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Litigation for Unaccompanied Children: Updates and Foundational Cases

A webinar series presented by:

The ABA Children's Immigration Law Academy (CILA) and
The National Immigration Litigation Alliance (NILA)

Webinar 5, Written Materials

Wednesday, January 18, 2023

Cases reviewed:

Galvez v. Jaddou

52 F.4th 821 (9th Cir. 2022) *(affirming permanent injunction issued on behalf of current and future Washington State SIJ petitioners against USCIS over its unlawful delays in adjudicating SIJ petitions)*

Facts:

Three SIJ petitioners filed a putative class action in the Western District of Washington against USCIS and other agency defendants alleging an unlawful pattern and practice of delaying adjudication of SIS petitions beyond the 180-day statutory deadline. *See* 8 U.S.C. § 1232(d)(2). The district court certified a class of all current and future SIS petitioners in Washington State. It subsequently granted summary judgment for the class members, including a permanent injunction which strictly held USICS to the deadline but allowed class members to toll the deadline to respond to a request for evidence (RFE) or notice of intent to deny (NOID) in certain circumstances.

The government appealed to the Ninth Circuit, challenging only the district court's grant of a permanent injunction and the scope and terms of the injunction. It did not challenge the district court's determination that delayed consideration of petitions for periods well past the 180-day period were unlawful.

Notable Holdings:

The Ninth Circuit held that the district court did not abuse its discretion in issuing a permanent injunction but affirmed only part of the terms of the injunction. Specifically, the Ninth Circuit did not affirm the district court's tolling provision, instead remanding this issue back to the district court for further proceedings.

The Ninth Circuit evaluated the district court's exercise of discretion in terms of the standard for an injunction: that the plaintiff has suffered an irreparable injury; that remedies available at law are inadequate to compensate for that injury; that the balance of hardships tips in favor of the plaintiff; and that the public interest would not be disserved by an injunction. On appeal the government argued that the district court erroneously (1) failed to consider the operational hardships it faced in balancing the hardships; and (2) relied on stale evidence to determine that plaintiffs were likely to suffer irreparable harm. The Ninth Circuit rejected both arguments.

With respect to its first argument, the government cited to evidence showing that there were only 59 officers adjudicating these petitions at the National Benefits Center and that the injunction would result in the agency having to prioritize Washington State petitioners to the prejudice of other petitioners. The Ninth Circuit held that the district court did not abuse its discretion in rejecting this argument by indicating that USCIS should find a way to prioritize *all* petitions and that this did not justify excusing the agency's continued violation of the law with respect to Washington petitioners.

With respect to the irreparable harm argument, the government argued that the district court ignored evidence regarding its general compliance with the statutory deadline. The Ninth Circuit disagreed that this evidence had been ignored; moreover, it stated that the agency's compliance with the statutory deadline while subject to a preliminary injunction did not establish that it would continue to do so without an injunction. Additionally, among other points, the Ninth Circuit cited

to the fact that the government did not—and could not—deny the district court's finding that USCIS believed it was not obliged to adjudicate SIJ petitions within 180 days, since the agency recently issued a final regulation permitting it to reset or suspend the deadline if it finds that additional evidence is needed.

With respect to the scope of the injunction, the Ninth Circuit found that the provision allowing a class member to toll the 180-day deadline was an abuse of discretion for three reasons: it did not include a requirement that the class member show good cause in support of tolling; it conflicted with regulations governing the timing of responses to RFEs and NOIDs; and the record did not show that the district court measured the parties' respective tolling provisions by the same standard. The Ninth Circuit instructed that, on remand, the district court could modify the injunction to permit tolling on a case-by-case basis, upon an affirmative showing of good cause and subject to a limitation on the tolling duration.

Practice Pointers:

- The district court's injunction is limited to the certified class, which includes only those petitioning within Washington State. However, there is helpful language in the Ninth Circuit opinion that, while not going so far as to find that the statutory deadline is mandatory, does indicate that Congress' intent was to expedite these adjudications. This language will benefit those litigating delays in individual cases within the Ninth Circuit and can be used as persuasive authority for cases arising in other circuits.
- Note that the case did not challenge—and the Ninth Circuit does not address—the validity of the regulations adopted in April 2022, which expressly allow for a reset of the deadline where USCIS finds that additional evidence is needed. *See* 8 C.F.R. § 204.11(g)(1).

