

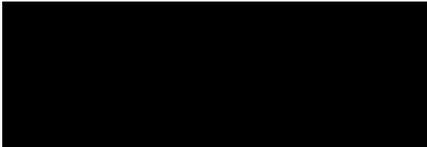


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FILE:



Office: MIAMI

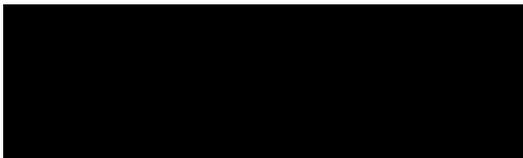
Date: FEB 15 2006

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 (district director) denied the special immigrant visa petition and denied the application for adjustment of status. 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 Peru 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 issued a decision on August 4, 2004, denying the petition for special immigrant juvenile (SIJ) status, and a decision dated August 5, 2004, denying the application for adjustment of status (Form I-485).

On appeal, the applicant's counsel challenges the denial of the petition asserting that Citizenship and Immigration Services (CIS) did not adjudicate the applications in a timely manner and allowed the beneficiary's eligibility to expire. The Notice of Appeal (Form I-290B) states: 1) that the form I-360 was filed before the child reached the age of eighteen, while she continued to be eligible for long term foster care, and should have been expedited; 2) that a child who is eligible for long-term foster care will normally be expected to remain in foster care until the age of majority, and asserts that the age of majority is clearly twenty-one consistent with all other immigration matters, and should not be determined with regard to state law; and 3) that it would be contrary to public policy not to allow a child to adjust status, especially when all the requirements were met at the time of filing. In support of the appeal, counsel has submitted a brief discussing her contentions in greater detail. The entire record was considered in rendering a decision on the current appeal.

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 record reflects that the applicant entered the United States on May 16, 1995, at the age of nine, as a non-immigrant visitor for pleasure, after having been issued a B1-B-2 visa in February 15, 1995, in Lima, Peru. It is unclear with whom the applicant resided following her entry into the United States, although it appears that at the time of the dependency proceedings she appeared with her aunt, [REDACTED]. A review of the record indicates that an Order for Adjudication of Dependency was issued by the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida, on November 19, 2003, more than eight years after the applicant entered the United States. The order indicated that after hearing the evidence and reviewing the record, the court found that there was a "sufficient factual basis" to find the applicant to be a dependent. The court noted that the applicant's mother was deceased and that she had been neglected and abandoned by her father, having been provided food and shelter by family members and neighbors.<sup>1</sup> See *Order for Adjudication of Dependency*, dated November 19, 2003. The applicant was placed in a long-term relative placement with [REDACTED] subject to a positive home study. *Id.* Approximately one month following the issuance of the dependency order, the applicant filed a Petition for Special Immigrant Juvenile (I-360) on December 15, 2003, along with an Application for Adjustment of Status (I-485). The district director denied the petition on August 4, 2004, approximately seven-and-a-half months after its filing, finding that the applicant had turned eighteen on December 27, 2003, and was no longer eligible for special immigrant juvenile status.

The district director's decision was premised on the fact that the applicant was no longer eligible for long-term foster care under Florida law having reached her eighteenth birthday on December 27, 2003, (approximately twelve days after the SIJ petition was filed). See *Decision of the District Director*, dated August 4, 2004. The Florida statutes contained at Title V, Chapter 39, referenced by the district director provide as follow:

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<sup>1</sup> It is unclear from the record whether the applicant came to the United States with her father, but information provided by the applicant on the Biographic Information form (G-325A), indicates that her father resides in Miami, Florida. The court's order indicates that the applicant who, at the time of the order had resided in the United States for eight years, had turned to bad influences during the previous year, and had moved from place to place causing the applicant to miss many days of school in the preceding year.

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 applicant had reached the age of majority under Florida law, she had aged out of the jurisdiction of the family court system, and was no longer dependent upon the Florida court, or eligible for long-term foster care. Consequently, she was no longer eligible for special immigrant status. *Id.*

On appeal, the beneficiary's counsel asserts in the statement accompanying the Form I-290B that CIS erred as a matter of law when it denied the SIJ petition. Counsel raises three arguments in support of the appeal. The arguments relate to CIS' processing of the beneficiary's case, and its interpretation of the regulations implementing the SIJ provisions of the statute.

