U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-P-S-

DATE: AUG. 18, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT

The Petitioner seeks classification as a special immigrant juvenile (SIJ). *See* Immigration and Nationality Act (the Act) sections 101(a)(27)(J) and 204(a)(1)(G), 8 U.S.C. §§ 1101(a)(27)(J) and 1154(a)(1)(G). SIJ classification protects foreign children in the United States who have been abused, neglected, or abandoned, and found dependent on a juvenile court in the United States.

The District Director, New York, New York, denied the petition. The Director concluded that the Petitioner is not eligible for SIJ classification because he was 21 years of age or older on the day he filed his Form I-360, Application for Amerasian, Widow(er), or Special Immigrant (SIJ petition). We dismissed the Petitioner's appeal, and denied his two subsequent motions to reopen or reconsider.

The matter is now before us again on a third motion to reopen or reconsider. On motion, the Petitioner submits a brief and copies of previously submitted evidence. The Petitioner claims that he was not yet 21 years of age on the date of filing because the SIJ petition was filed in the morning and he was born at night, and that we violated his due process rights because we raised additional deficiencies with his SIJ petition on appeal and motion. We will deny the motion.

I. APPLICABLE LAW

A motion to reopen must state the new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The burden of proof is on a petitioner to demonstrate eligibility for SIJ classification by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

II. ANALYSIS

In our prior decisions, incorporated here by reference, we found that the Petitioner was not under 21 years of age at the time of filing of his SIJ petition, as required by the regulations. *See* 8 C.F.R. § 204.11(c)(1), (d)(1). We further held that the Petitioner's guardianship order was deficient for various reasons. On motion, the Petitioner has not overcome our findings for the reasons stated below.

A. The Petitioner was not Under 21 Years of Age at the Time of Filing

On motion, the Petitioner continues to assert that we must follow the ruling in *Duarte-Ceri v. Holder*, 630 U.S. F.3d 83, 91 (2nd Cir. 2010) ("Where a statute conferring citizenship derivatively is susceptible of two interpretations, the only difference being the divisibility of a unit of time, the law favors the interpretation that preserves the right of citizenship over the interpretation that forfeits it"). However, as stated in our previous decisions, the holding in *Duarte-Ceri* relates to derivation of citizenship cases, and we decline to follow it in reference to the adjudication of a visa petition.[1] Although he claims that "there is abundant case law which supports" his contention, the Petitioner has not cited any precedent case, regulation, or statute to show that the holding in *Duarte-Ceri* applies to visa petitions or that a "day" is divisible in this context.[2] We give the words of the Act their ordinary, common meaning - that a person turns 21 on his birthday. While we recognize that there is a presumption in immigration cases to construe any lingering ambiguities in favor of the petitioner, there are no such ambiguities in the statutory provisions here.

B. The SIJ Petition Does Not Warrant USCIS Consent

The relevant evidence also does not establish that the Petitioner is eligible for SIJ classification because the record does not provide a reasonable, factual basis for the court's best-interest determination.[3] When adjudicating an SIJ petition, USCIS examines the juvenile court order only to determine if it contains the requisite findings of dependency or custody; non-viability of

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[1] Naturalization and visa petition proceedings are two different types of proceedings with different rules and rights under the Act. In fact, the definition of "child" for citizenship and naturalization differs from the definition used for the approval of visa petitions, the issuance of visas, and similar issues. *Compare* sections 101(b) and 101(c) of the Act.

[2] The Petitioner also continually asserts that we have not provided any legal argument or supported our position with case law. However, the burden of proof in these proceedings is on the Petitioner to demonstrate his eligibility for SIJ classification, not vice versa. *See Matter of Chawathe*, 25 I&N Dec. at 375. Further, as discussed in our decision dated February 5, 2016, the U.S. Supreme Court has declined to divide a day into parts, holding that "the day is the unit." *See Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437, 439-40 (1931).

