



U.S. Citizenship  
and Immigration  
Services

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

PUBLIC COPY

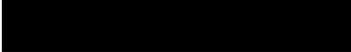


CG

FILE: 

Office: ST. PAUL (BLOOMINGTON)

Date: **AUG 25 2006**

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, St. Paul, denied the special immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The beneficiary is a twenty-one-year-old native and citizen of Mexico who 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 issued a decision on February 27, 2006, denying the petition for special immigrant juvenile (SIJ) status. Specifically, the district director found that the petitioner failed to submit sufficient documentation to support that the Department of Homeland Security (DHS) should consent to the beneficiary's dependency order serving as a precondition to a grant of special immigrant juvenile status under section 101(a)(27)(J)(iii) of the Act.

On appeal, counsel for the petitioner contends that there is insufficient basis for the district director to challenge the dependency order of the District Court for the Third Judicial District of the State of Minnesota ("the court"). *Attachment to Form I-290B*, dated March 30, 2006. Counsel further asserts that Citizenship and Immigration Services (CIS) delayed in adjudicating the application, and thus the application should be approved despite the fact that the beneficiary is now above age 20. *Id.* at 3. Counsel contends that the regulation that limits special immigrant juvenile status to those under age 21 is contrary to the Act, and thus it should not govern the present proceeding. *Id.*

The record contains a statement from counsel on Form I-290B; a Mexican civil registry document for the beneficiary; a letter from the beneficiary's church; a statement from the applicant; a letter from the applicant's confirmation teacher; a copy of a dependency order from the District Court for the Third Judicial District of the State of Minnesota, dated June 1, 2001; a letter from counsel in response to the district director's notice of intent to deny; a petition for a child in need of protection or services that was filed before the court by the petitioner; a letter from Guardian Ad Litem Services, Inc. that was filed with the court; a letter from the petitioner regarding communications to the court which were conveyed in the judges chambers and off the official record; a statement from the petitioner; a statement from the woman who has served as the beneficiary's guardian and mother since shortly after his birth; copies of photographs of the beneficiary with his mother; evidence that the beneficiary's guardians filed a fraudulent Form N-600, Application for Certificate of Citizenship; the results of a maternity and paternity test that report that the beneficiary's guardians are not his natural parents, and; documentation relating to the beneficiary's criminal history. The entire record was considered in rendering a decision on the current appeal.

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 Act . . . .

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;
- (3) Is unmarried;
- (4) 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;
- (5) Has been deemed eligible by the juvenile court for long-term foster care;
- (6) 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
- (7) 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 . . . .

On June 1, 2001, the court issued an order finding that: the beneficiary was abandoned at birth by his biological mother, and the identity of his father is unknown; the beneficiary is dependent on the court; the beneficiary is eligible for long-term foster care; it is in the beneficiary's best interest to remain in the United States; the petitioner shall file a petition for special immigrant juvenile status on behalf of the beneficiary and report to the court regarding the status of such application, and; the beneficiary's guardian ad litem shall meet

with the petitioner and the beneficiary and report to the court regarding the suitability of the petitioner's home. *Order of the District Court for the Third Judicial District of the State of Minnesota*, dated June 1, 2001. The record contains documentation that was under consideration by the court that describes the beneficiary's history and the conditions that led to the court's consideration of his welfare, including a detailed statement from the applicant's guardian ad litem and a petition from the petitioner. The record further contains statements from the petitioner in which he reports that he made oral communications to the court in the judge's chambers that were not captured in any official documentation. He provided that he stated information such as the circumstances of the beneficiary's entry to the United States and the fact that his guardians obtained fraudulent hospital records and a birth certificate to represent that they were the natural parents of the beneficiary. The petitioner indicated that the court was not aware of the fact that the applicant's guardians used the fraudulent documentation to file an application for a citizenship certificate on behalf of the applicant.

In the district director's decision, she found that the petitioner did not present all relevant documentation to the court, and thus the court's decision was based on an incomplete understanding of the beneficiary's and the petitioner's history. Specifically, the district director found that the petitioner did not establish that the court was in fact aware that the beneficiary's guardians obtained fraudulent documentation to show that they were the beneficiary's parents, or that they used such documentation to file an application for a citizenship certificate. The district director asserted that such facts were relevant to whether the beneficiary was abandoned by his natural parents. Thus, the district director determined that the petitioner failed to show that the court's order was based on all material facts, such that the Department of Homeland Security (DHS) should consent to the beneficiary's dependency order serving as a precondition to a grant of special immigrant juvenile status under section 101(a)(27)(J)(iii) of the Act.

In her closing paragraph, the district director highlighted the fact that the beneficiary's guardians made misrepresentations to state and federal agencies regarding the beneficiary's true parentage, thus implying that such misrepresentations have a negative bearing on the beneficiary's eligibility.

