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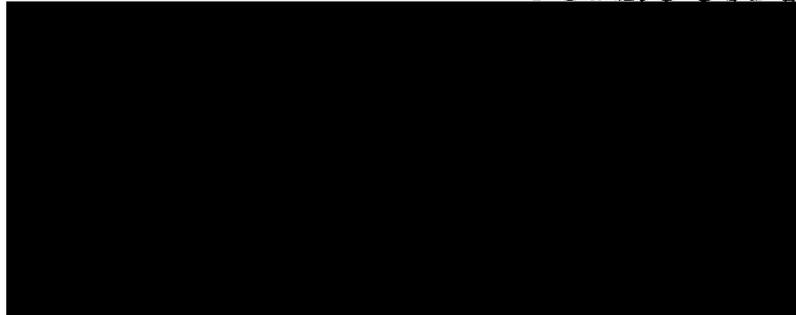
U.S. Department of Homeland Security  
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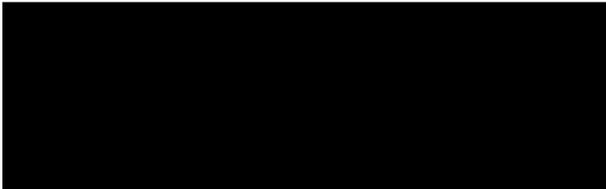
IN RE: Petitioner:



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, 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 sustained.

The applicant is a 20-year-old native and citizen of Guatemala. He 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 he 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). Specifically, the District Director found that, once the applicant reached age 18, he was no longer dependent on the Commonwealth of Massachusetts Trial Court, Probate and Family Court Department (“juvenile court”), as contemplated by 8 C.F.R. § 204.11(c)(5). The petition was denied accordingly.

On appeal, counsel for the applicant contends that the District Director erroneously concluded that the applicant ceased to qualify for SIJ status once he reached age 18 and was no longer dependent on the juvenile court. *Statement from Counsel on Form I-290B*, dated August 29, 2007. Counsel asserts that the applicant continues to qualify for SIJ status despite the fact that he reached the age of majority in Massachusetts, as he remains legally committed to the Massachusetts Department of Social Services (DSS) pursuant to a Voluntary Placement Agreement (VPA) under Mass. Gen. Laws ch. 119 § 23. *Brief in Support of Appeal*, dated September 26, 2007. Counsel suggests that a correct reading of section 101(a)(27)(J)(i) of the Act and the regulation at 8 C.F.R. § 204.11(c)(5) reflects that an applicant need not show that he continues to be dependent on a juvenile court, so long as he continues to be committed to, or placed under the custody of, an agency or department of a State. *Id.* at 6-10, 12, 14-16. Counsel further asserts that the District Director’s decision constitutes a change in policy without adequate notice to the applicant. *Id.* at 3-5, 16-17.

The record contains, in pertinent part, a brief from counsel; a copy of an order from the juvenile court, dated May 11, 2006 nunc pro tunc to August 12, 2004; a copy of a birth record for the applicant; an affidavit from a social worker on behalf of the Massachusetts DSS in support of a fee waiver for the applicant; affidavits from the Deputy General Counsel for the Massachusetts DSS, dated August 13 and 29, 2007; an affidavit from the applicant; a copy of a VPA executed by the applicant and DSS, dated September 26, 2007, and; a letter from a representative of the Children’s Hospital Boston, dated December 5, 2005. 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 [Secretary of Homeland Security] 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 Guatemala on November 2, 1986. The applicant explained that his father physically abused him, and two of his uncles and a neighbor sexually abused him. *Statement from Applicant*, dated August 9, 2007. The applicant stated that he left Guatemala and came to the United States to escape further abuse. *Id.* at 1. The applicant provided that he became involved with DSS due to the fact that he had no family to care for him in the United States. *Id.* He stated that he has endured serious emotional difficulty due to learning that he is HIV positive. *Id.* The applicant indicated that, since he turned 18, he signed a VPA to stay in DSS care because he requires assistance. *Id.* at 2.

On May 11, 2006, the juvenile court issued an order finding that: 1) the applicant was declared dependent by the Attleboro Juvenile Court of the County of Bristol on August 12, 2004, and that the applicant was committed to the custody of Massachusetts on that date; 2) on August 12, 2004, the applicant was deemed eligible for long term foster care due to abuse, neglect, or abandonment; 3) it is not in the applicant's best interest to be returned to Guatemala, and; 4) it is in the applicant's best interest to remain in the United States. *Order of the Juvenile Court*, dated May 11, 2006 nunc pro tunc to August 12, 2004. The juvenile court indicated that the order was dated nunc pro tunc to August 12, 2004, approximately three months prior to the applicant's eighteenth birthday.<sup>1</sup>