Rodriguez Diaz v. Garland

53 F.4th 1189 (9th Cir. Nov. 21, 2022) *(reversing district court grant, in habeas proceedings, of bond hearing to person held under 8 U.S.C. § 1226(a) and holding no due process violation)*

Facts:

Aroldo Rodriguez Diaz is a Salvadoran who was detained under 8 U.S.C. § 1226(a) pending the completion of his removal proceedings. At his initial bond hearing, the IJ refused to grant bond after concluding that Mr. Rodriguez Diaz's gang affiliation was a danger to the community. In subsequent habeas proceedings, the government appealed a district court ruling in his favor, which required a second bond hearing at which the burden to continue detention would be on the government, and a majority of the Ninth Circuit panel reversed.

Mr. Rodriguez Diaz came to the U.S. as a child and was initially convicted at age 15 of residential burglary. As an adult, his most serious offenses were spousal battery and intimidation of a witness, convictions for which he was sentenced to 276 days.

Removal proceedings: The IJ initially denied bond in February 2019 and denied CAT relief in May 2019. In the fall of 2019, the BIA dismissed Mr. Rodriguez Diaz's appeal and he filed a petition for review, with a stay granted in connection. The court notes that his asylum application remains pending with USCIS, as he filed when an unaccompanied child.

In February 2020, Mr. Rodriguez Diaz filed a motion for bond and custody redetermination with the IJ. He cited vacatur of a drug conviction and rehabilitation as material changes in circumstances, the regulatory standard for such motions. The IJ denied this motion, faulting Mr. Rodriguez Diaz for a prior denial of gang membership which he had recanted.

Habeas proceedings: While his appeal to the BIA was pending, Mr. Rodriguez Diaz filed a habeas petition in district court, claiming his prolonged detention without a fair hearing violated due process. Under the district court's favorable ruling, Mr. Rodriguez Diaz was granted a new hearing at which the government's burden was clear and convincing evidence. The IJ set bond at $10,000, and he was released after about 18 months of incarceration. The government appealed to the Ninth Circuit.

Notable Holding and Rationale:

The panel majority concluded that because this case arose under § 1226(a), it was distinct from circuit precedent addressing other detention provisions such as mandatory detention under § 1226(c) and post-removal-order detention under § 1231(a). Moreover, "[t]he Supreme Court has now twice overturned our decisions that invoked the canon of constitutional avoidance to interpret other immigration detention provisions as impliedly providing the right to a bond hearing."

The majority opinion emphasized that under § 1226(a) and its implementing regulations, the government must "provide extensive procedural protections that are unavailable under other detention provisions, including several layers of review of the agency's initial custody determination, an initial bond hearing before a neutral decisionmaker, the opportunity to be represented by counsel and to present evidence, the right to appeal, and the right to seek a new

hearing when circumstances materially change." Given these protections, the majority held that Mr. Rodriguez Diaz's due process claims fail as both facial and as-applied challenges.

Siding with the Third and Fourth Circuits in a split with the First and Second Circuits, the panel majority first "assume[d] without deciding that *Mathews* [*v. Eldridge*'s balancing test] applies here." Most significantly, the opinion concludes that "the existing agency procedures sufficiently protected Rodriguez Diaz's liberty interest and mitigated the risk of erroneous deprivation." It places considerable weight on permissible differential treatment of noncitizens, as "the Supreme Court has been clear: the Constitution permits 'rules that would be unacceptable if applied to citizens.'"

On the district court's burden-shifting, the majority held that "[n]othing in this record suggests that placing the burden of proof on the government was constitutionally necessary to minimize the risk of error, much less that such burden shifting would be constitutionally necessary in all, most, or many cases."

Judge Bumatay, in a concurrence, would have decided this case based on "the original understanding of the Due Process Clause." After canvassing that history, he concludes that "Congress may grant the Executive the authority to detain aliens during removal proceedings-with or without bond hearings. And so long as the government follows reasonable, individualized determinations to ensure that the alien is properly in removal proceedings, due process does not require more bond hearings even after a prolonged period."

