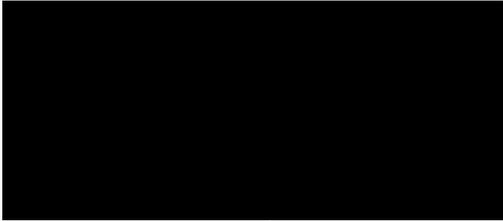




U.S. Citizenship  
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Services

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FILE:



Office: BALTIMORE

Date: MAR 21 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, Baltimore, (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 twenty-two-year-old native and citizen of Liberia 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 April 29, 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 alleges that the applicant aged-out of eligibility for SIJ status due to the district office's negligence and failure to expedite the adjudication of the petition, despite numerous requests by the petitioner to do so, and in contravention of its own established procedures. Counsel asserts that the failure to adjudicate the petition is fundamentally unfair and constituted action which was arbitrary, capricious, and an abuse of discretion. As a result, counsel argues that "equitable relief from the normal rules should be applied to allow approval of the petition and to grant the application for permanent resident status. *See Notice of Appeal (Form I-290B)* dated May 27, 2005; *see also Counsel's Letter in Support of Appeal*, dated May 27, 2005. 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 claims to have entered the United States on February 11, 1999, at the age of fifteen. The exact circumstances of the applicant's entry to the United States are somewhat unclear, as the applicant claims to have entered the United States with a family by the name of [REDACTED] and resided with them in Minnesota for several months in 1999.<sup>1</sup> The applicant then began residing in the state of Maryland with a woman who appears to have represented herself falsely as the applicant's mother.<sup>2</sup> It appears that at some point in time, the applicant ran away from her initial home in Maryland and began residing with another individual. It was during this time that the applicant made a report to officials of possible sexual abuse she had experienced. While no charges were pursued, the applicant was placed into the custody of the Montgomery County Department of Health and Human Services (DHHS), beginning in the fall of 2000, at the age of sixteen. The record contains numerous documents submitted by counsel which relate to the determination that the applicant was a Child in Need of Assistance (CINA), and her placement in the custody of the DHS, or with a foster parent or other similar accommodations.

In 2002, the applicant's current counsel was given access to her court records, and subsequently initiated SIJ proceedings by filing a Petition for Amerasian, Widow, or Special Immigrant (Form I-360), along with an Application for Adjustment of Status (Form I-485), on or about June 7, 2002. The applications were accompanied by a cover letter submitted by counsel dated May 31, 2002, which referenced the submission of, among other things, a court order dated April 18, 2002, issued by the Montgomery County Juvenile Court. This order, which was also submitted in response to a Request for Evidence (RFE), is entitled, Amended Order which was issued April 18, 2002, and which amends the previously issued orders to indicate that the

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<sup>1</sup> According to information contained in records submitted by applicant's counsel, it appears the applicant was brought into the United States by the family and was encouraged to represent herself to be a member of the family, and her date of birth as 1988, as opposed to 1984, the year of birth she now claims. The applicant indicated that she had been seeking to enter the United States in order to work and send money home to her family. Although her proceedings with the Department of Health and Human Services in Maryland and the Maryland juvenile court were initially conducted under the assumed age and identity, it appears that corrected information was submitted to those authorities which led the court to amend her court records.

<sup>2</sup> The actual relationship of this woman to the applicant or her family is unknown although at one point the applicant appears to have indicated that the woman may have "paid" the Minnesota family for her. There is nothing in the record which substantiates this claim.

applicant had been declared a Juvenile Court dependent and ward of the court since October 20, 2000, due to abandonment by her natural parents, and further noted that the applicant was eligible for long-term foster care and had been in shelter care or foster care since October 4, 2000. The court's order also found it not to be in the best interests of the applicant to be returned to the Republic of Liberia.<sup>3</sup> Counsel's cover letter included the following notation at the end of the letter: "Please note that [REDACTED] turned 18 years old on January 16, 2002. We would be most appreciative if the adjudication of her case can be expedited." *See Counsel's Cover Letter*, dated May 31, 2002.

