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U.S. Department of Homeland Security
20 Mass. Ave, N.W. Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: BOSTON Date: OCT 04 2007

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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 19-year-old native and citizen of El Salvador. 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 show that she continues to be dependent on a juvenile court and eligible for long-term foster care in the State of Massachusetts, as required by 8 C.F.R. § 204.11(c)(5). The petition was denied accordingly.

On appeal, counsel for the applicant contends that the decision of the District Director is based on an incorrect reading of the laws of Massachusetts and an erroneous interpretation of section 101(a)(27)(J) of the Act and related regulations. *Brief in Support of Appeal*, dated August 20, 2007. Counsel contends that the District Director's decision constitutes a change in USCIS policy without notice to the public, and as the applicant relied on previous policy to her detriment, the District Director is estopped from applying the changed policy in the present matter. *Id.* at 1, 5-7. Counsel asserts that the District Director's finding that 8 C.F.R. § 204.11 requires the applicant to be under age 18 contravenes the applicable provisions of the Act as well as State and federal notions of due process and fairness. *Id.* at 1.

The record contains, in pertinent part, a brief from counsel; a copy of an order from the Commonwealth of Massachusetts Trial Court, Probate and Family Court Department ("juvenile court"), dated January 24, 2006; an affidavit from an attorney attesting to his prior success with filing SIJ petitions with the USCIS Boston District Office for applicants who reached 18 years of age; a statement from the applicant; a statement from the applicant's brother; a copy of a birth record for the applicant; a report from psychologist evaluating the applicant's mental health, and; a copy of the applicant's passport. 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 El Salvador on February 2, 1988. The applicant suffered physical abuse from her father, sexual abuse from two of her brothers, rape by one of her cousins and school teachers, and verbal abuse from a friend of her mother. *Statement from the Applicant*, dated January 20, 2006; *Statement from the Applicant's Brother*, dated January 19, 2006. For her safety, the applicant traveled to the United States to join two of her brothers who are established in this country. *Id.* On September 14, 2005, the applicant was discovered attempting to enter the United States at the San Ysidro Port of Entry by hiding in the trunk of an automobile, and she was taken into DHS custody. On September 15, 2005, the applicant was issued a Notice to Appear based on the finding that she was in violation of sections 212(a)(4)(A) and 212(a)(7)(A)(i)(I) of the Act. The applicant was released to the custody of her brother on October 17, 2005.

On January 24, 2006, 22 days before the applicant's 18th birthday, the juvenile court issued an order finding that: the applicant was an unmarried ward under the laws of the State of Massachusetts; the applicant was dependent on the court relative to guardianship proceedings; the applicant's "custody continues under the jurisdiction of this Court"; reunification of the applicant and her parents was not possible, and thus the applicant was eligible for long-term foster care; it was not in the best interest of the applicant to be returned to El Salvador; it was in the best interest of the applicant to remain in the United States under the care of her brother, and; such findings were made because of abandonment, neglect, and/or abuse of the applicant. *Order of the Juvenile Court*, dated January 24, 2006. The applicant filed the present petition for SIJ status on February 1, 2006, 14 days prior to her 18th birthday.

The District Director found that the applicant failed to show that she continues to be dependent on a juvenile court and eligible for long-term foster care in the State of Massachusetts, as required by 8 C.F.R. § 204.11(c)(5). The District Director stated that "[w]ith a few limited exceptions; a child is no longer dependent upon the juvenile court in Massachusetts upon reaching the age of majority, determined to be age 18." *Decision of the District Director* at 4, undated. Thus, the District Director found that the applicant was no longer dependent on the juvenile court once she reached age 18. The District Director declined to discuss what exceptions exist, or to analyze whether the applicant met any of the referenced exceptions.