Counsel's first argument is that although the SIJ petition was filed before the applicant turned eighteen years of age, CIS erred in failing to expedite the petition and adjudicate it before she turned eighteen. Counsel's second argument is that the CIS should have used the age of twenty-one as the age of majority as that is the age applicable in all other immigration matters, and that state law should not have been referenced. Counsel's third argument is not a true contention of error, but a statement that public policy supports allowing the beneficiary to adjust status, especially when the requirements were met at the time of filing. The AAO will address counsel's principal arguments in greater detail.

Counsel's Contention of Undue Delay in CIS' Adjudication of the SIJ Petition

The AAO has examined the timeline at issue in the processing of the beneficiary's applications. The AAO is unable to agree with counsel's contention of unreasonable agency delay. The record reflects that the I-360 petition and the I-485 were filed on December 15, 2003, a mere twelve days prior to her eighteenth birthday, including the intervening weekend and holidays, making even fewer days available for the adjudication of the petition and application. This is despite the fact that the applicant had been residing in the United States for over ten years. Furthermore, the record reflects that the order from the juvenile court had been issued one month earlier, on November 19, 2003. In addition, the record reflects that when the I-360 and I-485 were filed, they were accompanied by a letter submitted by the applicant's counsel. That letter stated simply that the documents listed in the letter related to the applicant were being submitted for filing. After listing the various documents, the letter closed by providing a telephone number where she could be contacted in the event of questions. See Letter from [REDACTED] dated December 16, 2003. The letter itself did not express any concern that the applicant would shortly turn eighteen years of age, nor did it request any type of expedited treatment of the application. In addition, a review of the file also fails to disclose any other indication that counsel had sought expedited treatment of the applications.

In addition to the fact that the file does not indicate that any requests were made to bring the issue of the applicant's age to the attention of CIS officials or seek any expedited treatment of the application, counsel has not provided any authority which indicates that a failure to adjudicate a petition prior to subject of the petition reaching the age of majority, in and of itself, constitutes unreasonable delay. In addition, it is unclear from the file what the normal processing times for such applications were at that time, or whether the beneficiary's counsel was made aware of or had reason to be aware of the period of delay for such processing which includes necessary background checks. While it certainly would have been preferable to have had the petition adjudicated prior to the applicant reaching the age of majority, there is no evidence of undue delay. Based upon the information in the record, the AAO is unable to conclude that the district director's failure to adjudicate the applications within the twelve day period after their filing, constitutes an unreasonable delay. To the extent that counsel seeks to have the AAO find that a failure to adjudicate an application prior to the beneficiary's age-out date in and of itself constitutes an unreasonable delay, the AAO declines to do so.

The AAO turns next to counsel's second argument which is her claim that CIS should have used the age of twenty-one as the age at which the applicant was no longer eligible for SIJ status. Counsel asserts in her brief that:

8 C.F.R. 204.11(a) states the definition of a Child eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority. Clearly the age of majority is to be interpreted as 21. Under all immigration matters, children reach the age of majority at 21. Section 101(a)(27)(J) of the Act provides an alien is eligible for classification as a special immigrant juvenile if the alien is under 21 years of age. Since the statute clearly states that the alien be under 21 years of age, it provides for a special immigrant juvenile to adjust status to permanent resident before their 21<sup>st</sup> birthday. Otherwise, the age of 21 would not have been listed as a criteria, it provides for a special immigrant juvenile to adjust status to permanent resident before their 21<sup>st</sup> birthday. Otherwise, the age of 21 would not have been listed as a criteria.

*Counsel's Brief*, at p. 4.

