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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: BALTIMORE, MARYLAND Date: AUG 04 2009

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to 8 C.F.R. § 204.3

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The district director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(b)(1)(F). The district director denied the petition on the basis of his determination that the petitioner had failed to establish that the beneficiary qualified for classification as an orphan as the term is defined at section 101(b)(1)(F)(i) of the Act.

Section 101(b)(1)(F) of the Act defines an orphan, in pertinent part, as:

> a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States[.]

The petitioner filed the Form I-600 on November 13, 2008 in Baltimore, Maryland. The beneficiary, who was born on May 17, 1991, was therefore over the age of sixteen at the time the petition was filed, which precluded his classification as an orphan under the Act. Accordingly, the district director denied the Form I-600 on March 31, 2009.

Counsel filed a timely appeal on May 1, 2009. Counsel contends that the petition should be approved because the petitioner filed a previous orphan petition on behalf of the beneficiary in 2006. Although that petition was denied by the district director in 2007, counsel asserts nonetheless, that because the beneficiary had not yet reached the age of sixteen at the time that petition was filed, he is entitled to classification as an orphan.

Although not specifically stated as such, counsel is, in essence, arguing that the doctrine of equitable tolling should be applied to this case. As such, he is arguing that the statutory limitation contained in section 101(b)(1)(F) of the Act as it relates to children who are over the age of sixteen should be tolled due to the equities involved in this case. He contends that although the first Form I-600 filed on behalf of the beneficiary by the petitioner was denied, USCIS should nonetheless use the filing date of that petition, rather than the filing date of the instant petition, in calculating the

beneficiary's age for purposes of determining whether he was under the age of sixteen at the time the petition was filed.

There is no question of fact in this case with regard to whether the instant Form I-600 was timely filed. As was noted previously, it was filed on November 13, 2008; the beneficiary reached sixteen years of age on May 17, 2007, nearly eighteen months before the petition was filed. He was, however, under the age of sixteen at the time the previous Form I-600, which was denied, was filed. If equitable tolling of the age cutoff is permissible in this case, and the age cutoff date were tolled to the filing date of the first Form I-600 in 2006, then the statutory limitation contained in section 101(b)(1)(F) of the Act regarding children over the age of sixteen would not preclude approval of this petition.

The equitable tolling doctrine is presumed to apply to every federal statute of limitation. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1188 (9th Cir. 2001). However, not every statutory time limit is a statute of limitations subject to equitable tolling. A crucial distinction exists between statutes of limitation and statutes of repose. *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003). A statute of limitations limits the time in which a plaintiff may bring suit after a cause of action accrues. A statute of repose, in contrast, "cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action." *Weddel v. Sec'y of H.H.S.*, 100 F.3d 929, 931 (Fed. Cir. 1996). Statutes of repose are not subject to equitable tolling. *Lampf Pleva, Lipkin, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (superseded on other grounds); *Weddel v. Sec'y of H.H.S.*, 100 F.3d at 930-32.

The statute in question in *Munoz v. Ashcroft* was the asylum-filing deadline established by the Nicaraguan Adjustment and Central American Relief Act (NACARA).[1] The *Munoz* 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." *Munoz* 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, therefore, is 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. Again, 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 *Munoz,* 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). A statute of repose operates as a jurisdictional time-limit or prerequisite and cannot be tolled. *Id.*

[1] Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997).

When determining whether a time limitation is a statute of limitations that may be subject to equitable tolling, or whether it is jurisdictional, the United States 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 fourteen years of age. 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 fourteen to sixteen years of age in 1981. In order to keep families intact, Congress again amended those provisions to include older siblings of such children, allowing the older siblings between the age of sixteen and eighteen 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 the following:

> 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" set forth 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 sixteen years 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 *Munoz,* it is therefore not a time

limitation that can be tolled. Rather, it is a statute of repose that is not subject to equitable tolling.

USCIS lacks 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 sixteen at the time the Form I-600 is filed on his behalf does not meet the definition of an "orphan," and that cutoff date cannot be tolled.

On appeal, counsel looks to "the spirit and intent" of the Child Status Protection Act,[2] the Child Citizenship Act,[3] and the Hague Convention.[4] However, counsel cities no specific provision in any of those documents that grants USCIS the authority to toll the beneficiary's date of birth to the date of the filing of a prior petition that was denied. Counsel also states that the Form I-600 that was filed in 2006 was denied in error, and criticizes the district director's handling of that case. However, unless an appeal has been filed, the AAO has no jurisdiction to go behind the district director's denial of that petition. If the petitioner disagreed with the director's decision in that case, he should have appealed it.

Counsel also states that, because the petitioner has legally adopted the beneficiary in India, USCIS should approve the petition. However, the AAO emphasizes that the issue in this case is not whether the beneficiary has been adopted according to the laws of India. Rather it is whether the beneficiary meets the definition of an "orphan" for purposes of classification as an immediate relative under the laws of the United States. As was set forth previously, section 101(b)(1)(F) of the Act requires that, in order to meet that definition, the petition must have been filed before the beneficiary reached the age of sixteen years.

Finally, the AAO turns to counsel's assertions on appeal with regard to the district director's handling of the instant petition. Counsel states that that the district director's request for evidence was "groundless," that the district director "is quite adept at keeping families apart and in tears," and that the district director's denial is "the type of decision that makes gives [sic] our government a bad name." However, the AAO has reviewed the record of proceeding, and finds no evidence of any inclination on the part of the district director toward improperly denying this petition. Rather, as set forth in this decision, the decision was the proper result under the statute.

The AAO does not dispute the sympathetic aspects of this case. However, the AAO lacks the authority to grant the relief sought by counsel and the petitioner. The statutory limitation contained in section 101(b)(1)(F) of the Act regarding children over the age of sixteen precludes

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[2] Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002).
[3] Child Citizenship Act, Pub. L. No. 106-395, 114 Stat. 1631 (2000).
[4] *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption* (May 29, 1993). The United States ratified the Hague Convention on December 12, 2007, with an effective date of April 1, 2008.

approval of this petition, and neither the district director nor the AAO possess the authority to toll the filing date of the petition to that of the previously denied Form I-600 as a matter of equity. The beneficiary does not meet the definition of "orphan" as set forth at section 101(b)(1)(F) of the Act, and this petition was properly denied by the district director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.