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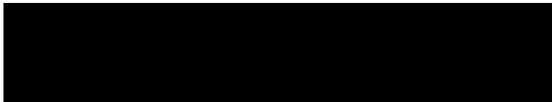
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FILE: [REDACTED] Office: BOSTON

Date: NOV 14 2007

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 dismissed.

The applicant is a 20-year-old native and citizen of Honduras. She 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 obtain the specific consent of the Secretary of the Department of Homeland Security (the Secretary) to the jurisdiction of the Commonwealth of Massachusetts Probate and Family Court (juvenile court) over the applicant for the purpose of issuing an order regarding her dependency and eligibility for SIJ status. *Decision of the District Director*, dated May 29, 2007. The District Director further found that the applicant did not show that the specific consent of the Secretary was not required. *Id.* at 2. The District Director cited section 101(a)(27)(J)(iii)(I) of the Act to support that “no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the [Secretary] unless the [Secretary] specifically consents to such jurisdiction. *Id.* at 2. Thus, the District Director determined that the applicant failed to show that the juvenile court’s orders of April 21 and 25, 2005 may serve as a basis for SIJ status. *Id.* at 1-2. The District Director further found that the applicant failed to show that she continues to be dependent on the juvenile court and eligible for long-term foster care, as required by 8 C.F.R. § 204.11(c)(5). *Id.* at 2. The petition was denied accordingly.

On appeal, counsel for the applicant contends that the District Director raised new grounds for denial that were not discussed in the previously issued Notice of Intent to Deny the petition. *Brief in Support of Appeal*, dated June 26, 2007. Specifically, counsel states that the District Director did not previously raise the issues of whether the applicant required the specific consent of the Secretary to the juvenile court’s jurisdiction, or whether the applicant continues to be dependent on the juvenile court and eligible for long-term foster care. *Id.* at 1-2. Counsel asserts that raising new issues in the district director’s denial contravenes U.S. Citizenship and Immigration Services (USCIS) regulations and constitutes a denial of due process. *Id.* at 2.

Counsel contends that the applicant was not in federal custody at the time the juvenile court issued its order on April 25, 2005, and thus she did not require the Secretary’s consent to the juvenile court’s jurisdiction. *Id.*

Counsel asserts that the applicant was dependent on the juvenile court at the time she filed her petition for SIJ status. *Id.* Counsel contends that the District Director applied an erroneous interpretation of the regulations, as she required the applicant to show that she continues to be dependent on the juvenile court at the time her petition is adjudicated. *Id.* Counsel asserts that this requirement is contrary to the Act. *Id.*

The record includes, but is not limited to, documents submitted or created in connection with the present petition for SIJ status; orders from the juvenile court; documentation in connection with the applicant’s proceedings in Immigration Court, before the Board of Immigration Appeals, and before the Ninth Circuit, and; documentation in connection with the applicant’s custody. 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 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 Honduras on April 26, 1987. The applicant asserted that, when she was age 15, she was transported to the United States by hired smugglers who drugged and raped her. The applicant indicated that, upon arrival to the United States, she was held, sexually assaulted, and verbally and physically abused by another group of smugglers. She was taken into custody by U.S. immigration authorities approximately one week after her arrival to the United States, and she was placed into Immigration Court proceedings through the issuance of a Notice to Appear on August 2, 2002.

On three occasions, the applicant, through counsel, requested that the Secretary consent to the juvenile court's jurisdiction to determine the applicant's dependency status. On each occasion, the Secretary, as represented by the Deputy Assistant Director and the National Juvenile Coordinator of the U.S. Immigration and Customs Enforcement (ICE) Office of Detention and Removal, denied the request for specific consent. *Letters from the Deputy Assistant Director of ICE Office of Detention and Removal*, dated May 20, 2004 and August 31, 2004; *Letter from the National Juvenile Coordinator of ICE Office of Detention and Removal*, dated April 1, 2005. On October 22, 2004, an Immigration Judge ordered the applicant removed from the United States. The applicant filed an appeal before the BIA on November 22, 2004. On March 2, 2005, the BIA dismissed the applicant's appeal, and the order of removal became final.