The AAO disagrees with several aspects of counsel's argument. First, counsel is mistaken that Section 101(a)(27)(J) sets the age of twenty-one as the age for determining an applicant's eligibility under the statute. The provisions of section 101(a)(27)(J) are included above, and establish no specific age for an applicant's eligibility for SIJ status. Rather, the statute sets forth the essential elements necessary for a juvenile court order to serve as the underlying basis of eligibility for SIJ status, and set forth the requirement of CIS consent to such orders. However, an applicant's age *is* addressed in the implementing regulations found at 8 C.F.R. § 204.11, which provide that an applicant must be under twenty-one years of age to be eligible for SIJ status. The fact that an applicant must be below the age of twenty-one does not, however, resolve the issue of whether an applicant's eligibility for relief may be further limited as to age, pursuant to the requirements of state law. The AAO finds that such is the case here, due to the need to refer to the applicable state law governing adjudications of dependency and eligibility for long-term foster care. This is principally due to the requirement in 8 C.F.R. § 204.11(c)(5) which requires that an applicant demonstrate that he "[c]ontinues 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." In determining whether an applicant

satisfies this requirement, it is necessary to determine what state law provides regarding the duration of the dependency order. While the AAO concedes that the Act accords the status of “child” to those individuals under the age of twenty-one,” that is a different question than the one faced here. Being a “child” for purposes of federal immigration law, does not mean that an individual satisfies the criteria under state law for being eligible for state dependency status or eligibility for long-term foster care. That is a matter that is subject to the particular state law in question, as the statute and regulation defers to the particular state’s determination of whether to treat an alien as dependent and eligible for long-term foster care. The fact that the regulation mentions the age of twenty-one, does not mean that the immigration authorities have determined that that age trumps the requirements of state law regarding state determinations of dependency, but rather serves to establish the age of twenty-one as the age beyond which an individual may, in no instance qualify for SIJ status, but inherent in the remaining regulatory requirements is the possibility that an individual, being unable to establish continued eligibility for long term foster care, would be otherwise ineligible for SIJ status.<sup>2</sup>

While the AAO understands counsel’s position, it is unable to ignore the remaining requirements of the regulation, and in giving effect to those requirements, finds that the Florida statutes limit eligibility for dependency care to individuals meeting the definition of “child” which, under Florida law, is limited to those individuals under the age of eighteen. Florida law extinguishes the jurisdiction of the juvenile courts in cases of individuals previously declared to be dependent, when such individuals reach the age of eighteen.

Moreover, in addition to the support for the district director’s decision from the language of the regulations themselves, additional support exists in case law. The contention of error raised by counsel was addressed by the Third Circuit Court of Appeals in the case of *M.B. v. Quarantillo*, 301 F.3d 109 (2002), in the context of whether the district director had properly withheld her consent to the jurisdiction of the juvenile court to address a dependency claim.<sup>3</sup> The decision contained an excerpt of the district director’s decision which noted, in pertinent part, that the request for the district director’s consent “was refused in accordance with regulations issued under the Immigration and Naturalization Act, as amended (INS), existing INS policy, and New Jersey State Law.” *M.B. v. Quarantillo*, at p. 110. Among the reasons cited in the district director’s denial of a request for reconsideration were the fact that the regulations required documentary evidence of the applicant’s age, and the finding that “New Jersey law limited the juvenile court’s authority to persons under the age of 18.” *Id.* The court summarized the plaintiff’s contentions as follows:

On appeal, plaintiff contends that the INS has no authority to determine whether an individual meets the jurisdictional age of juvenile court, but is limited by its regulations to determine only whether the person is under the age of twenty-one. In addition, he argues

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<sup>2</sup> The AAO notes that the supplementary information published with the regulation’s final rule noted that the regulation was adopting the age of twenty-one in the text in order to address the concerns of comments made which sought to eliminate variations in state law and accommodate states which allowed a juvenile court to “retain jurisdiction over certain individuals, such as students, who have reached the age of majority but require continued court protection.” See 58 FR 42843, 42846 (August 12, 1993). As explained by the agency, “the revised standard allows students and other young persons who continue to be dependent upon the juvenile court after reaching the age of eighteen to qualify for special immigrant juvenile status.” *Id.* Moreover, even if arguably was the intent of the agency to establish twenty-one as the qualifying age, that was subject to the remaining regulatory criteria, which require that an individual continue to be dependent upon the juvenile court and eligible for long-term care, an element which, in many states, expires by virtue of state law, at an age below twenty-one.

