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U.S. Department of Justice

Immigration and Naturalization Service

**Identifying data deleted to prevent clearly unwarranted invasion of personal privacy**

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

[Redacted]

File: [Redacted]

Office: HOUSTON, TEXAS

Date: OCT 30 2002

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

Petition: Petition for Special Immigrant Juvenile Pursuant to Section 202(b)(4) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(4)

IN BEHALF OF PETITIONER:

[Redacted]

**PUBLIC COPY**

**INSTRUCTIONS:**

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was approved by the District Director, Houston, Texas. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The beneficiary is a 22-year-old native and citizen of Romania 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).

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 expressly consents to the dependency order servicing 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; or

(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I-360 before June 1, 1994.

It is noted for the record that the beneficiary turned twenty-one years old on December 16, 2000, eighteen days after the director issued the notice of revocation. Pursuant to 8 C.F.R. 204.11(c)(1), the beneficiary is no longer eligible for a special immigrant visa or for adjustment of status based on that classification as she is no longer under twenty-one years of age. Furthermore, pursuant to 8 C.F.R. 205.1(a)(3)(iv), the approval is subject to automatic revocation as a matter of law. However, the United States District Court for the Southern District of Texas has enjoined the Attorney General and the Service from denying the petition or revoking its approval on the basis of the beneficiary's age alone. See Agreed Order of Szeri v. Cravener, No. H-00-4165 (S.D. Tex., December 8, 2000). For this reason, the issues raised on appeal will be addressed.

The petition was filed on December 8, 1997 and approved on October 13, 1998.

On October 31, 2000, the district director notified the beneficiary of his intent to revoke approval of her visa petition. The director provided four reasons as the basis of his intent to revoke. First, the district director determined that the beneficiary was not eligible for classification as a special immigrant juvenile because the record does not reflect that she has ever been deemed eligible for long-term foster care. The director cited 8 C.F.R. 204.11(a) which states: "*eligible for long term foster care* means that a determination has been made by a juvenile court that family reunification is no longer a viable

option." The director noted that the juvenile court ruled that the beneficiary should remain in the United States "to finish her education" as stipulated by the beneficiary's parents in the foreign guardianship order. Next, the director stated that a child establishes and maintains eligibility for this classification when the child has been adopted or placed in a guardianship situation after having been found dependent upon a juvenile court in the United States. He noted that in the instant case, the beneficiary entered the United States in a guardianship situation before being found a dependent upon a juvenile court in the United States. The director noted that the request for the State of Texas to recognize the foreign decree of guardianship was filed and granted immediately prior to the beneficiary's eighteenth birthday and that the record indicates that the beneficiary was motivated to obtain the Texas court order so as to become eligible for a special immigrant juvenile visa. Finally, the director states that there is no evidence that the guardianship resulted from abandonment, abuse, or neglect by her father and the beneficiary has maintained close contact with her father and sister.

In response to the district director's notice of intent to revoke, counsel asserts that even though the judge failed to make an express finding that family unification is no longer a viable option, the judge was aware that the beneficiary could not return to Romania or her parents ever. The court heard testimony that if returned to Romania, the beneficiary would have to return to the orphanage.

In response to the district director's second basis for his notice of intent to revoke, counsel states that a child is eligible for special immigrant juvenile classification regardless of whether the child has been adopted or placed in a guardianship situation before or after having been found dependent upon a juvenile court in the U.S. Counsel asserts that there is no requirement that the declaration of dependency be made before the guardianship can be established.

Counsel asserts that the fact that the beneficiary filed a request for the State of Texas to recognize the foreign decree of guardianship two weeks prior to the beneficiary's eighteenth birthday does not mean that she is not eligible for long term foster care.

In response to the district director's point that there is no evidence that the guardianship resulted from abandonment, abuse, or neglect by her father and the beneficiary has maintained close contact with her father and sister, counsel states that the juvenile court judge was silent as to the issue of neglect, abuse, and abandonment because he signed the order on December 4, 1997, only eight days after the law was changed to require such a finding. Counsel asserts that the Service failed to follow its own Field Guidance because they failed to notify the petitioner of the new eligibility requirements and to give her the opportunity to submit additional evidence or documentation in support of the petition. Counsel states that the record contains evidence that the beneficiary was neglected, abused, and abandoned before she

was placed in an orphanage and furthermore, the fact that she has had contact with her family does not mean that she has not been neglected, abused, or abandoned.