Judge Wardlaw dissented, because "the majority fails to account for the high risk of procedural error and the importance of Rodriguez Diaz's strong individual liberty interest." She criticized the majority's application of the *Mathews* test, writing that the opinion "disregards case law that guides us to view an individual's liberty interest in freedom from detention on a continuum, with the amount of due process necessary to protect that liberty interest increasing over time."

Judge Wardlaw and the majority disagree on whether the IJ's eventual release decision on $10,000 bond is pertinent. Her dissent stresses that "in real life terms the risk that Rodriguez Diaz was erroneously deprived of his liberty interest was one hundred percent," whereas the majority sees this as a disagreement about the bond hearing's outcome rather than the process that is due. They also disagree on which side is better positioned to have the burden of proof, with Judge Wardlaw stressing that "detainees are in a much worse position to compile a complete and accurate factual record than the government is. For instance, detainees have limited access to phones, computers, and mail, making it harder for them to gather relevant documents including their official records, proof of community ties, and employment verification. Detainees often face cultural and language barriers, making it even more difficult to access relevant information. Further, detainees often do not have access to legal help in building their case. And because detainees do not have a constitutional right to counsel, many indigent noncitizens enjoy no such privilege."

Practice Pointers:

- Be aware of ongoing developments in this case and this area of law:
    - Mandate has not yet issued and the petition for rehearing deadline has been extended to February 21, 2023.

- If the opinion becomes final, the majority's qualification that "we do not foreclose all as-applied challenges to § 1226(a)'s procedures" will be crucial.
- Judge Wardlaw criticizes the majority's exclusion of context, showing that painting a full picture of clients resonates with some judges: "Since he arrived in the United States as a young boy, Rodriguez Diaz has developed strong ties here. His wife and infant son, both of whom are United States citizens, and his entire extended family, reside in the U.S. As a child, Rodriguez Diaz spent most of his life separated from his parents. After a difficult childhood, Rodriguez Diaz struggled to adjust to life in a new country. He was often reprimanded at school for failing at schoolwork that was not in his native language. As a teenager, he was reunited with his parents from whom he had been separated for much of his childhood, but as a result, he regularly faced beatings by his father at home. In search of social protection in a dangerous neighborhood and acceptance from other sources, Rodriguez Diaz became involved with a local gang, the Carnales Locos....He was [later] referred to Camp Glenwood, a program for troubled juveniles, where he completed his GED. After he was released at age eighteen, he stopped participating in the activities of the Carnales Locos.... In 2017, [he] married and had a son . . . . [He] discovered that [his wife] had been unfaithful to him when he found her in another man's car with his son. Shortly after the incident, he . . . called her several names and made threats against her [all on the phone] . . . . While in immigration detention, following his initial bond hearing, Rodriguez Diaz made extensive efforts at rehabilitation: he completed courses on Anger Management, Domestic Violence, Substance Abuse, Parenting, Offender Responsibility, and Contentious Relationships, and he secured a case manager through the Second Chance Program, which provides him with services such as mental health counseling ... and help removing his gang-related tattoos upon release from custody."
- Judge Wardlaw's dissent also refers to jail conditions: "Rodriguez Diaz was held in Yuba County Jail, a facility that houses individuals convicted of crimes. During his detention, he did not have access to a cell phone or internet, was deprived of the ability to freely interact with his family, friends, and counsel, and was unable to work to support his wife and child."

Laparra-Deleon v. Garland

52 F.4th 514 (1st Cir. 2022) *(vacating and remanding BIA denial of a motion to rescind an in absentia order where petitioner did not receive a sufficient Notice to Appear and thus did not receive notice as required by 8 U.S.C. § 1229a(b)(5)(C)(ii))*

Facts:

Petitioner was served with a Notice to Appear (NTA) that did not include the date and time that removal proceedings would be held as required by 8 U.S.C. § 1229(a)(1)(G)(i). Subsequently, the Executive Office for Immigration Review (EOIR) sent a Notice of Hearing (NOH) to petitioner's address on file. The NOH was returned as undeliverable. Petitioner did not appear at the removal hearing and an immigration judge (IJ) ordered him removed in absentia.