<sup>3</sup> As the court noted, the plaintiff was in the custody of the INS, and thus the Attorney General’s consent was required in order for the juvenile court to have jurisdiction over the dependency claim. *Id.* at 110.

that the requirement of documentary evidence of age is contrary to the congressional intent underlying the special immigrant provisions for juveniles.

*Id.* at p. 111.

The court's decision reflects the language of section 101(27)(J)(i), and noted that the plaintiff was relying upon the language of the regulation which states that an applicant is under twenty-one years of age. *Id.* at p. 115. The court noted that there had been a significant amendment in 1997, to the original SIJ statute enacted in 1990. As noted by the court:

Before its amendment in 1997, the statute did not prevent a state court from assuming jurisdiction over a juvenile immigrant, even one in the legal custody of the INS. [citing to *Gao v. Jenifer*, 185 F.3d 548 (6<sup>th</sup> Cir. 1999)] In 1997, however, an amendment to the INA required the Attorney General to "expressly consent" to a juvenile court's dependency order. 8 U.S.C. § 1101(a)(27)(J)(iii). In addition, the amendment required the Attorney General to specifically consent to the jurisdiction of the juvenile court "to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General. . . ." 8 U.S.C. § 1101(a)(27)(J)(iii)(I).

*Id.* at p. 114.

The court discussed the reasons behind the change in the law, noting, "[t]he legislative history confirms that the revision in the statute was intended to curtail the granting of special immigrant juvenile status." After quoting from the conference report language indicating that there was desire to limit the benefit to abandoned, neglected or abused children, the court noted that the legislative history demonstrates an intent to remove immigration decisions from the exclusive control of juvenile courts and the social agencies affiliated with them. *Id.*

The court specifically addressed the plaintiff's challenge to the consideration of any age besides the age of twenty-one, noting:

The district director acknowledged that she had considered New Jersey law in connection with her decision. Consequently, the juvenile court's 18 year limitation was pertinent. We are not persuaded by plaintiff's argument that the regulatory history of 8 C.F.R. § 204.11 demonstrates that the INS had ceded the right to consider as relevant any age other than one under 21.<sup>4</sup> That concession was made under the 1990 version of the statute, before Congress limited availability of juvenile court jurisdiction by requiring the consent of the Attorney General.

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<sup>4</sup> While the text of the LEXIS copy of the decision indicates that the plaintiff's argument was that the consideration of any age other "other than one under 21" as impermissible, it appears, reading this statement in context, that this is an error. It appears that the decision should read that the plaintiff's argument was that the INS had ceded the right to consider as relevant any age *under twenty-one* as elsewhere in the decision it is clear that the plaintiff was arguing that the district director was bound to consider as a cut-off age only twenty-one, and was challenging the district director's consideration of the applicant having attained the age of eighteen, and its effect upon the juvenile court's jurisdiction.

The court concluded as follows:

In sum, we believe that the District Director did not act arbitrarily and capriciously in refusing consent to the juvenile court's jurisdiction. Both the statute and the regulation implicitly require an alien applying for special immigrant juvenile status to be young enough to qualify for a dependency order under state law. Neither the statute nor the regulation expressly prohibits the Attorney General from denying consent because the alien is too old to be eligible for a dependency order. For the District Director to withhold consent on the ground that the alien does not satisfy one of the statutory eligibility requirements, even if it is derived from state law and would ultimately be adjudicated by a state juvenile court, is not arbitrary and capricious.

*Id.* at p. 116.

While *M.B. v. Quarantillo* arose in the context of a case where the issue was the district director's denial of a request from an applicant to allow the juvenile court to have jurisdiction in connection with dependency proceedings, the principles from that case are applicable to the instant case where the juvenile court had already exercised jurisdiction and where the issue is whether the district director properly denied the SIJ petition. The principle taken from that case and applicable here is that it is permissible for CIS to consider state law as the regulation and statute implicitly require that an alien seeking SIJ status qualify under state law. The AAO finds therefore, that it was permissible for the district director to consider that under state law, the juvenile court's jurisdiction expired when the beneficiary turned eighteen on December 27, 2003, and she acquired the status of an adult.

Thus, the AAO finds that the district director did not err as a matter of law in finding that the applicant was no longer eligible for SIJ status, having determined that the applicant was no longer dependent upon the juvenile court.

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.