Counsel's Assertions on Appeal

On appeal, counsel cites the decision of the Massachusetts Supreme Judicial Court in *Eccleston v. Bankosky*, 438 Mass. 428 (Mass. 2003), to stand for the proposition that, pursuant to M.G.L.A. Chapter 215 § 6, the juvenile court may retain jurisdiction over a child for dependency purposes even though he or she has reached the age of 18. *Brief in Support of Appeal* at 3. Counsel contends that a decision maker must look at all of the facts and circumstances to determine whether an applicant remains dependent on the juvenile court. *Id.* (citing *Eccleston v. Bankosky*, 438 Mass. 428 (Mass. 2003)). Counsel asserts that the record supports that the juvenile court continues to exercise jurisdiction over the applicant in the present matter. *Id.*

Counsel contends that no evidence in the record suggests that the abuse, neglect, and abandonment experienced by the applicant has "magically disappeared" or that reunification with her parents is now possible. *Id.* Counsel observes that dependency on the juvenile court and guardianship are separate concepts under Massachusetts law. *Id.* at note 7. Counsel states that, while guardianship ends by law at age 18, dependency can continue under the equity powers of the juvenile court. *Id.* (citing *Eccleston v. Bankosky* at 437-438).

Counsel observes that the regulation at 8 C.F.R. § 204.11(a) states that eligibility 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. *Id.* at 4. Counsel points out that 8 C.F.R. § 204.11(c)(5) does not require an applicant to establish that she meets all State requirements to be placed into a foster care program. *Id.* Counsel asserts that the District Director erroneously required the applicant to show that she continues to be in a guardianship arrangement recognized by the State of Massachusetts, when 8 C.F.R. § 204.11(c)(5) imposes no such requirement. *Id.* Counsel suggests that, as family reunification continues to not be a viable option for the applicant, she continues to satisfy 8 C.F.R. § 204.11(c)(5). *Id.*

Counsel contends that the District Director's decision constitutes a change in USCIS policy without notice to the public, and the applicant relied on previous policy to her detriment. *Id.* at 1, 5-7. The applicant provides an affidavit from an attorney, [redacted], attesting to his prior success with filing SIJ petitions with the USCIS Boston District Office for applicants who reached 18 years of age, encompassing at least 20 cases. *Id.* Counsel asserts that "[t]he policy described by [redacted] was not only practiced, but arose out of an affirmatively-stated position, not unintentional, taken by the Boston District Director. *Id.* at 6. Counsel contends that the applicant could have pursued her petition for SIJ status soon after her arrival on September 14, 2005, and that she relied on the prior policy of the USCIS Boston District Office to her detriment. *Id.* at 7. Counsel suggests that such reliance caused the applicant to age out of eligibility under the analysis in the District Director's decision, and thus the District Director should be estopped from applying the allegedly new policy to deny the petition. *Id.*

Counsel observes that the regulation at 8 C.F.R. § 204.11(c)(5) imposes a requirement on applicants for SIJ status that is not present in the Act. *Id.* at 8. Specifically, counsel notes that 8 C.F.R. § 204.11(c)(5) requires that an applicant show that she "*continues* to be dependent upon the juvenile court and eligible for long-term foster care," while 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 and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment." 8 C.F.R. § 204.11(c)(5) (emphasis added); section 101(a)(27)(J)(i) of the Act (emphasis added). Counsel asserts that 8 C.F.R. § 204.11(c)(5) conflicts with section 101(a)(27)(J)(i) of the Act, and thus it is invalid. *Brief in Support of Appeal* at 9. Counsel contends that applying 8 C.F.R. § 204.11(c)(5) in the present matter constitutes an "arbitrary or capricious exercise of legacy INS's delegated authority." *Id.* (referencing *Chevron USA, Inc. v. Natural Resources Council*, 467 U.S. 837, 843-844 (1984)).

Counsel asserts that, as other applicants similarly situated to the applicant were granted SIJ status "until sometime in late 2006," denying the present petition constitutes a change in the application of the law,

practice and/or policy without prior notice and thus constitutes a violation of constitutional notions of fairness as well as due process. *Id.* at 9.

Analysis

The primary issue in the present proceeding is whether the applicant has shown that she meets the requirements of section 101(a)(27)(J)(i) of the Act and the regulation at 8 C.F.R. § 204.11(c)(5).

As a preliminary matter, counsel asserts that the requirements of 8 C.F.R. § 204.11(c)(5) may not be imposed on the applicant, as 8 C.F.R. § 204.11(c)(5) conflicts with the Act and is therefore invalid. However, the AAO does not find that 8 C.F.R. § 204.11(c)(5) conflicts with the Act such that it may not be applied in the instant case.

As observed by counsel, 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.

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 alternatives 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 that she continues to be dependent, on a juvenile court. *See* section 101(a)(27)(J)(i) of the Act.

