



U.S. Citizenship
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FILE: NO CASE NUMBER

Office: TEGUCIGALPA, HONDURAS

Date: **MAR 15 2007**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F)

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 Officer-in-Charge (OIC), Tegucigalpa, Honduras, denied the Petition to Classify Orphan as an Immediate Relative and certified the decision to the Administrative Appeals Office (AAO). The decision of the OIC will be affirmed and the petition will be denied.

The petitioner, [REDACTED] filed a Petition to Classify Orphan as an Immediate Relative (I-600 Petition) on August 4, 2006, in Honduras, on behalf of the beneficiary [REDACTED]. In response, the OIC issued a Notice of Intent to Deny, informing [REDACTED] and his wife that [REDACTED], their adoptive daughter, met all of the criteria for classification as an orphan except that she was over the age of 16 at the time the I-600 Petition was filed, and she therefore did not meet the requirements of the definition of "orphan" under section 101(b)(1)(F) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. § 1101(b)(1)(F). *OIC NOID*, September 22, 2006. In response, [REDACTED], through counsel, submitted rebuttal material and a Brief in Support of the I-600 Petition (*Brief*, October 20, 2006) and a Supplemental Brief (*Brief*, December 1, 2006) indicating that failure to timely file was due to circumstances beyond his control, and requesting that the doctrine of equitable tolling be applied to the case so that the petition could be deemed to be timely filed before [REDACTED] turned 16. Counsel emphasized that if the 16-year age limitation were to be tolled in this case, then [REDACTED] would be considered an orphan, as other statutory requirements had been met.

In support of his assertion that the doctrine of equitable tolling is applicable to this case, the petitioner cited to, *inter alia*, a US CIS policy memo and relevant case law holding that "equitable tolling is available in INA cases, as there is a 'presumption, read into every federal statute of limitation, that filing deadlines are subject to equitable tolling.'" *Legal and Discretionary Analysis for Adjudication (CIS Memo)*, Robert C. Divine, US CIS, May 3, 2006; *Muñoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003). Upon review of the material submitted, the OIC agreed that the late filing of the I-600 Petition had been beyond the control of the petitioner, but also found that neither the law nor the regulations permits equitable tolling in this case, and that CIS does not have the discretion to waive the filing deadline. *OIC Decision*, December 13, 2006. The I-600 Petition was denied accordingly. [REDACTED], through counsel, submitted an additional Brief in Support of the I-600 Petition (*Brief*, February 13, 2007) for consideration by the AAO on certification.

The petitioner also claims that he tried to file an incomplete I-600 Petition before the beneficiary turned 16, to be supplemented later when the required document from the Honduran agency was available, but that CIS in Tegucigalpa erroneously refused to accept it.

There is no question of fact in this case regarding whether the I-600 Petition was timely filed. It was filed on August 4, 2006; [REDACTED] turned 16 on June 9, 2006. The questions raised in his case are, therefore, (1) whether equitable tolling of the age cutoff date is permissible and, if so, whether it should be applied, given the facts of the case; and (2) whether CIS has discretionary authority to accept an incomplete I-600 Petition, subject to supplementation and approval at a later date, and abused its authority in refusing to accept it.

1. Doctrine of Equitable Tolling

In his decision, the OIC cites to *Muñoz, supra*, noting that the court refused to apply equitable tolling in that case because it found that the statute in question was a statute of repose, and not a statute of limitation. The statute in question in *Muñoz* was the asylum-filing deadline established by the Nicaraguan Adjustment and

Central American Relief Act (NACARA) (Pub.L. No. 105-100, 111 Stat. 2160 (Nov. 19, 1997)). The *Muñoz* court held that it was not dealing with a limitations period, but rather, “Congress created a statutory cutoff date of April 1, 1990 (asylum application deadline to qualify under NACARA) . . . We cannot ‘toll’ this type of cutoff date.” *Id.*, at 957. The court further explained that “[a] statute of repose is a fixed, statutory cutoff date, usually independent of any variable, such as claimant’s awareness of a violation. . . . [and] [i]n setting NACARA’s retroactive cutoff dates, Congress closed the class via a statute of repose, thereby precluding equitable tolling.” *Id.*

The issue in this case becomes, therefore, whether the 16-year age cutoff in section 101(b)(1)(F) of the Act operates as a statute of repose or a statute of limitations, as only a statute of limitations may be subject to equitable tolling. See *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1097 (9th Cir. 2005) (distinguishing *Muñoz*, finding a motion to reopen for purposes of seeking relief under NACARA to operate as a statute of limitations, unlike the asylum-filing deadline to establish threshold eligibility for NACARA). Another way to describe the difference is that a statute of repose operates as a jurisdictional time-limit or prerequisite and cannot be tolled. *Id.*

When determining whether a time limitation can be subject to equitable tolling or whether it is jurisdictional, the Supreme Court has recognized that the main purpose of the inquiry is to discover Congressional intent behind the statute. See *Id.*, at 1095 (citations omitted). In determining Congressional intent, it is necessary to interpret the language of a statute in accordance with Congress’s intent in passing it. *Id.*, 1096. The current definition of “orphan” (with several amendments over the years) was adopted in 1965. In enacting this legislation, Congress was primarily concerned with family unity and the welfare of children. In establishing the definition of “orphan” with this goal in mind, a statutory age limit was first set at 14. The maximum qualifying age for adopted children under section 101(b)(1)(E) and for orphans under section 101(b)(1)(F) of the Act was increased from 14 to 16 in 1981. In order to keep families in tact, Congress again amended those provisions to include older siblings of such children, allowing the older siblings between the age of 16 and 18 to qualify as adopted children or as orphans. Congress has thus spoken clearly, and when it deemed necessary, on the issue of age requirements for these categories of children. Where the plain meaning of a statute’s language is clear, the sole function of the courts is to enforce the statute. See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