Petitioner subsequently filed motions to terminate or, alternatively, to vacate the in absentia order which were denied by the IJ and Board or Immigration Appeals (BIA). In 2021, petitioner filed a motion to reopen and an alternative motion to rescind the order with the BIA, arguing that he had not received sufficient notice because the NTA did not include information required by 8 U.S.C. § 1229(a). In its precedent decision, *Matter of Laparra-Deleon*, 28 I. & N. Dec. 425 (BIA 2022), the BIA denied the motions. With respect to the motion to rescind, the BIA found that petitioner had receive sufficient notice because he received both the NTA and the NOH.

Notable Holding and Rationale:

The Court denied the petition with respect to the denial of the motion to terminate. However, the Court found that the notice requirements for an in absentia order were not satisfied by an NTA that lacked time and date information and a subsequent NOH, and, thus, vacated the BIA's decision and granted the petition for review with respect to the denial of the motion to rescind.

Pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii), individuals who receive an in absentia removal order can seek rescission and reopening of the order if they "demonstrate that [they] did not receive notice in accordance with paragraph (1) or (2) of [8 U.S.C. § 1229(a)]." Section 1229(a) provides written notice requirements for NTAs and NOHs, including that NTAs must provide "[t]he time and place at which [removal] proceedings will be held."

The First Circuit recognized that the Supreme Court interpreted the requirements of 8 U.S.C. § 1229(a) in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), and *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). The Court found that *Pereira* required that the NTA's § 1229(a) notice requirements be included in one document in the context of the cancellation of removal stop-time rule and that there was no reason that its interpretation would not extended to the in absentia context because the in absentia recission statute similarly references the notice requirements of 8 U.S.C. § 1229(a). In so holding, the Court reasoned that "[t]he phrase 'paragraph (1) or (2)' in § 1229a(b)(5)(A) and § 1229a(b)(5)(C)(ii) usefully makes clear that noncitizens will be subject to removal in absentia for failing to attend removal proceedings that are held at the 'time or place' set forth in a 'notice to appear' under § 1229(a)(1) or removal proceedings held at a 'new time or place' given to the noncitizen in the case of 'any change or postponement' to the 'time or place' that was mentioned in the 'notice to appear,' under § 1229(a)(2)." Therefore, because petitioner's initial NTA did not contain the required time and date information, the NOH could not provide notice of a change or

postponement to any time or place information. The Court thus vacated the BIA's decision and remanded for further proceedings.

The Court further noted that its conclusion accords with the Ninth Circuit's decision in *Singh v. Garland*, 24 F.4th 1315, 1317 (9th Cir. 2022), *reh'g en banc denied*, 51 F.4th 371 (9th Cir. 2022) and the Fifth Circuit's decision in *Rodriguez v. Garland*, 15 F.4th 351, 355-56 (5th Cir. 2021), *reh'g en banc denied*, 31 F.4th 935 (5th Cir. 2022).

Practice Pointers:

- The government received two extensions of the deadline to file a rehearing petition in this case. The deadline is now Feb. 17, 2023.
- There are ongoing developments in this area of law, so it is important to know relevant circuit law and make distinguishing arguments, where possible.
- Some quick updates on cases raising this issue:
    - *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022): The Supreme Court extended the deadline to file petition for writ of certiorari until Feb. 9, 2023.
    - *Mendez-Colin v. Garland*, No. 20-71846, 2022 WL 342959 (9th Cir. Feb. 4, 2022): The Supreme Court extended the deadline to file petition for writ of certiorari until Feb. 9, 2023.
    - *Dacostagomez-Aguilar v. Att'y Gen.*, 40 F.4th 1312 (11th Cir. 2022): The Supreme Court extended the deadline to file petition for writ of certiorari until Feb. 14, 2023.
    - *Campos-Chaves v. Garland*, 43 F.4th 447 (5th Cir. 2022): Petition for writ of certiorari planned.

Matter of Coronado Acevedo

28 I. & N. Dec. 648 (AG 2022)*(holding that IJs and the BIA can grant termination or dismissal of removal proceedings in certain limited circumstances)*

Facts:

DHS removal proceedings by filing a Notice to Appear (NTA). While removal proceedings were pending, the respondent's husband, a U.S. citizen, filed an I-130 immigrant visa petition on her behalf. Respondent requested a continuance to allow USCIS to adjudicate the petition, but the IJ denied the continuance and then denied her application for cancellation of removal. Respondent appealed to the Board of Immigration Appeals (BIA). While the appeal was pending, USCIS granted the I-130 petition. DHS then filed an unopposed motion to dismiss the removal proceedings without prejudice to allow the respondent to apply for adjustment of status before USCIS. The Board denied DHS's motion, concluding that *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (A.G. 2018) deprived it of authority to terminate or dismiss removal proceedings, and dismissed respondent's appeal of the IJ's denial of cancellation of removal. Attorney General Garland certified the case to himself for review.