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<sup>1</sup> Courts in Massachusetts are authorized to enter an order "as of an earlier day than that of entry." Mass. Gen. Laws ch. 237 § 4. In *Perkins v. Perkins*, the Supreme Judicial Court of Massachusetts explained that "[t]he function of a nunc pro tunc order in general is to put upon the record and to render efficacious some finding, direction or adjudication of the court made actually or inferentially at an earlier time, which by accident, mistake or oversight was not made [a] matter of record, or to validate some proceeding actually taken but by oversight or mistake not authorized, or to prevent a failure of justice resulting, directly or indirectly from delay in court proceedings subsequent to a time when a judgment, order or decree ought to and would have been entered, save that the cause was pending under advisement." *Perkins v. Perkins*, 225 Mass. 392, 395 (Mass. 1917) (citations omitted); see also *Fierro v. Reno*, 217 F.3d 1, 5 (1<sup>st</sup> Cir. 2000). In the present matter, the juvenile court's nunc pro tunc order states that the applicant "was declared dependent by the [juvenile court] on August 12, 2004, and was committed to the custody of the Commonwealth on that date due to the unavailability of a parent to care for him." *Juvenile Court Order* at 1. The juvenile court further stated that "[o]n August 12, 2004, the [applicant] was deemed eligible by this Court for long term foster care due to abuse, neglect or abandonment." *Id.* The applicant has not described, or provided any evidence of, proceedings before the juvenile court prior to May 11, 2006. Yet, the AAO finds sufficient indication in the order itself to show by a preponderance of the evidence that the juvenile court's order issued on May 11, 2006 was an act to put on record findings that were made by the juvenile court on August 12, 2004. See *Perkins*, 225 Mass. at 395; see also *Fierro*, 217 F.3d at 5. Thus, the order is deemed effective as of the nunc pro tunc date of August 12, 2004.

On November 2, 2004, the applicant reached age 18. Counsel states that the applicant remained in DSS foster care after age 18, as he executed a VPA. The applicant filed the present Form I-360 petition for SIJ status on October 5, 2006.<sup>2</sup> The record on appeal contains a VPA that was executed on September 26, 2007. *Voluntary Placement Agreement*, dated September 26, 2007.

### Assertions on Appeal

On appeal, counsel asserts that the applicant has established that he is eligible for SIJ status. Counsel suggests that a correct reading of section 101(a)(27)(J)(i) of the Act and the regulation at 8 C.F.R. § 204.11(c)(5) does not require that an applicant show that he continues to be dependent on a juvenile court, so long as he continues to be committed to, or placed under the custody of, an agency or department of a State. *Brief in Support of Appeal* at 6-10, 12, 14-16. Counsel asserts that the applicant continues to qualify for SIJ status despite the fact that he reached the age of majority in Massachusetts and is no longer dependent on the juvenile court, as he remains legally committed to DSS pursuant to a VPA under Mass. Gen. Laws ch. 119 § 23. *Id.* at 3.

Counsel notes that, with one exception that does not apply in the present matter, juvenile court jurisdiction over children in Massachusetts ends at age 18. *Id.* at 2 (citing Mass. Gen. Laws ch. 119 §§ 23-24). Counsel explains that a juvenile court can commit a child it deems dependent on the State due to abuse, neglect, or abandonment to the custody of DSS pursuant to Mass. Gen. Laws ch. 119 §§ 24, 26. *Id.* Counsel explains the following:

Since the Juvenile Court's jurisdiction – and Court oversight – normally ends at the age of 18, when youth in foster care approach the age of 18, DSS, acting as the State, makes a determination regarding the youth's continued "dependency," or need for long-term foster care, and discusses continued placement with the youth if clinically appropriate. Once DSS and the youth agree on a plan for continued foster placement, it is memorialized in a Voluntary Placement Agreement ["VPA"], which is executed by both parties (the youth and DSS). The youth may continue in DSS custody through a VPA at least until he reaches the age of 21.

*Id.* Counsel observes that Mass. Gen. Laws ch. 119 § 23 authorizes DSS to continue to have responsibility for a youth under age 21. *Id.* at 3. Counsel contends that the applicant has signed a VPA, and thus DSS continues to have responsibility for him. Thus, counsel asserts that the applicant continues to be committed to, or placed under the custody of, an agency or department of a State.

Counsel further contends that the District Director's decision constitutes a change in policy without adequate notice to the applicant. *Id.* at 3-5, 16-17.

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<sup>2</sup> It is noted that the District Director stated that the applicant filed the present petition on October 10, 2006. However, the record contains evidence that the petition was received by the District Director on October 5, 2006.

### Analysis

Upon review, the AAO finds that an individual in the State of Massachusetts may establish eligibility for SIJ status after reaching 18 years of age, as discussed below. In the present matter, the applicant has submitted sufficient evidence to show that he continues to be committed to, or placed under the custody of, an agency or department of the State of Massachusetts. *See* section 101(a)(27)(J)(i) of the Act. The record establishes that the applicant meets the remaining requirements for SIJ status.

