



U.S. Citizenship
and Immigration
Services

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FILE:



Office: PHOENIX

Date: MAR 16 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, Director
Administrative Appeals Office

DISCUSSION: The District Director, Phoenix, (district director) denied the special immigrant visa petition and denied the application for adjustment of status. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The beneficiary is a nineteen-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 7, 2005, denying the petition for special immigrant juvenile (SIJ) status, and a second decision the same date denying the application for adjustment of status (Form I-485).

On appeal, the applicant's counsel challenges the denial of the petition asserting that Citizenship and Immigration Services (CIS) did not adjudicate the application in a timely manner and allowed the beneficiary's eligibility to expire. Counsel's second, and the primary argument, is that the applicant's SIJ petition should have been approved because she was under the age of eighteen, and thus eligible for SIJ status at the time that she was interviewed with respect to the application on January 14, 2004. Counsel contends that the regulation which formed the basis for the denial is *ultra vires* and must be ignored and the petition and application granted *nunc pro tunc*. In support of the appeal, counsel has submitted a brief discussing her position in greater detail. 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;
- (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 record reflects that the applicant entered the United States without inspection in 1993, at the age of six. It appears that the applicant resided with her mother since that time. The applicant's petition is based upon a claim of physical abuse perpetrated by her mother, [REDACTED]. The petition is supported by the following documents: 1) a copy and translation of the applicant's birth certificate reflecting her birth on January 18, 1987; 2) an order from the Superior Court of the State of Arizona In and For the County of Maricopa, dated January 10, 2005, and entitled, Order and Findings Regarding Child's Eligibility for Special Immigrant Juvenile Status, which notes that the applicant was declared dependent and was placed in the legal custody of the Arizona Department of Economic Security on September 18, 2002¹; 3) a copy of the dependency order issued by the court as to the applicant's father; 4) a copy of the initial September 18, 2005, dependency order; 5) a copy of a Childhelp USA Report prepared following a referral of the applicant by the Phoenix Police Department, and providing the applicant's description of the physical abuse inflicted upon her by her mother; and 5) a copy of a printout from the Arizona Department of Corrections indicating that the mother was incarcerated as of February 21, 2003.²

It appears that the applicant was placed in the custody of the Arizona Department of Economic Security (ADES), which is the entity that assumes custody of children found to be dependent and in need of protection. Although the applicant appears to have been fifteen years old at the time of the entry of the dependency order, there is no additional information contained in the record regarding any subsequent proceedings relating to the dependency order, or which indicate whether the applicant remained in the custody of the ADES up until the time that she reached the age of majority on January 18, 2005.

For reasons that are unclear from the record, it was not until January 5, 2005, approximately two-and-a-half years after the entry of the September 18, 2002, dependency order, and just days before the applicant turned

¹ The court's order also noted that the applicant had been found to be dependent as to her father on October 23, 2002. In addition, the order also made the following additional findings relevant to the SIJ petition: that the applicant is eligible for "long-term foster care"; that it is not in the best interests of the applicant to be returned to her country of nationality; that the applicant remained dependent upon the juvenile court, and that the court's findings were made pursuant to a finding of abuse, neglect, and/or abandonment of the applicant.

² The documents in the record, which were obtained through the Arizona Department of Corrections website do not specify the nature of the offense for which the applicant's mother was incarcerated, but a review of the website information available from the ADC website confirms that the offense related to child abuse.

eighteen, the age of majority under Arizona law, that proceedings were initiated to secure SIJ status for the applicant. Those steps included filing the Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), on January 5, 2005, along with an Application for Adjustment of Status (Form I-485). The state court order, which included the requisite findings necessary for the approval of the petition, was not obtained until January 10, 2005, five days after the filing of the I-360/I-485, and just eight days before the applicant's eighteenth birthday. The AAO notes that the record does reflect efforts by counsel to expedite the adjudication of the applicant's case. The Forms I-360 and I-485 were accompanied by a cover letter from counsel dated January 5, 2005, in which counsel expresses concern about the approach of the applicant's eighteenth birthday and the possibility that she would age-out of eligibility for SIJ status. The following notation appears at the top of the letter: **"URGENT: AGE OUT CASE! NEEDS TO BE SCHEDULED FOR INTERVIEW BY FRIDAY, JANUARY 14, 2005."** In addition, counsel included the following request at the end of the cover letter:

Please schedule this urgent case as soon as possible. [REDACTED] turns 18 years old on Tuesday, January 18, 2005. As Monday [sic] January 17, 2005 is a federal holiday, this case needs to be scheduled for an interview at the very latest by Friday, January 14, 2005. Thank you for your assistance.