Notable Holdings and Rationale:

The Attorney General overruled *Matter of S-O-G- & F-D-B-*, finding that the vacatur was a logical extension of his earlier decision to overrule the case on which it relied. Specifically, *Matter of S-O-G- & F-D-B-* was predicated on *Matter of Castro-Tum*, 27 I & V. Dec. 271 (AG 2018), which held that IJs and EOIR lack authority to grant administrative closure—an interpretation that the Third, Fourth, and Seventh Circuit rejected (note: the Sixth Circuit affirmed the decision). AG Garland overruled *Matter of Castro-Tum* in 2021 in *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326 (AG 2021).

Citing to the Fourth Circuit's rejection of Castro-Tum, *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019), the AG reasoned that the analysis of whether *Matter of S-O-G- & F-D-B-* remained valid both begins and ends with the fact that *Matter of Castro-Tum* has been overruled. The AG noted that the Justice Department is "currently reconsidering the regulations at issue in both *Castro-Tum* and *S-O-G- & F-D-B-* and expects to issue a notice of proposed rulemaking that would address the authority of immigration judges and the Board to terminate removal proceedings." In the meantime, however, the AG held that, where appropriate, IJs and the BIA may terminate or dismiss removal proceedings in certain types of limited circumstances, including where: the respondent subsequently obtained lawful permanent resident status; removal proceedings cause adverse immigration consequences for a respondent who must travel abroad to obtain a visa; or termination is necessary to be eligible to seek immigration relief before USCIS (e.g., adjustment of status for an "arriving alien" or special immigrant juvenile).

Practice Pointers:

- IJs and the BIA may terminate or dismiss removal proceedings based on the circumstances described above.
- It is possible to argue that termination or dismissal may be appropriate for other reasons; in this situation, it is advisable to file a written motion and ask DHS to join the motion.

Cosme v. Garland

C.A. No. 22-1-JJM-LDA, --F. Supp. 3d --, 2022 WL 3139000 (D.R.I. Aug. 5, 2022) *(holding that SIJ statute did not require that a petitioner who had been found dependent on state court to additionally prove that (1) state court ordered some form of relief from parental abuse/neglect/abandonment, or (2) that relief from such parental misconduct was primary purpose for seeking SIJ status)*

Facts:

Guatemalan youth applied for SIJ status after receiving an order from the relevant Massachusetts state court which found that (1) he was dependent on the state for care and protection and that his custody was under its jurisdiction; (2) reunification with his parents was not possible due to the neglect of his mother; and (3) it was not in his best interest to return to Guatemala. USCIS refused to consent to SIJ status, and thus denied the petition, concluding that the petitioner did not meet his burden of showing that the state court—in connection with the dependency order—provided some form of relief to protect him from parental neglect. Following an administrative appeal, USCIS affirmed the denial on the basis that he had not shown that relief from his mother's neglect was the primary purpose behind his petition for SIJ status.

The petitioner then filed a complaint in the District of Rhode Island under the Administrative Procedure Act (APA). USCIS moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted.

Notable Holdings and Rationales:

The district court denied the government's motion to dismiss after finding that USCIS' decision was arbitrary and capricious under the APA, 5 U.S.C. § 706(2), in that it imposed requirements on the petitioner not found in the statute.

The court explained that the SIJ statute, 8 U.S.C. § 1101(a)(27)(J)(i), required that a petitioner show *either* that a state juvenile court has found the petitioner dependent on the state, *or* placed the petitioner under the custody of a state agency/department or individual/entity appointed by the state. Here, the court noted that the state court had found the plaintiff dependent on the state and thus did not need to place the petitioner under the custody of a qualified agency or individual. Moreover, the court further explained that there was no requirement in the statute that a state court order which satisfied the first prong of § 1101(a)(27)(J)(i) additionally order specific relief from parental abuse/neglect/abandonment. Similarly, the court held that there was no statutory requirement that the petitioner demonstrate that his primary purpose in filing for SIJ status was to gain relief from parental abuse/neglect/abandonment.

