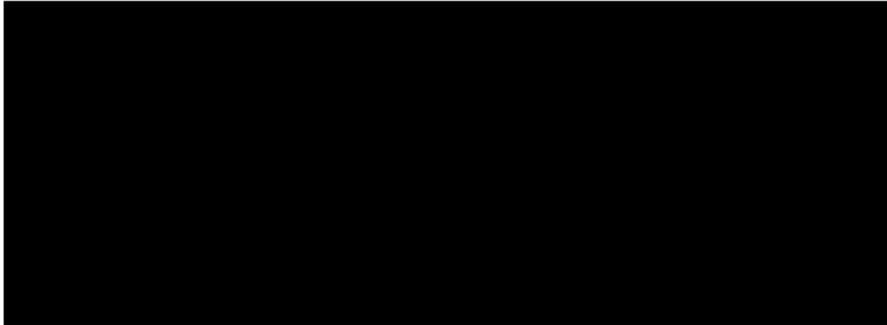




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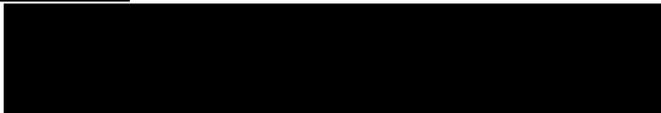


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Date: OCT 16 2007

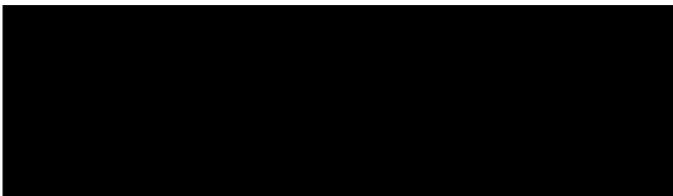
IN RE: Petitioner:

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

The applicant is an 19-year-old native and citizen of Honduras. She 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 found that the applicant failed to show that she continues to be dependent on a juvenile court and eligible for long-term foster care in the State of Massachusetts, as required by 8 C.F.R. § 204.11(c)(5). Specifically, the District Director found that, once the applicant reached age 18, she was no longer dependent on the Commonwealth of Massachusetts, Trial Court, Juvenile Court Department, Worcester Division (“juvenile court”), as contemplated by 8 C.F.R. § 204.11(c)(5). The petition was denied accordingly.

On appeal, counsel for the applicant contends that the District Director erroneously concluded that the applicant ceased to qualify for SIJ status once she reached age 18 and was no longer dependent on the juvenile court. *Statement from Counsel on Form I-290B*, dated August 29, 2007. Counsel asserts that the applicant continues to qualify for SIJ status despite the fact that she reached the age of majority in Massachusetts, as she remains legally committed to the Massachusetts Department of Social Services (DSS) pursuant to a Voluntary Placement Agreement (VPA) under Mass. Gen. Law Ch. 119 § 23. *Brief in Support of Appeal*, at 2-3, dated September 26, 2007. Counsel suggests that a correct reading of section 101(a)(27)(J)(i) of the Act and the regulation at 8 C.F.R. § 204.11(c)(5) reflects that an applicant need not show that she continues to be dependent on a juvenile court, so long as she continues to be committed to, or placed under the custody of, an agency or department of a State. *Id.* at 5-10, 12, 14-16. Counsel further asserts that the District Director’s decision constitutes a change in policy without adequate notice to the applicant. *Id.* at 3-4, 16-17.

The record contains, in pertinent part, a brief from counsel; a copy of an order from the juvenile court, dated August 10, 2006; affidavits from the Deputy General Counsel for the Massachusetts DSS, dated August 13 and 29, 2007; a copy of a VPA executed by the applicant and DSS, dated August 17, 2007 and extended until February 17, 2008; an affidavit from a social worker on behalf of the Massachusetts DSS in support of a fee waiver for the applicant, and; an affidavit from the applicant. The entire record was considered in rendering a decision on the current appeal.

Applicable Law

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 [Secretary of Homeland Security] 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 chapter

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 regulation at 8 C.F.R. § 204.11(a) provides the following:

Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of

majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in [a] guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care.

Facts and Procedure

The record reflects that the applicant was born in Honduras on August 19, 1988. *Statement from Applicant*, dated February 27, 2006. The applicant explained that she was sexually abused by her mother's boyfriend, and physically and emotionally abused by her mother. *Id.* at 1. She resided with her grandmother during the early part of her life, then she left to reside with her boyfriend at age 13. *Id.* at 1-2. The applicant gave birth to two children, at age 13 and 16. *Id.* at 3-4. Her boyfriend was sexually, physically, and emotionally abusive to her, and she fled from him and traveled to the United States at age 16. *Id.* at 2-5. The applicant was taken into custody by U.S. immigration agents immediately upon her arrival. *Id.* at 5.