Upon review, the petitioner has established a sufficient basis for the court's dependency order, and the record does not support that the court lacked material information that would have otherwise altered its order. As noted above, section 101(a)(27)(J)(iii) of the Act provides that the Secretary of Homeland Security must expressly consent to the applicant's dependency order serving as a precondition to the grant of special immigrant juvenile status.

*Express consent* means that the Secretary, through the CIS District Director, has "determine[d] that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.]"

Memorandum of William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, *Field Guidance on Special Immigrant Juvenile Status Petitions*, HQAND 70/23 (May 27, 2004)(quoting H.R. Rep. No. 105-405, at 130 (1997)).

Citizenship and Immigration Services (CIS) is not bound to accept the determination of a state juvenile court that an applicant is an abused, neglected or abandoned minor, or that it is not in his best interest to be returned to his country of nationality, without sufficient documentation of the basis for the decision. While such an order is required to establish eligibility under section 101(a)(27)(J) of the Act, it does not relieve the applicant from the burden of submitting sufficient documentation to satisfy CIS that the order was supported by relevant facts, and that it may serve as a basis for special immigrant juvenile status.

[E]xpress consent [to an order] should be given only if the adjudicator is aware of the facts that formed the basis for the juvenile court's rulings on dependency (or state custody), eligibility for long-term foster care based on abuse, neglect, or abandonment, and non-viability of family reunification, or the adjudicator determines that a reasonable basis in fact exists for these rulings.

Memorandum of William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, *Field Guidance on Special Immigrant Juvenile Status Petitions* at 4.

In the present matter, the record contains sufficient documentation to support the dependency order of the court, and the court's findings were based on substantial evidence and testimony. Contrary to the assertion of the district director, the record does not show that the court lacked information that would have undermined a finding that the beneficiary was abandoned by his natural parents. The facts that the applicant's guardians obtained fraudulent documents and used them to file an immigration application on his behalf are events that occurred after he was abandoned by his mother, thus they neither contradict that he was abandoned, nor any other assertions made to the court or CIS in this proceeding.

The district director implied that the misrepresentations of the beneficiary's guardians have a negative bearing on his eligibility for special immigrant status. However, the record does not support that the petitioner or the beneficiary have made misrepresentations in this proceeding or before any state or federal agency. The prior misrepresentations of the applicant's guardians do not prejudice the applicant in this proceeding. As noted above, the circumstances of the misrepresentations do not contradict any statements or facts presented in the present matter, and thus they do not call into question the credibility of the petitioner.

Accordingly, the applicant has established the basis for the court's order of June 1, 2001, such that the Secretary of Homeland Security is inclined to consent to the order serving as a precondition to the grant of special immigrant juvenile status. *See* section 101(a)(27)(J)(iii) of the Act.

However, the applicant is no longer eligible for special immigrant juvenile status under section 101(a)(27)(J) of the Act, as he is no longer under the age of 21. *See* 8 C.F.R. § 204.11(c)(1). The applicant reached age 21 on February 22, 2006. CIS lacks discretion to waive the requirement of 8 C.F.R. § 204.11(c)(1). For this reason, the petition may not be approved.

The petitioner filed the Form I-360 petition on December 27, 2001, when the beneficiary was 16-years-old. The district director issued a notice of intent to deny the petition on November 29, 2005, approximately four years after the petition was filed, at a time when the applicant had reached age 20. Counsel for the petitioner filed a response to the notice of intent to deny on December 28, 2005, 29 days after the notice was issued.

Counsel included in the response an indication that the petition had been pending for nearly four years, that the beneficiary would “age out” of eligibility on February 22, 2006, and that “the petition must be approved immediately.” *Response to Notice of Intent to Deny*, dated December 28, 2005. The record contains correspondence from counsel dated January 20, 2006, in which she emphasized to the district director that the beneficiary would reach age 21 in approximately one month. *Email from Counsel*, dated January 20, 2006. The district director denied the petition on February 27, 2006, five days after the beneficiary reached age 21 and became ineligible for special immigrant juvenile status pursuant to the regulation at 8 C.F.R. § 204.11(c)(1).

Counsel does not contest that the beneficiary has aged-out of eligibility for SIJ status. Instead, counsel argues that the beneficiary’s loss of eligibility is attributable to CIS delays that occurred despite counsel’s efforts to alert CIS to the potential for the applicant aging out of eligibility. Counsel cites the decisions in *INS v. Miranda*, 459 U.S. 14 (1982), and *Ibarra de Varela v. Ashcroft*, 368 F.3d 864 (8<sup>th</sup> Cir. 2004), to support the proposition that “[i]t is unjust to allow [CIS] to delay in its adjudication of a petition in order to prevent an alien from obtain[ing] an immigration benefit by virtue of an age out.” *Attachment to Form I-290B*, dated March 30, 2006.

However, in *INS v. Miranda* the Supreme Court found that an 18-month delay by the government in adjudicating an application for adjustment of status, in the absence of evidence of affirmative misconduct, did not estop the government from enforcing the immigration laws. *INS v. Miranda*, 459 U.S. at 19. In the instant matter, the record contains no evidence of affirmative misconduct by CIS. Thus, *INS v. Miranda* does not support the suggestion that CIS’s delay renders the present petition approvable despite the fact that the applicant is no longer statutorily eligible for SIJ status.