A child who meets the definition of “orphan” contained in section 101(b)(1)(F) of the Act is eligible for classification as an immediate relative under one of the definitions of “child” under the Act. The definition of the term “child” in section 101(b)(1) of the Act is particularly exhaustive. See *Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976) (in light of the history of the age restriction for adopted children, that provision must be given a literal interpretation). Even if [a relationship] closely resembles a parent-child relationship, Congress, through the statute’s plain language, precluded the functional approach to defining the term “child.” *INS v. Hector*, 479 U.S. 85 (1986) (examining the respondent’s relationship with her nieces). The Court added,

With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to [some] who share strong family ties. . . . But it is clear from our cases . . . that these are policy questions entrusted exclusively to the political branches of our Government, and

we have no judicial authority to substitute our political judgment for that of the Congress.
Fiallo v. Bell, 430 U.S. 787, 798 (1977).

INS v. Hector, 479 U.S. 85, 90, (1986).

In light of the clear statutory language in the Act regarding age cutoffs for children, including in the definition of an “orphan” at section 101(b)(1)(F), and Congressional intent to establish such age cutoffs for orphans and other children, the AAO concludes that the statutory cutoff age of 16 to meet the definition of “orphan” is a limitation period that operates as a jurisdictional prerequisite. It involves a threshold condition for eligibility under section 101(b)(1)(F) of the Act. Similar to the filing deadline at issue in *Muñoz*, it is therefore not a time limitation that can be tolled.

Nor does the CIS have the authority to exercise discretion over a statute of repose such as the one at issue here, as it would be inconsistent with legislative purpose. Neither the statute nor the regulations indicate that such discretion has been delegated to the Secretary of Homeland Security. Absent a change in the statute, a child who is not under the age of 16 at the time an I-600 Petition is filed on her behalf does not meet the definition of “orphan,” and that cutoff date cannot be tolled.

2. Filing an Incomplete I-600 Petition

██████████ also claims that he tried to file an incomplete I-600 before the beneficiary’s sixteenth birthday (June 9, 2006) to be supplemented later when a final document from the Honduran agency was available. He states that officials at the U.S. Embassy, Department of Homeland Security, in Honduras refused to accept the incomplete petition, thus denying him the opportunity to meet the filing deadline. *Affidavit by* ██████████ ██████████ October 19, 2006. He claims that he was told that he could not file the I-600 Petition until the responsible Honduran agency had executed the Public Deed of Adoption. *Id.* This Public Deed, or final adoption decree, was eventually executed in Honduras on July 25, 2006, indicating final Honduran “approval/certification of the international component of the adoption.” *Id.* The final adoption decree was therefore not issued until over a month after ██████████ turned 16. It is important to note that whether to approve an adoption under Honduran law, and when to do so, is a matter entirely within the jurisdiction of the competent authority in Honduras. Both ██████████ and the OIC agree that the inability to provide the document before ██████████ turned 16 was not due to any fault or lack of diligence on the part of ██████████.

The CIS Memo, *supra*, relied on by both the OIC and the petitioner, explains that “sometimes a case, especially when coupled with government errors or delay and compelling humanitarian factors, may justify an exercise of discretion resulting in an extraordinary favorable outcome for the applicant.” CIS Memo, *supra*, at 2. However, adjudicators who are considering such action are instructed to confirm whether the action would be lawful in light of the distinction between a statute of limitations and a statute of repose, as discussed above. *Id.*, fn 3. The Memo thus forecloses the use of discretion regarding the tolling of the age cutoff and does not otherwise provide guidance on the use of discretion regarding the acceptance of an incomplete petition.

Section 8 of the U.S. Code of Federal Regulations (8 C.F.R.) provides relevant instruction on the filing of petitions and required documentation. 8 C.F.R. § 103.2(b) relating to evidence and processing of applications

and petitions in general; and 8 C.F.R. § 204.3 relating specifically to the processing and adjudication of orphan cases, provide, *inter alia*, that an orphan petition must be accompanied by full documentation.

8 C.F.R. § 103.2(b) provides in pertinent part:

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form.

8 C.F.R. § 204.3(d) provides in pertinent part:

(1) *Filing an orphan petition after the advanced processing application has been approved.* The following supporting documentation must accompany an orphan petition filed after approval of the advanced processing application (emphasis added):

. . . .

(iv) Evidence of adoption abroad or that the prospective adoptive parents have, or a person or entity working on their behalf has, custody of the orphan for emigration and adoption in accordance with the laws of the foreign-sending country:

(A) A legible, certified copy of the adoption decree, if the orphan has been the subject of a full and final adoption abroad . . .

The regulations clearly require full documentation, including a final adoption decree in [REDACTED] case, as Mr. [REDACTED] was correctly informed by CIS in Honduras. The regulations do not indicate that CIS can exercise discretion in accepting an I-600 Petition that lacks the required documentation. Moreover, submitting a post-filing adoption decree would not permit approval of an I-600 Petition in any case, as it would not be evidence of eligibility at the time of filing. 8 C.F.R. § 103.2(b)(12). The regulations are clear, and do not support a conclusion that there was any abuse of discretion in the refusal to accept an incompletely documented I-600 Petition.

Despite the sympathetic aspects of this case, the fact remains that the beneficiary is not an orphan under the Act, as she was over 16 when the I-600 Petition was filed. Accordingly, the AAO finds that the beneficiary does not meet the definition of “orphan” as set forth in section 101(b)(1)(F) of the Act.

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met his burden in the present matter. On certification, the decision of the OIC will be affirmed and the petition will be denied.

ORDER: The decision of the OIC is affirmed. The petition is denied.