On August 10, 2006, the juvenile court issued an order stating that: 1) the applicant was committed to the custody of DSS on July 21, 2006 due to abuse, neglect, or abandonment, following the filing of a Care and Protection petition pursuant to Mass. Gen. Law Ch. 119 § 24; 2) on July 21, 2006, the applicant was deemed eligible for long term foster care due to abuse, neglect, and abandonment; 3) it is not in the best interest of the applicant to be returned to Honduras, and; 4) it is in the applicant's best interest to remain in the United States. *Juvenile Court Order*, dated August 10, 2006.

On August 19, 2006, the applicant reached age 18. Counsel states that the applicant remained in DSS foster care after age 18, as she executed a VPA. The applicant filed the present Form I-360 petition for SIJ status on January 12, 2007. The record contains a copy of a VPA, executed on August 17, 2007 and extended until February 17, 2008. *Voluntary Placement Agreement*, dated August 17, 2007.

Assertions on Appeal

On appeal, counsel asserts that the applicant has established that she is eligible for SIJ status. Counsel suggests that a correct reading of section 101(a)(27)(J)(i) of the Act and the regulation at 8 C.F.R. § 204.11(c)(5) does not require that an applicant show that she continues to be dependent on a juvenile court, so long as she continues to be committed to, or placed under the custody of, an agency or department of a State. *Brief in Support of Appeal* at 5-10, 12, 14-16. Counsel asserts that the applicant continues to qualify for SIJ status despite the fact that she reached the age of majority in Massachusetts and is no longer dependent on the juvenile court, as she remains legally committed to DSS pursuant to a VPA under Mass. Gen. Laws ch. 119 § 23. *Id.* at 3.

Counsel notes that, with one exception that does not apply in the present matter, juvenile court jurisdiction over children in Massachusetts ends at age 18. *Id.* at 2 (citing Mass. Gen. Laws ch. 119 §§ 23-24). Counsel explains that a juvenile court can commit a child it deems dependent on the State due to abuse, neglect, or abandonment to the custody of DSS pursuant to Mass. Gen. Laws ch. 119 §§ 24, 26. *Id.* Counsel explains the following:

Since the Juvenile Court's jurisdiction – and Court oversight – normally ends at the age of 18, when youth in foster care approach the age of 18, DSS, acting as the State, makes a determination regarding the youth's continued "dependency," or need for long-term foster care, and discusses continued placement with the youth if clinically appropriate. Once DSS and the youth agree on a plan for continued foster placement, it is memorialized in a Voluntary Placement Agreement ["VPA"], which is executed by both parties (the youth and DSS). The youth may continue in DSS custody through a VPA at least until he reaches the age of 21.

Id. Counsel observes that Mass. Gen. Laws ch. 119 § 23 authorizes DSS to continue to have responsibility for a youth under age 21. *Id.* at 2. Counsel contends that the applicant has signed a VPA, and thus DSS continues to have responsibility for her. *Id.* at 3. Thus, counsel asserts that the applicant continues to be committed to, or placed under the custody of, an agency or department of a State.

Counsel further contends that the District Director's decision constitutes a change in policy without adequate notice to the applicant. *Id.* at 3-4, 16-17.

Analysis

Upon review, the AAO finds that an individual in the State of Massachusetts may establish eligibility for SIJ status after reaching 18 years of age, as discussed below. In the present matter, the applicant has submitted sufficient evidence to show that she continues to be committed to, or placed under the custody of, an agency or department of the State of Massachusetts. *See* section 101(a)(27)(J)(i) of the Act. The record establishes that the applicant meets the remaining requirements for SIJ status.

As a preliminary matter, it is observed that where an applicant has shown that a juvenile court has legally committed her to, or placed her under the custody of, an agency or department of a State, and she continues to maintain such status, she is not also required to establish that she has been declared dependent, and that she continues to be dependent, on a juvenile court. *See* section 101(a)(27)(J)(i) of the Act.

The regulation at 8 C.F.R. § 204.11(c)(5) requires that an applicant show that she "continues to be dependent upon the juvenile court . . ." 8 C.F.R. § 204.11(c)(5). However, no such requirement is explicitly stated in the Act. Section 101(a)(27)(J)(i) of the Act merely requires that an applicant show that she is an individual 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 . . ." Section 101(a)(27)(J)(i) of the Act (amended on November 26, 1997).

The regulations at 8 C.F.R. § 204.11(c)(3) and (5), last amended in 1993, differ from the Act with respect to the requirement that an applicant show dependency on a juvenile court. As quoted above, section 101(a)(27)(J) of the Act requires that an applicant show that she is an individual 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 . . ." Section 101(a)(27)(J)(i) of the Act (emphasis added). Thus, section 101(a)(27)(J)(i) of the Act may be satisfied by showing that a juvenile court

has legally committed the applicant to, or placed the applicant under the custody of, an agency or department of a State, without the need to show that the applicant has been declared dependent on a juvenile court. *Id.* Because the regulations at 8 C.F.R. § 204.11(c)(3) and (5) were issued prior to the 1997 amendment of the Act, they require that an applicant has been declared dependent upon a juvenile court, and that she continues to be so dependent, without providing for the alternatives found in section 101(a)(27)(J)(i) of the Act of showing that a juvenile court has legally committed her to, or placed her under the custody of, an agency or department of a State.