The applicant obtained a letter from the U.S. Department of Health and Human Services (HHS) declaring her eligible for benefits under section 107(b) of the Trafficking Victims Protection Act of 2000, with an eligibility date of April 19, 2005. The letter from HHS indicated that the applicant was eligible to apply for benefits and services under any Federal or State program or activity funded or administered by any Federal agency to the same extent as an individual who is admitted to the United States as a refugee under section 207 of the INA, "provided [she met] other eligibility criteria." *Eligibility Letter from HHS*, with an eligibility date of April 19, 2005. Guidance from HHS reflects that, "[o]nce an unaccompanied minor is determined eligible for refugee benefits, and an Office of Refugee Resettlement (ORR)-funded URM placement is designated, the child is released from federal custody and becomes dependent by the local court." *Assessing Unaccompanied*

Children for Placement in ORR/DUCS Foster Care – Interim Guidance, HHS Administration for Children and Families, dated September 28, 2005.

On April 21, 2005, the juvenile court issued a temporary order committing the applicant to the custody of the Massachusetts Department of Social Services (DSS), appointing counsel for the applicant, and indicating that the appointment of counsel would survive the applicant's eighteenth birthday by 30 days, with the possibility of extensions by motion with notice. *Juvenile Court Temporary Order*, dated April 21, 2005. The record contains a second order from the court, dated April 25, 2005, finding that: 1) it is not in the applicant's best interests to be returned to Honduras; 2) it is in the applicant's best interests to continue to reside in Massachusetts; 3) it is in the applicant's best interests for DSS and Lutheran Social Services to continue to be her lawful custodians and to provide her care and nurturance. *Juvenile Court Order*, dated April 25, 2005. The juvenile court's April 25th, 2005 order referenced the fact that the applicant was placed, under the auspices of the Unaccompanied Refugee Minor Program of the Lutheran Community Services of Southern New England, at the Greentree Girls Program on May 6, 2005.¹ *Id.* On May 16, 2005, the applicant filed the present Form I-360 petition for SIJ status.

The applicant appealed the BIA's order of March 2, 2005 to the U.S District Court for the district of Arizona, yet on May 16, 2005 the appeal was dismissed and the applicant's request to stay her removal was denied. On May 31, 2005, the applicant filed a motion to reopen proceedings before the BIA based on the fact that the juvenile court declared her a ward of the State of Massachusetts and she had filed the present petition for SIJ status. On July 20, 2005, the BIA granted the applicant's motion to reopen, remanded the case to the Immigration Court, and granted the applicant's request for a stay of removal. The BIA noted that it was "unable to determine whether the [juvenile court] actually had jurisdiction to determine the [applicant's] custody status inasmuch as [the record indicated] that the [applicant was] currently detained by the DHS." On or about August 16, 2005, DHS filed a motion to reconsider before the BIA, arguing that the juvenile court order was invalid, as the applicant was in federal custody at the time the order was issued and the Secretary did not consent to the juvenile court's jurisdiction. On October 19, 2005, the BIA granted the motion of DHS.²

The applicant appealed the BIA's decision to the Ninth Circuit. On November 18, 2005, the Ninth Circuit granted the applicant a stay of removal pending a decision on the merits.

On April 4, 2007, the District Director issued a Notice of Intent to Deny the applicant's petition, noting that the applicant failed to establish that she continues to be dependent on a juvenile court and eligible for long-

¹ As the juvenile court's order of April 25, 2005 referenced the applicant's placement on May 6, 2005, it is evident that the order was backdated. However, the court did not indicate that its order was issued nunc pro tunc.