The court concluded that USCIS' denial of consent to SIJ status was arbitrary and capricious because it was based on requirements not found in the statute.

Practice Pointers:

- In 2022, USCIS amended the regulations by eliminating language which required an SIJ petitioner to show that gaining relief from parental neglect/abuse/abandonment was *the* primary reason for the state court petition; now, a petitioner need only show that this is a primary reason. 8 C.F.R. § 204.11(b)(5); *see also* 87 Fed. Reg. 13066, 13086 (Mar. 8, 2022) (recognizing that a petitioner can have dual or mixed motives for filing petitions).

The new regulations apply to all petitions pending on or after April 7, 2022. Consequently, USCIS should not be denying on this basis for cases subject to the new regulations.

- While not binding in other cases, practitioners can cite to *Cosme* as persuasive authority before either USCIS or another federal district court.
- Practitioners may want to consider litigation to challenge USCIS' refusal to consent on the basis that a state court order does not provide specific relief from neglect. With co-counsel, NILA filed a federal court challenge involving two juveniles whose petitions were denied on this basis; before USCIS filed a responsive pleading, it agreed to reopen and approve both cases.

Doe v. Mayorkas

585 F. Supp. 3d 49 (D.D.C. 2022) (holding that the state court order issued pursuant to Texas Declaratory Judgment Act was a qualifying declaration of dependency and that USCIS impermissibly changed its policy without a reasoned explanation when it found that the primary reason the juvenile sought the state court order was to obtain SIJ status)

Facts:

Honduran minor petitioned for SIJ status after receiving an order under the Texas Uniform Declaratory Judgment Act finding that she was dependent on the juvenile court, as well as the other findings required for SIJ status. The state court also concluded that the petitioner was entitled to SIJ status as defined by 8 U.S.C. § 1101(a)(27)(J).

USCIS' Administrative Appeals Office (AAO) issued a final decision denying SIJ status on two bases. First, the AAO concluded that the Texas state court order was not a qualifying declaration of dependency because it did not specify the state welfare statute that applied *and* because the Texas statute provides only a general right to a declaratory judgment and does not address the care and custody of juveniles. Second, the AAO found that the state court order "principally concerned" eligibility for SIJ status, not protection under the state welfare laws.

The juvenile challenged the denial in an APA action in the D.C. District Court, and both parties moved for summary judgment.

Notable Holdings and Rationales:

The district court granted the juvenile's motion for summary judgment and denied the government's motion. First, the court held that the Texas Declaratory Judgment Act was a qualifying state dependency statute under § 1101(a)(27)(J)(i). It found that the state court did apply specific state welfare statutes—those cited by the juvenile in her petition. Additionally, it rejected the AAO's conclusion that the state declaratory judgment act was not qualifying because it did not address the care and custody of juveniles, finding that such a requirement conflicted with the statute. In particular, the court explained that § 1101(a)(27)(J)(i) requires only that the state court declare the juvenile dependent on the court *or* provide a custody placement, not both. Additionally, the court rejected the government's reliance on *Budhathoki v. Nielsen*, 898 F.3d 504 (5th Cir. 2018), finding that this decision was not relevant because it concerned only child support orders.

Addressing the AAO's determination that consent was not warranted because the juvenile's primary purpose was to gain SIJ status, the juvenile argued that AAO's decision reflected an unannounced and impermissible retroactive policy change and supported this argument with evidence of at least 8 cases over several years in which USCIS approved SIJ petitions even though the predicate state court orders cited to SIJ status. The district court agreed that this evidence demonstrated a change in agency position. Moreover, citing, inter alia, *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1144 (D.C. Cir. 2014), the district court held that the agency was required to offer a reasoned explanation for the change, which it failed to do. The court remanded the case to USCIS for further consideration consistent with its opinion.

Practice Pointers:

- This case illustrates how it is important to cite to specific state child welfare laws in state court dependency petitions, particularly when proceeding under a state declaratory judgment act or similar general statute.
- For more practice points, see also the practice pointers under *Cosme*, above.