The Eighth Circuit in *Ibarra de Varela v. Ashcroft* determined that, to establish a claim of equitable estoppel against the government, a claimant must first prove that the government committed “affirmative misconduct,” and then prove: (1) false representation by the government; (2) that the government had an intent to induce the claimant to act on the misrepresentation; (3) the claimant’s lack of knowledge or inability to obtain true facts; and (4) the claimant’s reliance on misrepresentation to his detriment. *Ibarra de Varela v. Ashcroft*, 368 F.3d 864 (8<sup>th</sup> Cir. 2004). As the petitioner has not established that CIS committed affirmative misconduct in the present matter, *Ibarra de Varela v. Ashcroft* does not support that CIS’s delay renders the present petition approvable.

Nevertheless, the AAO acknowledges that CIS’ goal is to adjudicate cases expeditiously and has sought to avoid having applicants age-out of eligibility for benefits. It is not clear why the district office did not adjudicate the case prior to the applicant aging out of eligibility for the benefit. It is clear that the applicant’s counsel did, in fact, make requests to have the adjudication completed prior to the loss of eligibility.

In light of the inescapable conclusion that the applicant was no longer eligible for SIJ status on the date of the adjudication, having attained the age of majority five days earlier, counsel appears to be seeking to have the AAO fashion some type of equitable remedy on appeal in the nature of *nunc pro tunc* approval, or by finding that the district director should be estopped from imposing the statutory and regulatory requirements of SIJ eligibility. The AAO is unable to accept counsel’s invitation. The BIA has previously held that there is no authority to grant applications for adjustment of status on a *nunc pro tunc* basis. *Matter of Hernandez-*

*Puente*, 20 I&N Dec. 335 (BIA 1991). In addition to the implication that the application should be approved on a *nunc-pro tunc* basis, counsel also suggests, although indirectly, that the delay in the adjudication of the petition should render the application approvable notwithstanding the fact that the applicant had aged out of eligibility prior to the date of adjudication. Although not labeled as such by counsel, this is an argument of equitable estoppel, which if applied in the instant case, would mean that as a form of sanction for delays in the adjudication, CIS would be prohibited from determining that the applicant had aged out of eligibility for the benefit sought. The BIA's decision in *Matter of Hernandez-Puente*, also addressed the doctrine of equitable estoppel.<sup>1</sup> As noted by the BIA, the United States Supreme Court has opened the possibility that that equitable estoppel might be applied as 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), and *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). Nevertheless, 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 application by the courts of equitable estoppel against the government is a different question from whether the AAO is able to apply the doctrine in this, or any other case it is reviewing. That question was answered in the negative by the BIA, which assessed its own equitable estoppel authority as follows:

However, although 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 338-339.*

The AAO finds that it likewise derives its authority from the regulations and is no position to apply a remedy not explicitly granted by the regulations. Moreover, even if it were determined that the AAO had such authority, as noted above the facts contained in the record are insufficient in the AAO's view to conclude that

---

<sup>1</sup> 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 at all over a period of at least two years, during which time the beneficiary's family purportedly made numerous inquiries and received various assurances.

affirmative misconduct played a role. While it is true that a significant period of time elapsed between the time of filing and the time of the adjudication, the AAO is not in a position, both due to the absence of evidence and due to its limited role, to make a determination of affirmative misconduct. While counsel made attempts to have the matter adjudicated, the AAO finds that it is beyond its ability and authority to conclude that the petition should nevertheless be approved.

Counsel contends that the regulation that limits special immigrant juvenile status to those under age 21 is contrary to the Act, and thus it should not govern the present proceeding. *Attachment to Form I-290B*, dated March 30, 2006. However, as noted above the AAO derives its authority from the regulations, and it lacks authority to disregard such regulations of the United States. In adjudicating this appeal, the AAO must apply each of the criteria presented in 8 C.F.R. § 204.11(c).

It is unfortunate that the beneficiary became ineligible for the benefit due to having aged-out, and the AAO is sympathetic to the applicant's situation given the circumstances that led him to seek SIJ status. Nevertheless, even if the AAO had authority to fashion a remedy, the AAO is unable to conclude that the applicant's age-out was attributable to affirmative misconduct.

The AAO will withdraw the district director's analysis regarding the beneficiary's dependency order, yet the AAO finds that the beneficiary is no longer eligible for SIJ status due to the fact that he has reached age 21. Furthermore, the AAO is without authority to determine that the petition should nevertheless be approved.

In visa petition proceedings, the burden of proof is on the petitioner to establish eligibility for the benefit sought by a preponderance of the evidence. *Matter of Brantigan*, 11 I&N Dec. 151 (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 petitioner has not proven eligibility for the benefit sought.

**ORDER:** The appeal is dismissed.