² It is noted that the BIA focused on the issue of whether the Secretary expressly consented to the juvenile court's order serving as precondition for a grant of SIJ status, as required by section 101(a)(27)(J)(iii) of the Act. Yet, the Secretary's lack of specific consent to the juvenile court's jurisdiction under section 101(a)(27)(J)(iii)(I) of the Act was at issue, not the Secretary's express consent. The BIA did not address the matter of the applicant's custody status. Thus, the issue of specific consent was not raised to the Ninth Circuit.

term foster care in the State of Massachusetts, as required by 8 C.F.R. § 204.11(c)(5). The District Director stated that “[w]ith few limited exceptions, none applicable here, a minor is no longer dependent upon the juvenile court or eligible for long-term foster care once they reach the age of majority, determined to be age 18.” *Notice of Intent to Deny* at 3, dated April 4, 2007. Thus, the District Director suggested that the applicant was no longer dependent on the juvenile court or eligible for long-term foster care once she reached age 18. *Id.* The District Director further noted that the applicant moved to Freeport, New York once she reached the age of 18. *Id.*

On May 29, 2007, the District Director denied the petition, finding that the applicant failed to obtain the specific consent of the Secretary of the Department of Homeland Security to the jurisdiction of the juvenile court over the applicant for the purpose of issuing an order regarding her dependency and eligibility for SIJ status. *Decision of the District Director*, dated May 29, 2007. The District Director further found that the applicant did not show that the specific consent of the Secretary was not required. *Id.* at 2. The District Director cited section 101(a)(27)(J)(iii)(I) of the Act to support that “no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the [Secretary] unless the [Secretary] specifically consents to such jurisdiction.” *Id.* at 2. Thus, the District Director determined that the applicant failed to show that the juvenile court’s orders of April 21 and 25, 2005 may serve as a basis for SIJ status. *Id.* at 1-2. The District Director further found that the applicant failed to show that she continues to be dependent on the juvenile court and eligible for long-term foster care, as required by 8 C.F.R. § 204.11(c)(5). *Id.* at 2. The petition was denied accordingly.

Counsel’s Assertions on Appeal

On appeal, counsel for the applicant contends that the District Director raised new grounds for denial that were not discussed in the previously issued Notice of Intent to Deny the petition. *Brief in Support of Appeal*, dated June 26, 2007. Specifically, counsel states that the District Director did not previously raise the issues of whether the applicant required the specific consent of the Secretary to the juvenile court’s jurisdiction, or whether the applicant continues to be dependent on the juvenile court and eligible for long-term foster care. *Id.* at 1-2. Counsel asserts that raising new issues in the district director’s denial contravenes USCIS regulations and constitutes as denial of due process. *Id.* at 2, 8 (citing *Yeboah v. United States*, 223 F.Supp 2d 650, 660 (E.D. Pa. 2002), 8 C.F.R. § 103.2(b)(8)(iv), and an unpublished decision of the AAO).

Counsel contends that the applicant was not in federal custody at the time the juvenile court issued its order on April 25, 2005, and thus she did not require the Secretary’s consent to the juvenile court’s jurisdiction. *Id.* Specifically, counsel contends that the applicant was released into the custody of the State of Massachusetts on April 21, 2005, pursuant to her status as an unaccompanied minor deemed eligible for benefits by HHS. *Id.* at 5, 12. Counsel suggests that the applicant automatically entered the Unaccompanied Refugee Minors (URM) Program on the date she became eligible, and she thus entered into the custody of Massachusetts by operation of federal law. *Id.* at 12-13 (citing 8 U.S.C. § 1522(d)(2)(B)(ii) and 45 C.F.R. § 400.115(a)).

Counsel asserts that the applicant was dependent on the juvenile court at the time she filed her petition for SIJ status. *Id.* at 2, 14. Counsel contends that the District Director applied an erroneous interpretation of the regulations, as she required the applicant to show that she continues to be dependent on the juvenile court at the time her petition is adjudicated. *Id.* Counsel asserts that the Act does not require an applicant to show

that she continues to be dependent on a juvenile court at the time her petition is adjudicated, and that the District Director's imposing of such a requirement is thus contrary to the Act. *Id.* at 16-17.

Counsel asserts that USCIS guidance requires expedited processing for SIJ petitions where there is a risk that the applicant will age out of eligibility. *Id.* at 15-16. Counsel contends that, as the applicant's petition was adjudicated two years after she filed it, the District Director is estopped from denying the petition on that basis. *Id.* at 16.