In re 21st Birthday Denials of Special Immigrant Juvenile Status Applications by USCIS

Nos. 22-CV-1926 (GRB), 22-CV-2319, -- F. Supp. 3d --, 2022 WL 16540657 (E.D.N.Y. Oct. 28, 2022) *(holding that USCIS' denial of two SIJ petitions which arrived at USCIS on the petitioners' 21st birthdays contravened Second Circuit precedent in failing to consider the time of day that the juvenile was born; violated the regulations in failing to extend the deadline where the final day for filing the petition fell on a legal holiday; and were arbitrary and capricious for miscellaneous other reasons)*

Facts:

The decision concerns two district court complaints, each of which involved a juvenile whose SIJ petition was received by USCIS on their 21st birthdays and then denied on the basis that they were ineligible due to their age.

- In the first, the juvenile sent her petition to the Chicago lockbox by U.S. Postal Service overnight delivery with a scheduled delivery one day prior to her 21st birthday. A severe winter snowstorm hit delayed its delivery by one day, so that it arrived on her birthday.
- In the second, the juvenile sent her petition by Federal Express for overnight delivery 4 days prior to her birthday but, because of an intervening federal holiday, it was delivered on her birthday.

Both individuals filed federal court challenges to the denials, claiming USCIS' denials were arbitrary and capricious under the APA. USCIS filed a pre-motion conference letters briefing motions to dismiss or in the alternative motions for summary judgment. In pre-motion conferences in both cases, the court questioned whether USCIS' failure to consider the hour of the plaintiffs' births violated the law, citing Second Circuit case law. The court also questioned whether, in the second case, USCIS' failure to consider the federal holiday violated 8 C.F.R. § 1001.1(h), which provides that, when the last day of a period falls on a Saturday, Sunday or legal holiday, the period shall run until the end of the following day. The court then scheduled an evidentiary hearing over the time of each plaintiff's birth. Prior to the hearing, each juvenile submitted an affidavit regarding the time of their birth. The government then filed stipulated dismissals which the court noted failed to disclose the terms of the settlements or represent whether USCIS was voluntarily ceasing the practices identified in the case.

Notable Holdings and Rationales:

1. The district court held that USCIS was required by Second Circuit precedent to consider the time of the juvenile's birth when determining if a petition was filed while "under 21 years of age," 8 U.S.C. § 1101(b)(1) (defining "child"). *See Duarte-Ceri v. Holder*, 630 F.3d 83 (2d Cir. 2010) (holding that, for purposes of a derivative citizenship application, a person remained "under the age of 18" up until the time of their birth on their birthday).

2. The court further found that USCIS violated 8 C.F.R. § 1001.1(h). The court noted that USCIS computes the filing deadline for SIJ petitions to fall on the day prior to the juvenile's 21st birthday. In the second case, this filing deadline fell on a legal holiday, and the deadline should thus have been extended to include her birthday. The court found that USCIS' contrary ruling violated the regulation.

3. Finally, the court flagged several other issues concerning the possible arbitrariness of USCIS' inflexible interpretation of the statutory filing deadline. These include the requirement that all petitions be filed at the Chicago Lockbox, notwithstanding the existence of local USCIS offices and a regulation that contemplates electronic filing; USCIS' failure to extend the deadline in a snowstorm which closed USCIS offices; and USCIS' failure to apply the automatic COVID-19 filing extension to SIJ petitions.

Given these issues, the court ruled that fairness dictated that the nature of the settlement be made public. It further ordered Defendants to show cause why an order should not be entered directing USCIS to (1) describe steps it was taking to comply with the law in future determinations raising this issue, and (2) identify all pending petitions received on the juvenile's 21st birthday, including pending appeals.

Practice Pointers:

- The case docket indicates that the government's motion to reconsider the court's order is pending. At the request of the court, AILA filed an amicus brief. So, be sure to research further developments in the case before relying on the decision.
- Success on the time of birth issue may depend on whether there is caselaw in your circuit similar to *Duarte-Ceri*—or at least no cases holding the opposite.
- Here, the court allowed the plaintiffs to submit evidence about the time of their births that was not already in the administrative record. A safer practice is to get this evidence in the administrative record, either with the initial filing or through a motion to reopen or reconsider any denial on this basis, prior to filing a federal court case.