See Counsel's Letter, dated January 5, 2005.

Although the district director did, consistent with counsel's request, schedule the applicant for an interview for Friday, January 14, 2005, this was of little help to the applicant because the determinative date was not the interview of the applicant on January 14th, but the adjudication of the petition and adjustment application on February 7, 2005. At that point, the applicant was an adult under Arizona law, having reached the age of eighteen on January 18, 2005. Counsel's interrelated claims are that the district director unduly delayed the adjudication, and that in any event, the applicant remained eligible for SIJ status because she was still a minor at the time of the interview on January 14, 2005. The AAO disagrees with counsel's contentions for the reasons set forth below.

First, although counsel contends that the applicant's eligibility must be determined as of the date of the interview, this contention is made without reference to any supporting authority. The Board of Immigration Appeals (BIA), has held, as have various federal courts, that a non-immigrant seeking adjustment of status must be eligible for the underlying preference category through which he seeks adjustment, at the time that the application for adjustment is acted upon. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991) *citing Pei-Chi Tien v. INS*, 638 F.2d 1324 (5th Cir. 1981); *Yui Sing Tse v. INS*, 596 F.2d 831 (9th Cir. 1979); *see also* section 204(e) of the Act, 8 U.S.C. § 1154(e) (1988) (indicating that an individual for whom a petition is approved is not entitled to immigrant status until the admission at the port of entry). Additionally, the regulations providing for the revocation of approval of petitions make clear that revocation is applicable as of the date of approval in those situations where the enumerated circumstances occur, in the case of an applicant for adjustment of status, "before the decision on his or her adjustment application becomes final." *See* 8 C.F.R. § 205.1(a)(3). In the instant case, the application was acted upon, not on the date of interview, but rather, on the date of the adjudication, i.e., February 7, 2005. While it may have been counsel's belief that the application would be considered and adjudicated on the same date, that was not the case as additional processing of the case was necessary even after the date of the interview on January 14, 2005.

Second, the AAO finds no evidence to support counsel's contention of undue delay in the agency's adjudication of the petition. Counsel suggests that the delay was inappropriate, stating in the brief, "[t]he Service appears, without indicating why, to have considered or adjudicated Ms. [REDACTED] SIJS petition after her 18th birth date. As stated above, Applicant avers that this is improper, as she met all of the SIJS criteria, pursuant to statute and regulations, at the time she was interviewed." *Counsel's Brief*, dated March 31, 2005, at p. 5. Counsel's suggestion of in undue delay is simply unsupported by the evidence in the record. If anything, the AAO finds that the district office handled the applicant's I-360 and I-485 in an extremely expeditious manner. The record reflects that the applications were accepted for filing, processed, the applicant scheduled for an interview and the applications adjudicated, all within a period of just slightly over one month. While the record does not contain evidence of the normal processing times in effect at the time, it is clear that the district director expedited the processing of the applications. Counsel relies principally on the assertion that the regulation, which provides that in order to be eligible for the approval of an SIJ petition an alien must demonstrate that he continues to be dependent upon the juvenile court and eligible for long-term foster care, is *ultra vires*, must be ignored by CIS, and the application approved *nunc pro tunc*. The AAO does not accept this assertion. 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). Counsel's argument, in essence, is that the regulation is *ultra vires* in nature because it imposes requirements that impermissibly go beyond what is authorized by the statute, and consequently, CIS should be foreclosed from applying the regulation to the applicant's case. The AAO rejects counsel's assertions, again, based upon *Matter of Hernandez-Peunte*, which found that it was not the province of the BIA or immigration judges to pass upon the validity of the regulations and statutes that it administers, and as such, agency action premised upon application of those regulations or statutes is appropriate. *Id.* (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 likewise is an entity, which, deriving its authority from the statute and regulations lacks the ability to invalidate or ignore the statutory provisions and regulations that it administers.³