Analysis

1. Specific Consent

Upon review, the applicant has not established that she meets the requirements for SIJ status. Specifically, the applicant has not shown that she obtained the specific consent of the Secretary to the juvenile court's jurisdiction to determine her custody status, as contemplated by section 101(a)(27)(J)(iii)(I) of the Act. Nor has the applicant established that the Secretary's specific consent was not required. Accordingly, the applicant has not shown that the order of the juvenile court may serve as a basis for SIJ status, as required by section 101(a)(27)(J)(i) of the Act.

Section 101(a)(27)(J)(iii)(I) of the Act states that "no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the [Secretary] unless the [Secretary] specifically consents to such jurisdiction."

During the time that the applicant was in the actual custody of DHS, on three occasions she requested the specific consent of the Secretary to the juvenile court's jurisdiction. On each occasion, the Secretary, as represented by the Deputy Assistant Director and the National Juvenile Coordinator of the U.S. Immigration and Customs Enforcement (ICE) Office of Detention and Removal, denied the request for specific consent. *Letters from the Deputy Assistant Director of ICE Office of Detention and Removal*, dated May 20, 2004 and August 31, 2004; *Letter from the National Juvenile Coordinator of ICE Office of Detention and Removal*, dated April 1, 2005. Specifically, the Secretary found that the applicant failed to submit sufficient explanation and evidence to support that she was neglected, abandoned, or abused by her parents, or that family reunification is not viable. *Id.* Thus, the Secretary determined that the applicant failed to show that she was reasonably likely to meet her burden of proof in establishing eligibility for SIJ status. *Id.* At no time has the applicant obtained the specific consent of the Secretary to the juvenile court's jurisdiction over her custody status.

Counsel asserts that the applicant was transferred to the custody of the State of Massachusetts on April 19, 2005, pursuant to an eligibility letter from HHS. Irrespective of whether the applicant remained in the actual custody of the Secretary as of April 19, 2005, the record shows that she continued to be in the constructive custody of the Secretary.

It is noted that the Act and regulations do not provide a clear definition of "constructive custody." To determine whether an applicant is in the constructive custody of the Secretary such that she required specific consent, the AAO looks to internal guidance and the past practice of DHS. *Matter of Perez Quintanilla*

(AAO adopted decision June 7, 2007); *see also Memorandum #3 - Field Guidance on Special Immigrant Juvenile Status Petitions* ("Yates Memo #3"), William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, HQADN 70/23 (May 27, 2004). The current practice of DHS deems that an applicant with a final order of removal is in the constructive custody of the Secretary. *Matter of Perez Quintanilla* at 7.

In the present matter, the applicant was under a final order of removal at the time the juvenile court issued its orders on April 21 and 25, 2005. Specifically, the applicant was ordered removed by an Immigration Judge on October 22, 2004. On March 2, 2005, the BIA dismissed the applicant's appeal, and the order of removal became final under section 101(a)(47)(B)(i) of the Act. Accordingly, the applicant was in the constructive custody of the Secretary on April 21, 2005, and she required the Secretary's specific consent to the jurisdiction of the juvenile court. As she did not obtain the Secretary's specific consent, the juvenile court's orders are invalid and may not serve as a basis for a grant of SIJ status. Section 101(a)(27)(J)(iii)(I) of the Act; *Yates Memo #3* at 5. For this reason, the petition must be denied. *Id.*

It is noted that the applicant has not shown that she was no longer in the actual custody of the Secretary as of the date the juvenile court issued its orders on April 21 and 25, 2005. Counsel references a letter from HHS declaring the applicant eligible for benefits under section 107(b) of the Trafficking Victims Protection Act of 2000, with an eligibility date of April 19, 2005. Counsel contends that the HHS letter placed the applicant under the custody of the State of Massachusetts as of the eligibility date of April 19, 2005 by operation of law. However, counsel has not shown that the applicant's custody was automatically transferred.

Counsel cites 8 U.S.C. § 1522(d)(2)(B)(ii) that provides the following:

- (ii) The Director [of the Office of Refugee Resettlement] shall attempt to arrange for the placement under the laws of the States of such unaccompanied refugee children, who have been accepted for admission to the United States, before (or as soon as possible after) their arrival in the United States. During any interim period while such a child is in the United States or in transit to the United States but before the child is so placed, the Director shall assume legal responsibility (including financial responsibility) for the child, if necessary, and is authorized to make necessary decisions to provide for the child's immediate care.

