trauma expert. She was asked to examine the petitioner during his period of detention at the Krome Service Processing Center, to evaluate his mental well-being. Her evaluation resulted in a diagnosis of extreme depression, clinical anxiety, and Post-Traumatic Stress Disorder. *See Psychological Evaluation of Ernesto Joseph*, dated May 9, 2003. According to counsel, the assessment revealed that the petitioner "was extremely dissociated, affecting his conscious memory and logical thought." *See Counsel's Brief in Response to Notice of Certification*, pp.18-20.

Medical Evidence

The record contains the results of a number of medical assessments conducted for the purpose of assisting in determining the petitioner's age. The first examination was conducted shortly after immigration officials apprehended the petitioner. That examination, a forensic dental examination conducted on November 4, 2002, estimated that he was 19 years old.

A year later, on November 3, 2003, wrist and knee X-Rays were taken. The X-ray results dated November 12, 2003, revealed that the two indicators of age from the two assessment points from the wrist X-rays indicated confidence levels of 95% of the petitioner being between 16.94 and 18.14 years for assessor 1, and

between 16.56 and 17.76 years for assessor 2. The knee X ray was associated with a 95% confidence level of the petitioner being between 16.31 and 18.08. The results of the forensic dental examination revealed that “the empirical statistical probability of [REDACTED] having attained his 18th birthday is 87.7%.”

Counsel challenges these assessments by asserting that medical examinations of this type to determine age “are universally regarded as unreliable.” *Counsel’s Brief in Response to Notice of Certification*, at p. 8.

The District Director’s Decision

In discussing the district director’s decision denying the petition for SIJ status, counsel states that the denial did not question the authenticity of the birth certificates or cite to any new evidence indicating that the petitioner was born on a date other than July 16, 1987. *Counsel’s Brief in Response to Notice of Certification*, at p.10. Counsel asserts that instead, the district director’s decision was based upon four factors: 1) the birth certificate was registered with the Haitian authorities in 2002 and not when he was born; 2) the birth certificate states that it was registered by the deceased father; 3) the petitioner’s testimony regarding the dates that his parents died; 4) the petitioner’s testimony regarding his age relative to that of his cousin, [REDACTED]

The AAO finds that on balance, the petitioner’s evidence has overcome the questions raised, and CIS has not been able to demonstrate through its own evidence that sufficient doubts exist as to the petitioner’s eligibility.

The AAO notes that although counsel has criticized the medical evidence as being an unreliable way to determine age, the evidence actually supports the petitioner’s claim to a great degree. On balance, the X-ray evidence indicates that it is more likely that the petitioner is under the age of 18. While the dental evidence suggests that he is over 18, the evidence tends neither to conclusively prove, nor disprove that he is over the age of 18.

The AAO finds that there is insufficient evidence in the record to conclude that the birth certificate evidence is inaccurate or otherwise unreliable. The documents have been authenticated as being legitimate documents. Although the authenticator of the records is not in a position to vouch for the accuracy of the information contained in those records, neither is CIS in a position to question what those documents on their face assert. It bears mentioning that there has been a considerable amount of effort both investigatory and otherwise to determine the accuracy of the information contained in the birth certificate, and that such efforts have been conducted over a lengthy period of time. While ICE and CIS have dedicated resources to that effort, it does not appear that any conclusive evidence has been produced to justify a rejection of the contents of the birth certificates. While it appears from the record that it was deemed important to obtain the petitioner’s baptismal records and sacramental records pertaining to the funerals of his parents, it does not appear that any such evidence was obtained. While such evidence could have either bolstered or refuted the petitioner’s claim, it simply does not exist in the record. Without it, no documentary evidence exists to cast doubt on the birth certificate evidence.

¹ The correct reference to the beneficiary’s file number should have been [REDACTED] and not [REDACTED]. This error appears to have been a typographical error.

The AAO notes the inconsistencies in the petitioner's testimony, and the problems described in the petitioner's birth and death certificate evidence. However, we find that the petitioner has presented sufficient evidence for those concerns to be overcome in this case. The expert witnesses have provided plausible explanations for the inconsistencies. Furthermore, there is no countervailing evidence that contradicts those conclusions.

Finally, the AAO notes that the immigration judge did, in fact, comment on the youthful appearance of the petitioner during the immigration court proceedings, and the Florida court found the petitioner to be a juvenile. Based on a thorough review of the record, the AAO finds that the date of birth shown on the petitioner's birth certificate, July 16, 1987, should be accepted as the petitioner's correct date of birth in this and any future proceedings.

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). In this case, the evidence establishes that the petitioner is eligible for the benefit sought. Accordingly, the decision of the district director denying the petition is withdrawn and the petition will be approved.

ORDER: The petition is approved.