According to the record, the beneficiary was placed in an orphanage by her grandmother because her parents were unable to care for her. The beneficiary became a ward of the state. The beneficiary's guardians, [REDACTED] went to Romania as missionaries in 1992. They taught at the orphanage where the beneficiary was resident. Before they returned to the U.S., they obtained a guardianship agreement dated May 17, 1995 by which the beneficiary's parents authorized their daughter to go to the United States to study under the guardianship of the Wagstaffs. The beneficiary entered the United States on July 30, 1995 as a nonimmigrant student (F-1). She subsequently filed an application for an exchange visitor (J-1) visa that was denied. On December 4, 1997, 12 days before the beneficiary's 18<sup>th</sup> birthday, the Wagstaffs obtained an order recognizing the validity of the foreign decree of guardianship.

On November 28, 2000, the district director revoked the visa petition, noting that there was no mention of the beneficiary's abuse, neglect, or abandonment in the transcript of proceedings from the Texas juvenile court. The district director points out that the court asked what the result would be of returning the beneficiary to Romania, and that the response was "the main problem would be, of course, economics." The district director indicated that the petitioner failed to submit the evidence requested, to wit, all correspondence between the beneficiary and her father and evidence of phone calls made to Romania.

On appeal, counsel asserts that the district director failed to take into account the timing of the court order vis-à-vis amendments to the Act regarding special immigrant juvenile petitions. The juvenile court wrote its order without the benefit of knowledge of the requirement that he make a finding of abuse, neglect, or abandonment. Counsel referred the director to specific Service Memoranda providing field guidance on special immigrant juveniles and the implementation of the amendments. The field guidance states that for those I-360's filed on or after November 26, 1997, the petitioners should be notified of the new eligibility requirements and be given the opportunity to submit additional evidence in support of the petition. Counsel states that the director failed to notify the petitioner and give her an opportunity to provide additional evidence.

In review, counsel's argument is without merit. The district director put the petitioner on notice of the new requirements in his notice of intent to revoke the visa petition. Counsel had another opportunity to provide relevant evidence when he filed this appeal.

Counsel asserts that the district director misconstrues the juvenile court's intent by asserting that the intent of the court was merely to provide a guardianship relationship. Counsel asserts that the judge intended to provide for special immigrant

juvenile status because he signed the order before the beneficiary turned 18.

The district director reviewed the juvenile court order and transcript for evidence of the basis of its decision to declare the petitioner dependent on the court. In the absence of finding that the juvenile court declared the petitioner dependent and eligible for long-term foster care due to abuse, neglect, or abandonment, the district director correctly revoked the petition.

Counsel states that the district director disregarded references in the court record that the judge did not intend for the beneficiary to return to Romania where she would be relegated to an orphanage. The issue is not whether the juvenile court judge intended to prevent the beneficiary's return to her home country. The issue is whether she meets the eligibility requirements of the Act and regulations.

Finally, counsel argues that the fact that the beneficiary has had contact with her father and sister does not prove that she was not abused or neglected. The point has merit, but the petitioner has failed to establish that she was deemed eligible for long-term foster care due to abuse, neglect, or abandonment.

The district director determined that the beneficiary is ineligible for classification as a special immigrant juvenile because she sought recognition of her foreign guardianship order two weeks before her 18<sup>th</sup> birthday. According 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: is under twenty-one years of age; is unmarried; and, has been declared dependent upon a juvenile court located in the United States. There is no requirement in the Act that the alien be declared dependent upon a juvenile court long before she reaches her 18<sup>th</sup> birthday.

The district director also determined that the beneficiary is ineligible because she sought the juvenile court order *solely* because she wanted to obtain the special immigrant juvenile visa. There is no requirement in the Act that provides that the alien cannot be motivated, in part, by a desire to obtain an immigrant visa when she seeks a juvenile court order, *provided that* the juvenile meet all the requirements of the Act and regulations. In the instant case, the petitioner failed to establish that she meets all the requirements to be eligible for special immigrant juvenile classification.

The petitioner failed to establish that she was deemed eligible by a juvenile court for long-term foster care due to abuse, neglect, or abandonment. She failed to establish that she was determined to be eligible for long-term foster care by the juvenile court in accordance with the regulations. "*Eligible for long-term foster care* means a determination has been made by a juvenile court that family reunification is no longer a viable option." 8 C.F.R. 204.11(a). In the instant case, the court expressly found that it was in the best interest of the beneficiary to remain in the home,

care and custody of the Wagstaffs, but the court did not make express findings regarding family unification.

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. 493 (BIA 1966); Matter of Soo Hoo, 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. Therefore, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.