Thus, 8 U.S.C. § 1522(d)(2)(B)(ii) provides that the federal government would retain responsibility for an applicant until such time that she is actually placed with a State agency. Under 8 U.S.C. § 1522(d)(2)(B)(ii), the federal government "shall attempt" to arrange the placement of an applicant with a State. 8 U.S.C. § 1522(d)(2)(B)(ii). Thus, 8 U.S.C. § 1522(d)(2)(B)(ii) does not reflect that, without further action, an HHS designation of eligibility for benefits constitutes a transfer of custody to a State.

Counsel cites 45 C.F.R. § 400.115(a) that provides the following:

- (a) A State must ensure that legal responsibility is established, including legal custody and/or guardianship, as appropriate, in accordance with applicable State law, for each unaccompanied minor who resettles in the State. The State must initiate procedures

for establishing legal responsibility for the minor, with an appropriate court (if action by a court is required by State law), within 30 days after the minor arrives at the location of resettlement.

While 45 C.F.R. § 400.115(a) instructs States to ensure that legal responsibility is established for an unaccompanied minor, it does not address a State's responsibility when such legal responsibility has been assumed by the federal government. Thus, 45 C.F.R. § 400.115(a) does not serve as sufficient authority to show that an HHS designation of eligibility for benefits automatically constitutes a transfer of custody to a State.

The HHS letter gave the applicant access to benefits under the URM Program, which is administered by the States. Guidance from HHS reflects that, once an unaccompanied minor is determined eligible for refugee benefits, and an ORR-funded URM placement is designated, the child may be released from federal custody and declared dependent by a local court. *Assessing Unaccompanied Children for Placement in ORR/DUCS Foster Care – Interim Guidance*, HHS Administration for Children and Families, at 4, dated September 28, 2005. However, the applicant has not shown that prior to the juvenile court's orders on April 21 and 25, 2005, she was released from federal custody and transferred to state custody.

Based on the foregoing, the applicant has not established that she was in fact released from the actual custody of the Secretary prior to the juvenile court's order on April 21, 2005. However, it is again noted that, irrespective of whether the applicant was in the actual custody of the Secretary, she was in the Secretary's constructive custody as of the date of the juvenile court's orders, as discussed above.

2. Juvenile Court Dependency

Counsel asserts that the applicant was dependent on the juvenile court at the time she filed her petition for SIJ status. *Brief in Support of Appeal* at 2, 14. Counsel asserts that the Act does not require an applicant to show that she continues to be dependent on a juvenile court at the time her petition is adjudicated, and that the District Director's imposing of such a requirement is thus contrary to the Act. *Id.* at 16-17. However, under 8 C.F.R. § 204.11(c)(5) and pursuant to the intent of Congress in enacting the SIJ program, an applicant must continue to be dependent on a juvenile court, or legally committed to, or placed under the custody of, an agency or department of a State, at the time her petition is adjudicated.

The regulation at 8 C.F.R. § 204.11(c)(5) requires that an applicant show that she "*continues* to be dependent upon the juvenile court . . ." 8 C.F.R. § 204.11(c)(5) (emphasis added). 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 she 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). Counsel suggests that the Act is satisfied where an applicant establishes that, at some point prior to applying for SIJ status, she has been declared dependent on a juvenile court. Counsel contends that an applicant remains eligible for SIJ status even if she is no longer dependent on a juvenile court or committed to a State's care.

The AAO acknowledges that the regulations at 8 C.F.R. § 204.11(c)(3) and (5) 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 she 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.* The regulations at 8 C.F.R. § 204.11(c)(3) and (5) require that an applicant has been declared dependent upon a juvenile court, and that she continues to be so dependent, without providing for the alternative found in section 101(a)(27)(J)(i) of the Act of showing that a juvenile court has legally committed her to, or placed her 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 her to, or placed her under the custody of, an agency or department of a State, and she continues to maintain that status, she is not also required to establish that she has been declared dependent, and continues to be dependent, on a juvenile court. Section 101(a)(27)(J)(i) of the Act.