However, counsel's assertion that the requirements of 8 C.F.R. § 204.11(c)(5) should be invalidated in total is not persuasive. The construction of 8 C.F.R. § 204.11(c)(5) serves to require that an applicant continue to be dependent on 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 record clearly shows that, on January 24, 2006, the applicant was deemed dependent on the juvenile court relative to guardianship proceedings and eligible for long-term foster care in the State of Massachusetts. *Order of the Juvenile Court*, dated January 24, 2006. However, the applicant reached 18 years of age 22 days later on February 15, 2006. Counsel contends that the juvenile court retained jurisdiction over the applicant beyond her 18th birthday, thus she remains dependent on the juvenile court and in compliance with 8 C.F.R. § 204.11(c)(5). Yet, the court order, as well as the record, do not support a finding that the juvenile court maintained jurisdiction over the applicant beyond her eighteenth birthday, or that it had legal authority to do so under Massachusetts law.

In its order, the juvenile court indicated that the applicant's custody "continues under the jurisdiction of this Court," yet it did not provide a date on which such jurisdiction would end. As the applicant was age 17 at the time the court issued its order, the statement that the applicant's custody continues under the jurisdiction of the court does not establish that the court intended to retain jurisdiction over the applicant past her eighteenth birthday, at such time that she would reach 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.[1] Moreover, Massachusetts law provides that a guardianship terminates by law when a child reaches age 18. *See* M.G.L.A. Chapter 201 § 4.

Counsel asserts that, pursuant to M.G.L.A. Chapter 215 § 6, the juvenile court was authorized to retain jurisdiction over the applicant for dependency purposes even though she reached the age of 18. Counsel bases this assertion on the decision of the Massachusetts Supreme Judicial Court in *Eccleston v. Bankosky*, 438 Mass. 428 (Mass. 2003).

Massachusetts General Laws Chapter 215 § 6 defines the jurisdiction of the juvenile court (probate court) that deemed the applicant dependent upon the court and eligible for long-term foster care. M.G.L.A. Chapter 215 § 6 states, in pertinent part, "Probate courts shall . . . have jurisdiction concurrent with the supreme judicial and superior courts, of all cases and matters in which equitable relief is sought relative to . . . (vi) all matters relative to guardianship or conservatorship." While M.G.L.A. Chapter 215 § 6 gives the juvenile court jurisdiction over the applicant's guardianship, it is silent on whether the court may retain jurisdiction over the applicant past age 18, or whether orders issued by the juvenile court relative to the applicant's guardianship remain in effect beyond the applicant's eighteenth birthday by operation of law.

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[1] Juvenile court jurisdiction in the State of Massachusetts ended 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.

In *Eccleston*, a child's guardian filed a complaint against the child's father, approximately one month prior to the child's eighteenth birthday, requesting that a Family and Probate Court order the father to pay child support beyond the child's eighteenth birthday. The Massachusetts Supreme Judicial Court found that the Probate and Family Court judge lacked authority under M.G.L.A. Chapter 201 § 40 to order the father to pay postminority support to his daughter's former guardian after the daughter turned 18 years old, because the "guardianship of a minor must end when the minor attains the age of eighteen years, . . .[and t]he statutory reference to an actual age precludes judicial discretion." *Eccleston*, 438 Mass. at 433 (internal quotation marks and citation omitted). However, the court held that the Probate and Family Court judge had authority pursuant to equity powers under M.G.L.A. Chapter 215 § 6 to order a father to pay child support for his daughter beyond her eighteenth birthday. *See Eccleston* 438 Mass. at 439-40. The Court discussed the concept of emancipation under Massachusetts law, and indicated that a parent's obligation to his child does not automatically terminate upon a child's reaching the age of majority. *Id.* at 434. The Massachusetts Supreme Judicial Court stated that the facts of each case must be considered to determine if emancipation has occurred, and that a parent may be ordered to pay child support for a child who is found to be "unemancipated." *Id.* at 434, 437.[2]

Although the *Eccleston* court held that "the equity powers granted to Probate and Family Court judges in M.G.L.A. Chapter 215, § 6, are broad enough to permit a judge to impose a postminority support order on the child's financially able noncustodial parent or parents," *id.* at 437, it is not clear that the court's general equity jurisdiction could extend to continued court dependency outside of the child support context. Moreover, in the present matter, the record contains no indication that the juvenile court ordered or intended that its jurisdiction over the applicant should continue after the applicant reached the age of majority, by law or by equity. The AAO makes no finding regarding whether the juvenile court would have had authority to continue its jurisdiction over the applicant beyond her eighteenth birthday for the purpose of maintaining her dependency upon the juvenile court. In the absence of such an affirmative order or action by the juvenile court, the applicant has not established that the juvenile court's jurisdiction continues, such that the applicant remains dependent upon the juvenile court.

