

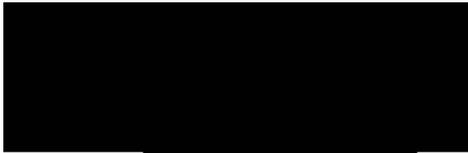
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



FILE:

Office: BOSTON, MASSACHUSETTS

Date:

AUG 04 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to 8 C.F.R. § 204.3

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The field office director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101(b)(1)(F). The district director denied the petition on the basis of his determination that the petitioner had failed to establish that the beneficiary qualified for classification as an orphan as the term is defined at section 101(b)(1)(F)(i) of the Act.

Section 101(b)(1)(F) of the Act defines an orphan, in pertinent part, as:

a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child’s proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States[.]

The petitioner filed the Form I-600 on March 21, 2008 in Boston, Massachusetts. The beneficiary, who was born on February 26, 1992, was therefore over the age of sixteen at the time the petition was filed, which precluded her classification as an orphan under the Act. Accordingly, the field office director denied the Form I-600 on August 12, 2008.

Counsel filed a timely appeal on September 15, 2008. Counsel contends that the field office director denied the petition in error. In particular, counsel looks to the field office director’s instructions for filing the Form I-600, which are contained on the petitioner’s Form I-600A¹ approval notice. Counsel contends that the field office director’s instructions for filing the Form I-600 were unclear, and that such lack of clarity on the part of the field office director caused counsel to file the Form I-600 after the beneficiary reached sixteen years of age:

Counsel notes that the instructions on the approved I-600A seemed ambiguous. The instructions indicate that a notice had been sent to the NVC [National Visa Center] and a cable had been sent to the Embassy in Port-au-Prince. The

¹ See Form I-600A, [REDACTED], approved January 17, 2008.

instructions further indicate that the I-600 could be filed with either the local office or the U.S. Consulate. Due to difficulties in mailing paperwork at the U.S. Consulate in Port-au-Prince, Counsel filed the application with the National Visa Center. Additionally, Counsel is aware that virtually no documents are ever filed directly with the Consul in Port-au-Prince, and almost all documents are filed with the NVC. The package was delivered to the NVC on February 25, 2008. . . . [footnotes omitted].

Although not specifically stated as such, counsel is, in essence, arguing that the doctrine of equitable tolling should be applied to this case. As such, he is arguing that the statutory limitation contained in section 101(b)(1)(F) of the Act as it relates to children who are over the age of sixteen should be tolled due to the equities involved in this case. He contends that although he improperly filed the Form I-600 at the National Visa Center, USCIS should nonetheless use the filing date of that petition, rather than the filing date of the instant petition, in calculating the beneficiary's age for purposes of determining whether she was under the age of sixteen at the time the petition was filed. Before directly addressing the petitioner's implicit request for application of the doctrine of equitable tolling, the AAO will first address the matter of his filing the Form I-600 at the National Visa Center.

The regulation at 8 C.F.R. § 1.1(c) defines the "Service" as follows:

The term *Service* means the Immigration and Naturalization Service, as it existed prior to March 1, 2003. Unless otherwise specified, references to the Service after that date mean [U.S.] Citizenship and Immigration Services, [U.S.] Customs and Border Protection, and [U.S.] Immigration and Customs enforcement.

The regulation at 8 C.F.R. § 204.3(b) defines the term "overseas site" as follows:

Overseas site means the Department of State immigrant visa-issuing post having jurisdiction over the orphan's residence, or in foreign countries in which the Service has an office or offices, the Service office having jurisdiction over the orphan's residence.

The regulation at 8 C.F.R. § 204.3(g)(2) states, in pertinent part, the following:

- (2) *Where to file an orphan petition when the advanced processing application has been approved. . . .*
 - (i) *Prospective adoptive parents residing in the United States who do not travel abroad to locate and/or adopt an orphan. If the prospective adoptive parents reside in the United States and do not travel abroad to locate and/or adopt an orphan, the petition must be filed with the Service office having jurisdiction over the place of residence of the prospective adoptive parents.*

- (ii) *Prospective adoptive parents residing in the United States, with one or both members of the prospective adoptive couple, or the unmarried prospective adoptive parent, traveling abroad to locate and/or adopt an orphan.* If the prospective adoptive parents reside in the United States, and one or both members of the prospective adoptive couple, or the unmarried prospective adoptive parent, travel abroad to locate and/or adopt an orphan, the petition may be filed with the stateside Service office having jurisdiction over the place of residence of the prospective adoptive parents in the United States or at the overseas site. . . .
- (3) *Advanced processing application approved.*
 - (i) If the advanced processing application is approved, the prospective adoptive parents shall be advised in writing. The application and supporting documents shall be forwarded to the overseas site where the orphan resides. . . .