As a preliminary matter, it is observed that where an applicant has shown that a juvenile court has legally committed him to, or placed him under the custody of, an agency or department of a State, and he continues to maintain such status, he is not also required to establish that he has been declared dependent, and that he continues to be dependent, on a juvenile court. *See* section 101(a)(27)(J)(i) of the Act.

The regulation at 8 C.F.R. § 204.11(c)(5) requires that an applicant show that he “continues to be dependent upon the juvenile court . . .” 8 C.F.R. § 204.11(c)(5). However, 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 he 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 (amended on November 26, 1997).

The regulations at 8 C.F.R. § 204.11(c)(3) and (5), last amended in 1993, 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 he 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.* Because the regulations at 8 C.F.R. § 204.11(c)(3) and (5) were issued prior to the 1997 amendment of the Act, they require that an applicant has been declared dependent upon a juvenile court, and that he 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 him to, or placed him 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 him to, or placed him under the custody of, an agency or department of a State, and he continues to maintain that status, he is not also required to establish that he has been declared dependent, and that he continues to be dependent, on a juvenile court. *See* section 101(a)(27)(J)(i) of the Act.

Mass. Gen. Laws ch. 119 § 23 authorizes DSS to accept for foster care any child under eighteen years who in its judgment is in need of foster care. Pursuant to Mass. Gen. Laws ch. 119 § 23, DSS may retain responsibility for a former foster child until such child reaches age 21 for the purposes of specific educational or rehabilitative programs. Mass. Gen. Laws ch. 119 § 23. Mass. Gen. Laws ch. 119 § 23 provides that, in order for DSS to retain such responsibility over an individual, DSS and the individual must agree on the conditions of DSS's assistance, such as those defined by a VPA. *Id.*

The Deputy General Counsel of DSS described DSS's experience with applicants for SIJ status who were over the age of 18 years as follows:

From approximately 1998 . . . to October, 2006, DSS children and youth were routinely granted SIJ status upon a showing that they had been the subject of a juvenile court order prior to their 18<sup>th</sup> birthday that found: they were dependent on the court or committed to DSS custody due to abuse, neglect or abandonment; they were deemed eligible for long term foster care due to abuse, neglect or abandonment; and that it was not in the child's best interest to be returned to his or her country of origin. DSS youth ages 18 to 21 submitted evidence of their continued placement in foster care, which consisted of a DSS Voluntary Placement Agreement (VPA) signed by a DSS representative and the youth.

In filing SIJ petitions/applications for older undocumented youth, DSS and the youth routinely relied on the understanding that their 18<sup>th</sup> birthday would not be a barrier to demonstrating eligibility for SIJ status provided they remained in foster care pursuant to a VPA and met other eligibility criteria.

*Affidavit from Deputy General Counsel for the Massachusetts DSS*, dated August 13, 2007. As quoted above, counsel echoed this statement of the significance of the VPA as evidence that an applicant continues to be committed to, or placed under the custody of, DSS. *Brief in Support of Appeal* at 3.

In the present matter, on appeal the applicant has provided a copy of a VPA to show that he continues to be committed to, or placed under the custody of, DSS. The VPA defines the conditions under which DSS continues to provide services and have responsibility for the applicant. *Voluntary Placement Agreement* at 1-3. The VPA states that it was executed pursuant to the authority of Mass. Gen. Laws ch. 119 § 23. *Id.* at 1.

The record contains an affidavit in support of a fee waiver for the applicant from the Deputy General Counsel of DSS that states that "[the applicant] entered DSS foster care when he was under 18 years of age. Having turned 18, he continues in the care of DSS." *Fee Waiver Affidavit from the Deputy General Counsel for the Massachusetts DSS*, dated August 29, 2007. The record further contains an affidavit from a social worker on behalf of DSS in support of a fee waiver for the applicant, in which the social worker stated that the applicant "has been committed to the custody of the Department of Social Services," and that the applicant "is indigent and [his] case remains open." *Affidavit from Massachusetts DSS Social Worker*, dated June 16, 2006. The social worker noted that the applicant was age 19 as of the date that the affidavit was created, suggesting that the applicant continued in DSS care beyond his 18<sup>th</sup> birthday. *Id.*

The VPA executed by the applicant and DSS, as supported by the affidavits from the Deputy General Counsel of DSS and DSS social worker, is sufficient evidence to show that the applicant continues to be committed to, or placed under the custody of, DSS. *See* Mass. Gen. Laws ch. 119 § 23. Accordingly, the applicant has shown that he continues to meet the requirements of section 101(a)(27)(J)(i) of the Act.

#### Conclusion

Based on the foregoing, the applicant has shown that he is 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. The record establishes that the applicant meets the remaining requirements for SIJ status. Accordingly, the applicant has shown that he is eligible for SIJ status and the petition will be approved.

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 shown eligibility for the benefit sought. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.