As discussed above, as an alternative to showing continued dependency on the juvenile court, the applicant may show that a court has legally committed her to, or placed her under the custody of, an agency or department of a State. Section 101(a)(27)(J)(i) of the Act. The record does not reflect that the applicant is legally committed to, or under the custody of, an agency or department of the State of Massachusetts. *Id.*

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 reason, the applicant has not established that she is eligible for SIJ status. *Id.*

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[2] The Court further noted that Massachusetts has "enacted laws to ensure that children who have 'aged out' of foster care on reaching the age of eighteen years receive postminority support to enable them to pursue opportunities for education, rehabilitation, and training. *See* [M.G.L.A.] c. 119, § 23 (Department of Social Services may retain responsibility for former foster child to age twenty-one years, with person's agreement, 'for the purposes of specific educational or rehabilitative programs')." *Eccleston*, 438 Mass. at 436. However, there is no contention that this provision is applicable to these proceedings.

Counsel contends that the District Director's decision constitutes a change in USCIS policy without notice to the public, and that the applicant relied on previous policy to her detriment. However, the applicant has not submitted any examples of specific petitions that were granted based on the same or similar facts as the present matter. The applicant provides an affidavit from an attorney, [redacted]., in which Mr. [redacted] attested to his prior success with filing SIJ petitions with the USCIS Boston District Office for applicants who reached 18 years of age, encompassing at least 20 cases. Yet, [redacted] did not describe the facts of any of the referenced successful cases such that the AAO can compare them to the present matter. Notably [redacted] did not state whether the applicants in his prior cases remained dependent on a juvenile court, or legally committed to, or under the custody of, an agency or department of the State of Massachusetts in order to satisfy section 101(a)(27)(J)(i) of the Act and 8 C.F.R. § 204.11(c)(5).

Counsel contends that the applicant could have pursued her petition for SIJ status soon after her arrival in the United States, and that she relied on the prior policy of the USCIS Boston District Office to her detriment. However, the applicant arrived in the United States on September 14, 2005 and she received the juvenile court's order on January 24, 2006, approximately four months later. The applicant has not described measures she could have taken to obtain a juvenile court order in less than four months after her arrival to the United States. The applicant filed the present petition for SIJ status on February 1, 2006, eight days after she received the court order. The applicant has not shown that clarification of the SIJ policy of the USCIS Boston District Office would have allowed her to prepare and submit a petition for SIJ status faster than eight days. As the applicant entered the United States five months prior to her eighteenth birthday, she had limited time in which to obtain counsel, file a petition with the juvenile court, obtain an order from the juvenile court, prepare and file a petition for SIJ status, and allow sufficient time for USCIS to adjudicate the petition prior to her eighteenth birthday. The applicant has not established that her reliance on a perceived differing SIJ policy of the USCIS Boston District Office resulted in her attaining the age of eighteen prior to adjudication of the present petition.

Further, even had the applicant established that her reliance on a changed USCIS Boston District Office SIJ policy caused her to age out of 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.[3] 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

[3] 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 of 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.

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 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 detrimental reliance by the applicant upon a changed policy.

The AAO further notes that if the District Director discovers that a provision of the Act or regulations has been misapplied in prior matters, it is his or her duty to ensure that such provision is correctly applied in all future matters. Prior errors do not serve as binding precedent, irrespective of an applicant's reliance on the previous misapplication of the Act or regulations. *Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The AAO acknowledges counsel's correct observation that the regulation at 8 C.F.R. § 204.11(a) states that eligibility 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. Thus, the eligibility for long-term foster care components of 8 C.F.R. §§ 204.11(c)(4) and (5) may be met by showing that a juvenile court has deemed that reunifying an applicant with her family is no longer viable, and that such non-viability continues. The AAO further acknowledges that the record reflects that reunifying the applicant with her parents remains not a viable option. However, the applicant has not established that she is otherwise eligible for SIJ status, as discussed above.

Conclusion

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. 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.