Approximately fourteen months later, on or about August 11, 2003, counsel submitted a follow-up letter to the Vermont Service Center, which again requested expedited treatment of the applicant's petition. The letter was labeled "Expedite Request for [REDACTED]" and stated in the body that the applicant was nineteen years old and that her petition and application had been pending for over one year, and requested expedited adjudication. *See Counsel's Letter*, dated August 7, 2003. It appears that the next action in the case was that the applicant was scheduled for an adjustment interview on February 17, 2004. According to counsel, an oral request to expedite the case was made at that time. After the adjustment interview, the applicant's counsel was given a request for additional evidence. In response to the request, counsel submitted numerous documents on April 7, 2004, relating to the juvenile court proceedings. The cover letter accompanying the submissions, likewise mentioned the possibility of the applicant becoming ineligible due to attaining the age of majority, stating: "Please note that [REDACTED] is 20 years old and will turn 21 next January 16, 2005. Any action you can take to expedite this case and complete adjudication before she ages out will be greatly appreciated." *Counsel's Letter*, dated April 7, 2004. The next evidence of correspondence between the district office and the applicant or her counsel is a letter from the applicant's counsel in March of 2005, at which point the applicant had attained the age of majority approximately two months earlier. The district director issued his decisions on April 29, 2005. The instant appeal followed the district director's decision.

Counsel does not contest that the applicant has aged-out of eligibility for SIJ status. Instead, counsel argues that the applicant's loss of eligibility is attributable to CIS delays that occurred despite counsel's frequent efforts to alert CIS to the potential for the applicant aging out of eligibility. In addition, counsel contends that the district director's failure to timely adjudicate the petition was in violation of existing policy directives. In particular, counsel cites to a field instruction regarding expedited processing of petitions and applications. *See Service Center Guidance for Expedite Requests on Petitions and Applications*, dated November 30, 2001. Although counsel's statement on appeal suggests that the district director ignored agency procedures set forth in the memorandum, the guidance itself did not serve to mandate any particular procedure for handling age-out cases. The memorandum cited merely set forth the situations under which a matter could be expedited. Moreover, the principal purpose of the memorandum appears not to be discuss the factors justifying expediting a case and the actions to be taken to expedite the case, but rather it is more in the nature of an information memorandum designed to note categories of cases that could be expedited, and more importantly to detail the addresses within the agency to which requests for expediting cases should be sent. The only reference to age-out cases appearing in the guidance memorandum is a reference to a different memorandum that discussed procedures to expedite clearances in age-out cases. Consequently, the fact that a procedure was

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<sup>3</sup> It appears that this order was issued in order to amend the previous orders issued in the case by making the findings necessary for the applicant to qualify for SIJ status.

established to facilitate expediting cases and counsel's efforts to seek expedition of the case does not create some type of right to an expedited adjudication. Furthermore, the failure to adjudicate the applicants' petition does not itself constitute a violation of the memorandum cited.

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 was unable to 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 numerous requests to have the adjudication completed prior to the loss of eligibility. However, given that there is no dispute as to whether the applicant had reached the age of majority, the question for the AAO to address on appeal is whether the district director's decision was the legally correct. The AAO finds that the district director correctly determined that the applicant was ineligible for SIJ status. 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 on the date of the adjudication, April 29, 2005. On that date, the applicant was no longer eligible for the benefit sought.

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 more than three months 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 of eligibility for the benefit sought. The BIA's decision in *Matter of Hernandez-Puente*, also addressed the doctrine of equitable estoppel.<sup>4</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*

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<sup>4</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.

*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). 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 contained in the record are insufficient in the AAO's view to conclude that affirmative misconduct played a role. While it is true that a significant period of time elapsed between the time of filing in June of 2002, and the time of the adjudication in April of 2005, 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 numerous 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.

It is unfortunate that the applicant became ineligible for the benefit due to having aged-out, and the AAO is particularly sympathetic to the applicant's situation given the unfortunate circumstances that led her 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 in any way to any form of affirmative misconduct.

The AAO finds that the district director did not err in concluding that the applicant was no longer eligible for SIJ status. 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.