Regulations are enacted to govern the application of statutes according to the intent of Congress. Where requirements found in a statute conflict with those in a regulation, the requirements of the statute trump the regulation. Thus, while the regulations at 8 C.F.R. § 204.11(c)(3) and (5) indicate that an applicant must be declared dependent and continue to be dependent upon a juvenile court, the AAO must give effect to the alternative requirements of section 101(a)(27)(J)(i) of the Act. Accordingly, where an applicant has shown that a juvenile court has legally committed her to, or placed her under the custody of, an agency or department of a State, and she continues to maintain that status, she is not also required to establish that she has been declared dependent, and that she continues to be dependent, on a juvenile court. *See* section 101(a)(27)(J)(i) of the Act.

Mass. Gen. Laws ch. 119 § 23 authorizes DSS to accept for foster care any child under eighteen years who in its judgment is in need of foster care. Pursuant to Mass. Gen. Laws ch. 119 § 23, DSS may retain responsibility for a former foster child until such child reaches age 21 for the purposes of specific educational or rehabilitative programs. Mass. Gen. Laws ch. 119 § 23. Mass. Gen. Laws ch. 119 § 23 provides that, in order for DSS to retain such responsibility over an individual, DSS and the individual must agree on the conditions of DSS's assistance, such as those defined by a VPA. *Id.*

The Deputy General Counsel of DSS described DSS's experience with applicants for SIJ status who were over the age of 18 years as follows:

From approximately 1998 . . . to October, 2006, DSS children and youth were routinely granted SIJ status upon a showing that they had been the subject of a juvenile court order prior to their 18th birthday that found: they were dependent on the court or committed to DSS custody due to abuse, neglect or abandonment; they were deemed eligible for long term foster care due to abuse, neglect or abandonment; and that it was not in the child's best interest to be returned to his or her country of origin. DSS youth ages 18 to 21 submitted evidence of their continued placement in foster care, which consisted of a DSS Voluntary Placement Agreement (VPA) signed by a DSS representative and the youth.

In filing SIJ petitions/applications for older undocumented youth, DSS and the youth routinely relied on the understanding that their 18th birthday would not be a barrier to demonstrating eligibility for SIJ status provided they remained in foster care pursuant to a VPA and met other eligibility criteria.

Affidavit from Deputy General Counsel for the Massachusetts DSS, dated August 13, 2007. As quoted above, counsel echoed this statement of the significance of the VPA as evidence that an applicant continues to be committed to, or placed under the custody of, DSS. *Brief in Support of Appeal* at 3.

In the present matter, on appeal the applicant has provided a copy of a VPA to show that she continues to be committed to, or placed under the custody of, DSS. The VPA defines the conditions under which DSS continues to provide services and have responsibility for the applicant. *Voluntary Placement Agreement* at 1-3. The VPA states that it was executed pursuant to the authority of Mass. Gen. Laws ch. 119 § 23. *Id.* at 1.

The record contains an affidavit in support of a fee waiver for the applicant from the Deputy General Counsel of DSS that states that “[the applicant] entered DSS foster care when she was under 18 years of age. Since turning 18, she has continued in the care of DSS.” *Fee Waiver Affidavit from the Deputy General Counsel for the Massachusetts DSS*, dated August 29, 2007. The affidavit from the Deputy General Counsel supports that the applicant remains under the care and supervision of DSS.

The record contains an affidavit from a social worker on behalf of DSS in support of a fee waiver for the applicant, in which the social worker stated that “[the applicant], age 18, has been committed to the custody of the Department of Social Services,” and that the applicant “is indigent and [her] case remains open.” *Affidavit from Massachusetts DSS Social Worker*, dated January 5, 2007. As the social worker noted that the applicant was age 18, the affidavit supports that the applicant continued in DSS care beyond her 18th birthday. *Id.*

The VPA executed by the applicant and DSS, as supported by the affidavits from the Deputy General Counsel of DSS and a DSS social worker, is sufficient evidence to show that the applicant continues to be committed to, or placed under the custody of, DSS. *See* Mass. Gen. Laws ch. 119 § 23. Accordingly, the applicant has shown that she continues to meet the requirements of section 101(a)(27)(J)(i) of the Act.

Conclusion

Based on the foregoing, the applicant has shown that she is legally committed to, or under the custody of, an agency or department of the State of Massachusetts. Section 101(a)(27)(J)(i) of the Act. The record establishes that the applicant meets the remaining requirements for SIJ status. Accordingly, the applicant has shown that she is eligible for SIJ status and the petition will be approved.

In visa petition proceedings, the burden of proof is on the applicant to establish eligibility for the benefit sought by a preponderance of the evidence. *Matter of Brantigan*, 11 I&N Dec. 493 (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 applicant has shown eligibility for the benefit sought. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.