

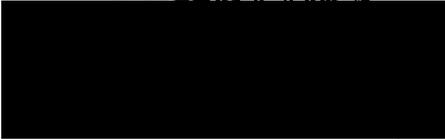


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FILE:



Office: MIAMI

Date: MAR 01 2006

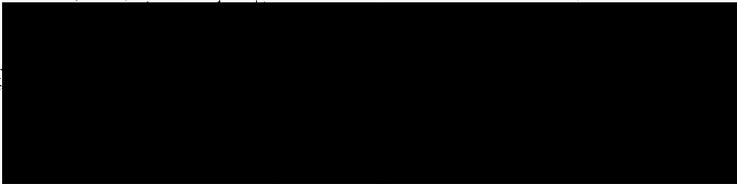
IN RE: Petitioner:



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-one-year-old native and citizen of Trinidad and Tobago 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 May 13, 2005, denying the petition for special immigrant juvenile (SIJ) status, and a decision dated May 31, 2005, 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) should not have applied the regulation which requires that in order to be eligible for SIJ status an alien continue to be dependent upon the juvenile court and eligible for long-term foster care, arguing that the regulation is ultra vires and should have been nullified by the adjudicator. 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 September 8, 2001, at the age of seventeen, as a non-immigrant visitor for pleasure, after having been issued a B1-B-2 visa on July 23, 1997, in Port of Spain, Trinidad and Tobago.<sup>1</sup> It is unclear with whom the applicant resided following his entry into the United States, although it appears that at the time of the dependency proceedings he appeared with his aunt, [REDACTED] and his uncle [REDACTED]. A review of the record indicates that an Order for Adjudication of Dependency was issued by the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, on June 18, 2002. The order indicated that the applicant had been adjudicated a dependent child under Florida law, and noted that the order was entered based upon neglect and abandonment by the biological parents, since 1986 in the case of the father, and since 1991 in the case of the mother. *See Order for Adjudication of Dependency*, dated June 18, 2002. The applicant was placed in a long-term relative placement with his aunt and uncle, at a rescheduled dispositional hearing held on July 3, 2002. At the rescheduled hearing, the court's order, in addition to providing for the applicant's placement with his aunt and uncle, also ordered that the applicant be placed under the protective supervision of the Department of Children and Families. The court also declared that it would retain jurisdiction over the case until the applicant reached the age of eighteen, at which time the protective supervision of the Department of Children and Families would be terminated. *See Dispositional Hearing Order*, dated July 3, 2002.

On July 23, 2002, approximately three weeks after the court's issuance of the July 3, 2002, order, and five days before the applicant's eighteenth birthday, counsel filed a motion entitled, *Emergency Motion for Order Regarding Minor's Eligibility for Special Immigrant Status*, in which counsel sought to have the court declare that the applicant was deemed eligible for Special Immigrant Juvenile Status under 8 U.S.C. § 1101(a)(27)(J). The record reflects that the court that issued the original dependency order did not grant the motion.<sup>2</sup>

Approximately one year later, on February 26, 2003, the applicant's counsel filed a Petition for Special Immigrant Juvenile (I-360), along with an Application for Adjustment of Status (I-485). As noted previously, the district director denied the petition and application in May of 2005. 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 his eighteenth birthday on July 28, 2002, (approximately seven months after the SIJ petition

<sup>1</sup> The record reflects that the applicant had previously entered the United States in 1999, on the B-1 B-2 visa.

<sup>2</sup> Counsel renewed the motion in a letter sent to a different judge, on February 12, 2004, but the second judge likewise did not grant the motion.

was filed).<sup>3</sup> The district director also found that the dependency order submitted by the applicant failed to meet the regulatory requirements of 8 C.F.R. § 204.11 in that the court order did not determine that it would not be in the applicant's best interest to return to his native country. *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:

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, he 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, he 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's arguments in support of the appeal are that CIS unduly delayed processing the applicant's case, and that its interpretation of the SIJ regulations is in conflict with the provisions statute.

Counsel's first argument is that CIS' adjudicative delays before she aged out of eligibility for SIJ status. Counsel's second, and principal argument is that CIS should have used the age of twenty-one as the age of majority and that the age of majority under state law should not have been referenced.

#### Counsel's Contention of 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 February 26, 2003, seven months *after* the applicant's eighteenth birthday. This is despite the fact that the applicant had been residing in the United States for nearly two years. Furthermore, the record reflects that the dependency related orders from the state court had been issued one year earlier, in June and July 2002. There is no explanation for the delay in the initiation of the SIJ proceedings before either the state court or before CIS. The delay in the filing is also notable in light of the claim made in the filings with the state court that both parents had abandoned the applicant since at least 1991.

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<sup>3</sup> A review of the district director's decision reflects that he mistakenly stated that seventeen months—as opposed to seven months—had elapsed between the applicant turning eighteen and the filing of the I-360.

Thus, the record reflects, for reasons that are not apparent, that the SIJ petition was filed well after the applicant attained the age of majority under Florida law. Consequently, the applicant's counsel cannot convincingly make the assertion that there was an undue delay in the adjudication of the petition before the applicant reached the age of majority under state law. Neither can counsel suggest that there was an undue delay in the adjudication of the petition measured from the time of filing in February of 2003, to its adjudication in May of 2005, even using the age of twenty-one as the cut-off date. This is because the facts reflect that the petition was adjudicated by the district director on May 13, 2005, and the I-485 on May 31, 2005, dates which are approximately two months before the applicant turned twenty-one on July 28, 2005. Therefore, counsel's suggestion of unreasonable delay is completely unsupported by the record. If anything, it was the failure to file the petition prior to the applicant's eighteenth birthday that resulted in the applicant aging-out of eligibility.<sup>4</sup>

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 statement accompanying the I-290B that:

The plain language of the law in Section 101(a)(27) of the INA establishes that the applicant has met the statutory requirements of eligibility, despite having "aged out" during USCIS administrative delays. Specifically 101(a)(27)(J)(i) states, "an immigrant who is present in the United States who has been declared dependent on a juvenile court. . .and who has been deemed eligible by that court for long term foster care because of abuse, neglect, or abandonment." There is no requirement that the immigrant continue to be a dependent on the juvenile court "at the time of adjudication." The rules of statutory construction must be followed. The statute explicitly states, "has been" which is a phrase indicating past tense and has no requirement or indication of the present tense. The Service's argument that 8 C.F.R. § 204.11(5) overcomes the statute by requiring, "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. . .", violates the plain language of the statute. The regulation cited, while clear in its language and purpose to exclude children who are no longer dependent on the juvenile court, is contradictory to the plain language of the statute and must be nullified by the government adjudicator.

*Counsel's Statement in Support of the Form I-290B.*

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. §

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<sup>4</sup> The AAO's discussion here does not suggest that had the petition been pending at the time the applicant turned eighteen that it would have constituted an unreasonable delay. As that issue is not presented by the instant case, this decision will not address the questionable merit of such an argument.

204.11, which provide that an applicant must be less than 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. 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>5</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>6</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:

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<sup>5</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>6</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.

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 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>7</sup> That concession was made under the 1990 version of the statute, before

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<sup>7</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 than 21 was 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

Congress limited availability of juvenile court jurisdiction by requiring the consent of the Attorney General.

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.

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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.