[3] In our previous decision, we indicated that the guardianship order was deficient because it did not contain the requisite non-viability of reunification and best-interest determinations. However, as the Petitioner points out, those findings are contained in the separate Special Immigrant Juvenile Status Order issued 2015. We withdraw the portion of our decision that indicated that the deficiencies were based on a lack of non-viability and best-interest findings. Similarly, although the juvenile court order does not indicate the section of New York law under which the court's jurisdiction over the Petitioner as a juvenile arises, the order reflects that the court has jurisdiction to make determinations about the custody and care of juveniles until the age of 21 with their consent.

reunification due to abuse, neglect, or abandonment; and that return is not in the petitioner's best interests, as required by sections 101(a)(27)(J)(i) and (ii) of the Act. USCIS is not the fact finder in regards to these issues of child welfare under state law. Rather, the statute explicitly defers such findings to the expertise and judgment of the juvenile court. Section 101(a)(27)(J)(i)-(ii) of the Act (referencing the determinations of a juvenile court or other administrative or judicial body). However, USCIS requires the factual basis for the court's findings so it may fulfill its required consent function.[4] Juvenile court orders that include or are supplemented by specific findings of fact as to its SIJ findings will generally be sufficient to establish eligibility for consent. Although a juvenile court's findings need not be overly detailed, they must reflect that the juvenile court made an informed decision.[5]

In this case, the record of proceedings does not provide a reasonable factual basis for the order of the juvenile court. The Special Immigrant Juvenile Status Order states that the Petitioner could not be reunified with his parents due to neglect and abandonment, that the Petitioner was "abandoned by his father at a young age," and that his mother "told him to leave home and support himself when [he] was years old." However, the Status Order does not contain specific factual findings underlying that determination. Similarly, other than stating generally that it is not in the Petitioner's best interest to be removed from the United States and returned to India, there is no evidence in the record to show how the Court arrived at this decision. Neither the guardianship order nor the Special Immigrant Juvenile Status Order contains specific facts supporting the court's findings, and the record of proceedings does not contain, for example, any separate findings of fact accompanying the orders, or an affidavit from the juvenile court or the Petitioner's guardian summarizing the evidence that was presented to support the juvenile court's orders. *See USCIS Memo #3 at* 5 (describing the types of evidence that USCIS may request and consider when making a consent determination). Accordingly, the present record lacks sufficient evidence to provide a reasonable factual basis for the juvenile court's determinations and to warrant the agency's consent to the Petitioner's request for SIJ classification, as required by section 101(a)(27)(J)(iii) of the Act.

On motion, the Petitioner claims that we violated due process by withdrawing part of our previous decision and raising new arguments. However, there are no due process rights implicated in the adjudication of a benefits application. *See Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."); *see also Arriaga v. Mukasey*, 521 F.3d 219, 222–23 (2d Cir. 2008) (The "void for vagueness" doctrine of due process is chiefly applied to criminal legislation and laws with civil consequences receive less exacting scrutiny); *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (The fifth amendment protects against the deprivation of property rights granted to immigrants

[4] A "factual basis" means the facts upon which the juvenile court relied in making its rulings or findings.

[5] *See* Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQADN 70/23, *Memorandum No. 3 – Field Guidance on Special Immigrant Juvenile Status Petitions* 4-5 (May 27, 2004), https://www.uscis.gov/archive/archive-laws/archive-memos (where the record demonstrates a reasonable factual basis for the juvenile court's order, USCIS should not question the juvenile court's rulings).

without due process, however, petitioners do not have an inherent property right in an immigrant visa). Regardless, even if due process rights did apply here, a due process violation exists only where the petitioner demonstrates resultant prejudice. *See Hassan v. INS*, 927 F.2d 465, 469 (9th Cir. 1991). Here, the Petitioner has had the opportunity to respond to our derogatory findings, and did respond, through multiple motions to reopen or reconsider. Even if the orders were not deficient, the Petitioner is nonetheless unable to show his eligibility for SIJ classification because he was not under the age of 21 years at the time of filing. Accordingly, there is no resulting prejudice. Furthermore, it is well settled that we may deny a petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).[6]

In summary, the Petitioner's SIJ petition is not approvable because he was not under the age of 21 years at the time of filing. Even if the Petitioner could have cured this deficiency, he would still remain ineligible for the requested benefit because his guardianship order is deficient in that it does not state the basis for jurisdiction over the Petitioner as a juvenile, and we would not consent to a grant of SIJ classification due to the lack of a reasonable factual basis for the court's determinations.

III. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-P-S-*, ID# 17722 (AAO Aug. 18, 2016)

[6] In addition, a request for evidence would have been superfluous as the Petitioner is unable to cure the deficiency that he was not under the age of 21 years at the time of filing.