

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

61

[REDACTED]

FILE: [REDACTED]

Office: BOSTON

Date: JUN 02 2008

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 Honduras. He 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 he 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). Specifically, the District Director found that, once the applicant reached age 18, he was no longer dependent on the Commonwealth of Massachusetts Trial Court, Probate and Family Court Department (“juvenile court”), as contemplated by 8 C.F.R. § 204.11(c)(5). The petition was denied accordingly.

On appeal, counsel for the applicant contends that the District Director erroneously concluded that the applicant ceased to qualify for SIJ status once he reached age 18 and was no longer dependent on the juvenile court. *Statement from Counsel on Form I-290B*, dated March 11, 2008. Counsel asserts that the applicant continues to qualify for SIJ status despite the fact that he reached the age of majority in Massachusetts. *Id.*

The record contains a statement from counsel; a copy of an order from the juvenile court; a copy of a birth record for the applicant; documentation from the U.S. Department of Health and Human Services Office of Refugee Resettlement regarding the applicant’s custody status, and; documentation relating to the applicant’s proceedings in Immigration Court. 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 [Secretary of Homeland Security] 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 March 5, 1989. The applicant has not seen his mother since he was an infant. His father resides in Honduras and consented to the applicant's grandmother becoming the applicant's guardian from when he was one year old. The applicant has resided with his grandmother and other relatives.

On November 15, 2006, the juvenile court found that the applicant was abandoned and neglected and in need of a permanent guardian. *Order from the Juvenile Court*, dated November 15, 2006. The juvenile court found that it is not in the applicant's best interests to be returned to Honduras, and that it is in his best interests to continue to reside in the United States. *Id.* at 2. The juvenile court placed the applicant under the guardianship of his grandmother. *Id.*

On February 23, 2007, the applicant filed the present Form I-360 petition for SIJ status. On March 5, 2007, the applicant reached age 18.

Assertions on Appeal

On appeal, counsel asserts that the applicant has established that he is eligible for SIJ status. Counsel concedes that the applicant is no longer in the custody of or placement with a State department or agency, and that he has reached 18 years of age. *Statement from Counsel on Form I-290B* at 1. However, counsel asserts that prior decisions of the AAO reflect that an applicant can continue to be eligible for SIJ status after his eighteenth birthday. *Id.* at 1-2. Specifically, counsel contends that the Act only requires that an applicant has been declared dependent on a juvenile court at some point, and that there is no requirement that he continues to be so dependent at the time of receiving SIJ status. *Id.* Counsel therefore suggests that, as the applicant was declared dependent on the juvenile court before his eighteenth birthday, the fact that he reached age 18 and was no longer dependent did not affect his eligibility for SIJ status. *Id.*

Counsel asserts that the regulation at 8 C.F.R. § 204.11(a) reflects that an applicant may be placed in a guardianship situation yet continue to meet the requirements for SIJ status, despite the fact that he is no longer dependent on a juvenile court. *Id.* at 1-2. Counsel states that “[a] regulation which provides that adoption satisfies the long-term foster care requirements of INA § 101(a)(27)(J)(i) for purpose of special immigrant juvenile eligibility would be superfluous if dependency on the juvenile court were an inflexible requirement for the status.” *Id.* at 3. Counsel contends that “[w]hether the child were deemed eligible for long-term foster care would be irrelevant since the adoption removes the child from the jurisdiction of the juvenile court.” *Id.*

Counsel further asserts that the definition of special immigrant juvenile is analogous to the definition of a child under the Act, and that as long as required conditions occurred prior to the applicant's eighteenth birthday, he remains eligible for SIJ status until his twenty-first birthday. *Id.*

Counsel further contends that the District Director's decision constitutes a change in policy without adequate notice to the applicant, which violates fundamental principles of due process and fairness. *Id.*

Analysis

Upon review, the AAO finds that an individual in the State of Massachusetts may establish eligibility for SIJ status after reaching 18 years of age, as discussed below. In the present matter, the applicant has not submitted sufficient evidence to show that he continues to be dependent on the juvenile court or committed to, or placed under the custody of, an agency or department of the State of Massachusetts. *See* section 101(a)(27)(J)(i) of the Act.