In addition to the assertion 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 of eligibility for the benefit sought. The BIA's decision in *Matter of Hernandez-Puente*, also addressed the doctrine of equitable estoppel.⁴ 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

³ This is not to say, however, that the AAO agrees with counsel's contention that the SIJ regulatory provision at issue is *ultra-vires* in nature. In fact, as will be discussed in a subsequent portion of this opinion, the regulatory provisions would appear to be entirely consistent with the statutory scheme and the congressional purpose underlying the SIJ provisions.

⁴ 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.

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). Nevertheless, 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 the facts in the instant case do not lend themselves to a finding of affirmative misconduct. As noted, counsel filed the I-130 and the I-485 simultaneously on January 5, 2005, thirteen days before the applicant's eighteenth birthday. In addition, the period between the date of filing included several weekend days and one holiday, leaving even fewer days for the processing of the applications. To counsel's credit, she attempted to remedy the late filing by alerting CIS officials of the impending age-out date, asking that the interview date be scheduled no later than Friday, January 14, 2005. As noted, the record reflects that the case was expeditiously handled by CIS, but it was insufficient merely to have filed an application and request an expedited interview. The applicant must demonstrate that she is admissible, which necessarily involves not only conducting the interview but also conducting the necessary background checks. On January 6, 2005, the day following the filing of the applications, the district office sent the applicant a notice to appear for a fingerprinting appointment in connection with the application for adjustment of status. That interview was scheduled for January 18, 2005. The record reflects that on January 10, 2005, the applicant was sent a notice of interview, scheduling her for an appointment on her applications for Friday, January 14, 2005, and on the same date the district office sent a request to expedite a background name check with the FBI.⁵ This request

⁵ It appears that the background check pursued was a name check only request, which appears to have been pursued pending the receipt of the complete fingerprint check from the FBI.

to expedite was faxed to the Headquarters office coordinating expedited background checks, and noted that the request was on the basis of an impending age-out. The request was forwarded to the FBI that same week, which appears to have faxed back its reply at approximately 5:45 p.m., on Friday, January 14, 2005. The following Monday was a holiday, and the results were faxed to the Phoenix district office on Tuesday, January 18, 2005, the very next business day, which also happened to be the date that the applicant turned eighteen, and consequently aged-out of eligibility for SIJ status.

While it is unfortunate that the applicant became ineligible for the benefit due to having aged-out, and while the AAO is particularly sympathetic to the applicant's situation given the unfortunate circumstances that led her to seek SIJ status, it cannot be said that the applicant's age-out was attributable in anyway to any form of affirmative misconduct, or even negligent delay. Indeed, it is obvious from the record that the matter was clearly expedited and adjudicated in an extremely rapid time period, largely due to the district office's deliberate efforts to expedite the matter before other pending matters. The fact that the applicant aged-out of eligibility is not attributable to any governmental delays so much as it is attributable to the delays that preceded the filing by the applicant and/or those acting on her behalf. It must be remembered that the applicant was initially found to be dependent upon the juvenile court due to her mistreatment at the hands of her mother, on September 18, 2002, almost sixteen months before the petition and adjustment application were filed with CIS. It is unclear why the delays occurred, but it appears that additional steps had to be taken to obtain the necessary orders from the state court, and these efforts were not completed until after the filing of the SIJ petition and the adjustment application. Ample opportunity existed for the applications to be completed and submitted with a reasonable time for an adjudication. It appears that these non-agency delays are what prevented the applicant from obtaining SIJ status before her age-out date.

Thus, the AAO finds that the district director did not err in concluding that the applicant was no longer eligible for SIJ status. In addition, even if the AAO were to conclude that misconduct contributing to unwarranted delays had occurred in the processing of the applicant's case, the AAO lacks authority to provide an equitable remedy to the applicant. Moreover, the applicant's circumstances, in the AAO's view, do not warrant such a remedy.

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.