However, counsel’s assertion that an applicant need not show that she continues to be dependent on a juvenile court or committed to a State’s care at the time of adjudication is not persuasive. The construction of 8 C.F.R. § 204.11(c)(5) serves to require that an applicant continue to be dependent upon a juvenile court or to need State-managed assistance at the time of adjudication of the petition for SIJ status. Essentially, 8 C.F.R. § 204.11(c)(5) requires that the conditions described in section 101(a)(27)(J)(i) of the Act continue at the time of adjudication. Special immigrant juvenile status was created to offer relief to children who are victims of abuse, neglect, or abandonment, not merely as a means to lawful permanent resident status. *See, e.g.*, H.R. Rep. No. 105-405, at 130 (1997). It is a reasonable interpretation of Congressional intent in creating the SIJ program that an applicant should continue to be dependent upon a juvenile court or to require State-managed assistance at the time of adjudication of the petition for SIJ status. *Id.* If such a requirement was not imposed, one can envision factual scenarios that would contravene the spirit of protection embodied in the SIJ program. For example, an abused child placed into foster care at an early age may meet all requirements for SIJ status at that time. Yet, changed circumstances may result in successful reunification of the child with her parents. Under counsel’s interpretation of the Act, such child would continue to be eligible for SIJ status based on her prior status as a child in need of State assistance, despite the fact that she no longer requires such assistance. The AAO does not find such an interpretation to be congruent with Congressional intent in enacting the SIJ provisions of the Act. *See, e.g.*, H.R. Rep. No. 105-405, at 130 (1997).

It is further noted that 8 C.F.R. § 204.11(c) contains other requirements that are not explicitly stated in the Act. For example, 8 C.F.R. § 204.11(c)(1) requires that an applicant be under twenty-one years of age. While such a requirement does not appear in the Act, it is a reasonable interpretation of Congressional intent to limit special immigrant juvenile status to those under a certain age. Thus, the fact that 8 C.F.R. § 204.11(c)

includes requirements that are not explicitly stated in the Act does not render the provisions of 8 C.F.R. § 204.11(c) in conflict with the Act or invalid.

Counsel's argument is, in essence, that 8 C.F.R. § 204.11(c)(5) is *ultra vires* in nature because it imposes requirements that impermissibly go beyond what is authorized by the statute, and consequently, USCIS should be foreclosed from applying the regulation to the applicant's case. However, in *Matter of Hernandez-Puente*, the Board of Immigration Appeals (BIA) found that it was not the province of the BIA or immigration judges to pass upon the validity of the regulations and statutes that they administer. *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991) (citing *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bogart*, 15 I&N Dec. 552 (BIA 1975, 1976; A.G. 1976); *Matter of Chavarri-Alva*, 14 I&N Dec. 298 (BIA 1973)). Similarly, the AAO is an entity, which, deriving its authority from the statute and regulations, lacks the authority to invalidate or ignore the statutory provisions and regulations that it administers.

Based on the foregoing, in order to establish that she is eligible for SIJ status, the applicant must show that she 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 and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment." Section 101(a)(27)(J)(i) of the Act. In accord with congressional intent, as reflected in 8 C.F.R. § 204.11(c)(5), the applicant must show that the conditions described in section 101(a)(27)(J)(i) of the Act continue as of the time that the petition for SIJ status is adjudicated.

The applicant has not shown that she continues to be dependent on the juvenile court, or that she is committed to the care or custody of a State. In fact, the record reflects that the applicant no longer resides in the State of Massachusetts, as she relocated to Freeport, New York. *Facsimile from Lutheran Social Services of New England*, dated April 30, 2007. A facsimile from Lutheran Social Services of New England reflects that the applicant is no longer involved with their services, as the author explains that the organization considered what they could do "to let [the applicant] know that she would be welcome back to the program." *Id.* at 3.

The applicant has not shown that the juvenile court maintained jurisdiction over her beyond her 18th birthday, the time that she reached the age of majority under Massachusetts law. M.G.L.A. ch. 4 § 7 (defining "age of majority"); M.G.L.A. 231 § 85P (defining "age of majority"). Nor did the juvenile court cite any provision of Massachusetts law that would provide it with the authority to maintain jurisdiction over the applicant beyond her eighteenth birthday.³ Moreover, Massachusetts law provides that a guardianship terminates by law when a child reaches age 18. *See* M.G.L.A. Chapter 201 § 4.