Counsel asserts that he attempted to file the Form I-600 at the National Visa Center because the instructions on the I-600A approval notice were ambiguous. However, the regulatory provisions cited above provide guidance on where to file Forms I-600. If the prospective adoptive parent(s) will not travel, then the Form I-600 is “filed with the Service office having jurisdiction over the place of residence of the prospective adoptive parents,” which would be the Boston office. If the prospective adoptive parent(s) will travel, then the Form I-600 is “filed with the stateside Service office having jurisdiction over the place of residence of the prospective adoptive parents in the United States or at the overseas site,” which would be either the Boston office, or Port-au-Prince.

The National Visa Center is not mentioned in the regulatory criteria governing the filing of Forms I-600. The National Visa Center is an office of the Department of State, so it is not an office of the “Service.” As it is located in New Hampshire, it is not an “overseas site,” either. Although counsel states that he consulted with another attorney, he does not indicate whether he consulted the regulations. Nor does the AAO find convincing counsel’s apparent assertion on appeal that the National Visa Center should have forwarded the petitioner’s improperly filed Form I-600 to the appropriate office having jurisdiction over the matter; the National Visa Center cannot be tasked with the job of accepting applications over which it has no jurisdiction and then assuming responsibility for ensuring that such improperly filed applications are then routed to the correct locations.

The I-600A approval notice instructed the petitioner that he should file the Form I-600 at “the Service office or American Consulate Office or Embassy where your approved advance processing application is being retained or has been forwarded as indicated by an ‘X.’” The field office director then marked two items with an “x”: (1) the National Visa Center; and (2) the American Consulate or Embassy in Port-au-Prince, Haiti. As the National Visa Center is neither

a Service office nor a consulate office or embassy, the Form I-600 should have been filed in Port-au-Prince, Haiti.

The AAO acknowledges that the Form I-600A was worded inartfully. However, the field office director's inartful wording does not excuse counsel's apparent failure to consult the regulations governing the filing of Forms I-600 when considering his course of action. Further, the AAO is without discretionary authority to waive the statutory age cutoff contained at section 101(b)(1)(F)(i) of the Act as a result of inartful wording on a notice issued by a field office director.

Having made these observations, the AAO turns next to counsel's implicit request for application of the doctrine of equitable tolling to this matter.

There is no question of fact in this case with regard to whether the instant Form I-600 was timely filed. As was noted previously, it was filed on March 21, 2008; the beneficiary reached sixteen years of age on February 26, 2008. Counsel asserts, however, that the beneficiary was under the age of sixteen on the date he attempted to file the Form I-600 at the National Visa Center. If equitable tolling of the age cutoff were permissible in this case, and the age cutoff date were tolled to the date counsel claims he attempted to file the Form I-600 with the National Visa Center, then the statutory limitation contained in section 101(b)(1)(F) of the Act regarding children over the age of sixteen would not preclude approval of this petition.

The equitable tolling doctrine is presumed to apply to every federal statute of limitation. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1188 (9th Cir. 2001). However, not every statutory time limit is a statute of limitations subject to equitable tolling. A crucial distinction exists between statutes of limitation and statutes of repose. *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003). A statute of limitations limits the time in which a plaintiff may bring suit after a cause of action accrues. A statute of repose, in contrast, "cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action." *Weddel v. Sec'y of H.H.S.*, 100 F.3d 929, 931 (Fed. Cir. 1996). Statutes of repose are not subject to equitable tolling. *Lampf Pleva, Lipkin, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (superseded on other grounds); *Weddel v. Sec'y of H.H.S.*, 100 F.3d at 930-32.