As a preliminary matter, it is observed that where an applicant has shown that a juvenile court has legally committed him to, or placed him under the custody of, an agency or department of a State, and he continues to maintain such status, he is not also required to establish that he has been declared dependent, and that he continues to be dependent, on a juvenile court. *See* section 101(a)(27)(J)(i) of the Act.

The regulation at 8 C.F.R. § 204.11(c)(5) requires that an applicant show that he “continues to be dependent upon the juvenile court . . .” 8 C.F.R. § 204.11(c)(5). 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 he 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 (amended on November 26, 1997).

The regulations at 8 C.F.R. § 204.11(c)(3) and (5), last amended in 1993, 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 he 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.* Because the regulations at 8 C.F.R. § 204.11(c)(3) and (5) were issued prior to the 1997 amendment of the Act, they require that an applicant has been declared dependent upon a juvenile court, and that he 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 him to, or placed him 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. As observed by counsel, 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 him to, or placed him under the custody of, an agency or department of a State, and he continues to maintain that status, he is not also

required to establish that he has been declared dependent, and that he continues to be dependent, on a juvenile court. *See* section 101(a)(27)(J)(i) of the Act.

Mass. Gen. Laws ch. 119 § 23 authorizes the Massachusetts Department of Social Services (DSS) to accept for foster care any child under eighteen years who in its judgment is in need of foster care. Pursuant to Mass. Gen. Laws ch. 119 § 23, DSS may retain responsibility for a former foster child until such child reaches age 21 for the purposes of specific educational or rehabilitative programs. Mass. Gen. Laws ch. 119 § 23. Mass. Gen. Laws ch. 119 § 23 provides that, in order for DSS to retain such responsibility over an individual, DSS and the individual must agree on the conditions of DSS's assistance, such as those defined by a VPA. *Id.*

In the present matter, the applicant has not provided any evidence to show that he continues to be committed to the custody or care of a State agency. As noted above, counsel concedes that the applicant is no longer in the custody of DSS, and that the facts of the present matter are different from those under consideration in the prior AAO decision she referenced. The applicant has not shown that the juvenile court retained jurisdiction over him beyond his eighteenth birthday.

Counsel asserts that the regulation at 8 C.F.R. § 204.11(a) reflects that an applicant may be placed in a guardianship situation yet continue to meet the requirements for SIJ status, despite the fact that he is no longer dependent on a juvenile court. Counsel states that “[a] regulation which provides that adoption satisfies the long-term foster care requirements of INA § 101(a)(27)(J)(i) for purpose of special immigrant juvenile eligibility would be superfluous if dependency on the juvenile court were an inflexible requirement for the status.” *Statement from Counsel on Form I-290B* at 3. However, whether the applicant satisfies the long-term foster care requirement of INA § 101(a)(27)(J)(i) is not at issue in the present proceeding, thus 8 C.F.R. § 204.11(a) is not directly relevant. Counsel invites the AAO to draw conclusions regarding other provisions of the Act and regulations based on a reading of 8 C.F.R. § 204.11(a). However, the AAO does not find that 8 C.F.R. § 204.11(a) serves as sufficient indication that the applicant is not required to show that he is presently dependent on the juvenile court or committed to the care of a State agency.

Counsel further asserts that the definition of special immigrant juvenile is analogous to the definition of a child under the Act, and that as long as required conditions occurred prior to the applicant's eighteenth birthday, he remains eligible for SIJ status until his twenty-first birthday. *Id.* However, the AAO finds sufficient guidance in the Act and regulations pertaining to SIJ status to ascertain the related age requirements, without the need to rely on inferences drawn from section 101(b)(1)(B) of the Act. Counsel's assertion in this regard is not persuasive.

Counsel further contends that the District Director's decision constitutes a change in policy without adequate notice to the applicant, which violates fundamental principles of due process and fairness. However, the applicant has not established that the District Director would have approved the present petition under a former policy. As discussed above, the applicant has not shown eligibility for SIJ status in the present proceeding. It is noted that the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Conclusion

Based on the foregoing, the applicant has not shown that he is dependent on the juvenile court or 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. Accordingly, the applicant has not shown that he 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.