³ Juvenile court jurisdiction in the State of Massachusetts ends upon a child attaining the age of 18. *See* M.G.L.A. Chapter 119 § 24 (setting forth procedure to commit a child under the age of 18 to custody or other disposition). However, the AAO recognizes that some exceptions exist regarding criminal actions against a juvenile. *See* M.G.L.A. Chapter 119 § 72. Yet, as the present matter does not involve criminal proceedings against the applicant, the extension of juvenile court jurisdiction provided in M.G.L.A. Chapter 119 § 72 does not apply.

Based on the foregoing, the applicant has not shown that she is dependent on a juvenile court, or that she 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. For this additional reason, the applicant has not established that she is eligible for SIJ status and the petition may not be approved. *Id.*

Counsel suggests that the District Director's delay in adjudicating the present petition caused the applicant to age out of eligibility or to otherwise become ineligible for SIJ status, and thus the District Director should be estopped from denying the petition on the basis that the applicant has failed to continue to meet the requirements. As discussed above, the applicant has not shown that the juvenile court orders on which she bases her petition are valid, thus her eligibility did not change while her petition was pending with the District Director. Accordingly, the applicant has not shown that the processing time resulted in the denial of her petition.

It is further noted that the applicant filed her Form I-360 petition for SIJ status on May 16, 2005, after she had already reached age 18, the age of majority in Massachusetts, thus the processing time did not result in the applicant attaining the age of majority prior to adjudication. M.G.L.A. ch. 4 § 7; M.G.L.A. ch. 231 § 85P. As referenced above, the applicant relocated out of Massachusetts, which likely affected her eligibility. The applicant has not asserted or shown that her relocation was connected to any delay from the District Director.

Further, even had the applicant established that delay from the District Director affected her eligibility for SIJ status, the AAO would lack authority to apply the doctrine of equitable estoppel to approve the petition. The BIA's decision in *Matter of Hernandez-Puente* addressed the doctrine of equitable estoppel.⁴ As noted by the BIA, the United States Supreme Court has opened the possibility that equitable estoppel might be applied against the government based upon the actions of its agents in situations where it is found that those agents engaged in "affirmative misconduct." See *INS v. Hibi*, 414 U.S. 5 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961). However, it has not specifically ruled that affirmative misconduct would be sufficient to prevent the government from enforcing the immigration laws. *INS v. Miranda*, 459 U.S. 14 (1982); see also *Matter of Tuakoi*, 19 I&N Dec. 341 (BIA 1985); *Matter of M/V "Solemn Judge"*, 18 I&N Dec. 186 (BIA 1982). It is observed that some federal courts have found affirmative misconduct in certain situations and have imposed the doctrine of equitable estoppel against the government. See, e.g., *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2d Cir. 1976). Yet, the question of whether a federal court may apply the doctrine of equitable estoppel against the government is different from whether the AAO has the authority to apply the doctrine in this, or any other case. That question was answered in the negative by the BIA, which assessed its own equitable estoppel authority as follows:

[A]lthough the Fifth Circuit may have accepted the availability of estoppel against the Service, the Board itself and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Service so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. Equitable

⁴ The AAO notes that although *Matter of Hernandez-Puente* did not involve an SIJ petition, it involved a similar factual scenario of an individual who aged out eligibility for derivative status. Additionally, the facts involved the agency's failure to adjudicate the petition over a period of at least two years, during which time the beneficiary's family purportedly made numerous inquiries and received various assurances.

estoppel is a judicially devised doctrine that precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or a defense, regardless of its substantive validity. *M.D. Phelps v. Fed. Emergency Management Agency*, 785 F.2d 13 (1st Cir. 1986). Estoppel is an equitable form of action and only equitable rights are recognized. *Keado v. United States*, 853 F.2d 1209 (5th Cir. 1988). By contrast, this Board, in considering and determining cases before it, can only exercise such discretion and authority conferred upon the Attorney General by law. 8 C.F.R. § 3.1(d)(1) (1991). Our jurisdiction is defined by the regulations and we have no jurisdiction unless it is affirmatively granted by the regulations. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985); *Matter of Zaidan*, 19 I&N Dec. 297 (BIA 1985).