The statute in question in *Munoz v. Ashcroft* was the asylum-filing deadline established by the Nicaraguan Adjustment and Central American Relief Act (NACARA).² The *Munoz* court held that it was not dealing with a limitations period, but rather, "Congress created a statutory cutoff date of April 1, 1990 (asylum application deadline to qualify under NACARA) . . . We cannot 'toll' this type of cutoff date." *Munoz* at 957. The court further explained that "[a] statute of repose is a fixed, statutory cutoff date, usually independent of any variable, such as claimant's

² Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997).

awareness of a violation. . . . [and] [i]n setting NACARA's retroactive cutoff dates, Congress closed the class via a statute of repose, thereby precluding equitable tolling." *Id.*

The issue in this case, therefore, is whether the 16-year age cutoff in section 101(b)(1)(F) of the Act operates as a statute of repose or a statute of limitations. Again, only a statute of limitations may be subject to equitable tolling. *See Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1097 (9th Cir. 2005) (distinguishing *Munoz*, finding a motion to reopen for purposes of seeking relief under NACARA to operate as a statute of limitations, unlike the asylum-filing deadline to establish threshold eligibility for NACARA). A statute of repose operates as a jurisdictional time-limit or prerequisite and cannot be tolled. *Id.*

When determining whether a time limitation is a statute of limitations that may be subject to equitable tolling, or whether it is jurisdictional, the United States Supreme Court has recognized that the main purpose of the inquiry is to discover Congressional intent behind the statute. *See Id.*, at 1095 (citations omitted). In determining Congressional intent, it is necessary to interpret **the language of a statute in accordance with Congress's intent in passing it.** *Id.*, 1096. The current definition of "orphan" (with several amendments over the years) was adopted in 1965. In enacting this legislation, Congress was primarily concerned with family unity and the welfare of children. In establishing the definition of "orphan" with this goal in mind, a statutory age limit was first set at fourteen years of age. The maximum qualifying age for adopted children under section 101(b)(1)(E) and for orphans under section 101(b)(1)(F) of the Act was increased from fourteen to sixteen years of age in 1981. In order to keep families in tact, Congress again amended those provisions to include older siblings of such children, allowing the older siblings between the age of sixteen and eighteen to qualify as adopted children or as orphans. Congress has thus spoken clearly, and when it deemed necessary, on the issue of age requirements for these categories of children. Where the plain meaning of a statute's language is clear, the sole function of the courts is to enforce the statute. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

A child who meets the definition of "orphan" contained in section 101(b)(1)(F) of the Act is eligible for classification as an immediate relative under one of the definitions of "child" under the Act. The definition of the term "child" in section 101(b)(1) of the Act is particularly exhaustive. *See Matter of Cariaga*, 15 I&N Dec. 716 (BIA 1976) (in light of the history of the age restriction for adopted children, that provision must be given a literal interpretation). Even if [a relationship] closely resembles a parent-child relationship, Congress, through the statute's plain language, precluded the functional approach to defining the term "child." *INS v. Hector*, 479 U.S. 85 (1986) (examining the respondent's relationship with her nieces). The Court added the following:

With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to [some] who share strong family ties. . . . But it is clear from our cases . . . that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to

substitute our political judgment for that of the Congress. *Fiallo v. Bell*, 430 U.S. 787, 798 (1977).

INS v. Hector, 479 U.S. 85, 90, (1986).

In light of the clear statutory language in the Act regarding age cutoffs for children, including in the definition of an “orphan” set forth at section 101(b)(1)(F), and Congressional intent to establish such age cutoffs for orphans and other children, the AAO concludes that the statutory cutoff age of sixteen years to meet the definition of “orphan” is a limitation period that operates as a jurisdictional prerequisite. It involves a threshold condition for eligibility under section 101(b)(1)(F) of the Act. Similar to the filing deadline at issue in *Munoz*, it is therefore not a time limitation that can be tolled. Rather, it is a statute of repose that is not subject to equitable tolling.

USCIS lacks the authority to exercise discretion over a statute of repose such as the one at issue here, as it would be inconsistent with legislative purpose. Neither the statute nor the regulations indicate that such discretion has been delegated to the Secretary of Homeland Security. Absent a change in the statute, a child who is not under the age of sixteen at the time the Form I-600 is filed on his behalf does not meet the definition of an “orphan,” and that cutoff date cannot be tolled.

The AAO does not dispute the sympathetic aspects of this case with regard to the beneficiary’s status. However, the AAO lacks the authority to grant the relief sought by counsel. The statutory limitation contained in section 101(b)(1)(F) of the Act regarding children over the age of sixteen precludes approval of this petition, and neither the field office director nor the AAO possess the authority to toll the filing date of the petition to the date counsel improperly sent the Form I-600 to the National Visa Center, regardless of whether he was justified in assuming he was correct to do so, as a matter of equity. The beneficiary does not meet the definition of “orphan” as set forth at section 101(b)(1)(F) of the Act, and this petition was properly denied by the field office director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.