Matter of Hernandez-Puente, supra at 338-39.

The AAO finds that it likewise derives its authority from the regulations and lacks authority to apply a remedy not explicitly granted by the regulations. Moreover, even if it were determined that the AAO had such authority, as discussed above, the facts in the instant case do not lend themselves to a finding of affirmative misconduct by the District Director, or a change in the applicant's eligibility that is attributable to actions of the District Director.

Counsel contends that the District Director raised new grounds for denial that were not discussed in the previously issued Notice of Intent to Deny the petition. Specifically, counsel states that the District Director did not previously raise the issues of whether the applicant required the specific consent of the Secretary to the juvenile court's jurisdiction, or whether the applicant continues to be dependent on the juvenile court and eligible for long-term foster care. Counsel asserts that raising new issues in the district director's denial contravenes USCIS regulations and constitutes a denial of due process. Counsel contends that the petition should be remanded to the District Director so that a new Notice of Intent to Deny may be issued, affording the applicant an opportunity to respond to the grounds for denial.

Counsel references the decision of the U.S. District Court for the Eastern District of Pennsylvania in *Yeboah v. United States*, 223 F.Supp 2d 650, 660 (E.D. Pa. 2002). However, the court in *Yeboah* found that the applicant was afforded due process, in that the applicant's request for consent to go before a juvenile court was adequately considered to adhere to standards of due process. *Id.* The fact that the matter in *Yeboah* was remanded for further consideration does not establish that the present matter should be remanded to the District Director. It is further noted that decisions of the U.S. District Court for the Eastern District of Pennsylvania, while instructive, are not binding on the present matter.

Counsel cited an unpublished decision of the AAO, yet he did not discuss the facts of the referenced matter or explain how they relate to the instant case. Counsel has not shown that the referenced matter has a bearing on the applicant's petition.

Counsel asserts that the District Director's denial was in error in light of 8 C.F.R. § 103.2(b)(8)(iv), which provides the following:

A request for evidence or notice of intent to deny will be in writing and will specify the type of evidence required, and whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond.

Upon review of the notice of intent to deny, it is observed that the District Director based her intent to deny on the fact that the applicant had not shown that she continues to be dependent on the juvenile court and eligible for long-term foster care. *Decision of the District Director* at 3. The District Director repeated this finding in her denial, thus this basis did not constitute a new ground for denying the petition. *Id.*

In the notice of intent to deny the petition, the District Director reported that the applicant was subject to an order of removal. *Id.* at 3. Yet, the District Director did not directly address the issue of the requirement for the Secretary's specific consent to the juvenile court's jurisdiction. The AAO agrees that, in light of the fact that the District Director chose to issue a notice of intent to deny, the issue of specific consent should have been raised in the notice.⁵ Yet, the applicant has had opportunity to fully respond to the District Director's grounds for denial on appeal. The AAO does not find that the present matter warrants remanding the petition back to the District Director, or that such a measure would afford the applicant the opportunity not provided by the instant appeal process.

Conclusion

Based on the foregoing, the applicant has not shown that she obtained the required specific consent of the Secretary to the juvenile court's jurisdiction, thus the applicant has not shown that the juvenile court's orders are a valid basis for a grant of SIJ status. Nor has the applicant shown that she is dependent on a juvenile court, or that she 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. Nor has the applicant established that the AAO has the authority to apply the doctrine of equitable estoppel in the present matter, or that if such authority existed, it would be warranted based on the current facts. Accordingly, the applicant has not established that she is eligible for SIJ status.

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 not shown eligibility for the benefit sought. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁵ It is noted that the regulations did not compel the District Director to issue a notice of intent to deny or request for additional evidence in the present matter, as the applicant's initial application contained conclusive evidence of ineligibility – a final order of removal with clear evidence that the Secretary denied the applicant's repeated requests for specific consent to the juvenile court's jurisdiction. 8 C.F.R. § 103.2(b)(8)(ii).