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U.S. Department of Homeland Security
Citizenship and Immigration Services

**identifying data deleted to
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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



FILE:

OFFICE: Seattle, Washington

Date: **OCT 22 2003**

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:



PUBLIC COPY

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The special immigrant visa petition was denied by the District Director, Seattle, Washington, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a 17-year-old native and citizen of Guatemala who seeks classification as a special immigrant juvenile pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4).

Counsel for the petitioner has filed a motion for a temporary restraining order or injunction and declaratory action on the petitioner's behalf in the United States District Court for the Western District of Washington to compel CIS to grant the petitioner's special immigrant juvenile visa petition before the petitioner reaches 18 years of age.

The district director denied the petition, in part, because the petitioner failed to submit sufficient evidence to establish that the petitioner had been abused or abandoned. The district director requested that the petitioner submit a copy of the Department of Social and Health Services' (DSHS) case plan and found that by failing to submit the requested evidence, the petitioner had abandoned his petition and therefore it had to be denied pursuant to 8 C.F.R. § 103.2(b)(13). The district director further noted that the petitioner failed to provide evidence that any attempt had been made to reunite the petitioner with his father or another family member in Guatemala as required by Article 37 of the Vienna Convention on Consular Relations, 21 UST 77 (1963).

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 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 petitioner entered the United States without inspection on February 19, 2001 near Nuevo Progreso, Texas. On August 13, 2002, the petitioner filed a petition seeking classification as a special immigrant juvenile.

In support of the petition, counsel submits certain court records including an order of the Superior Court of Washington for King County, Juvenile Division, dated February 5, 2002. The court found that the petitioner was "declared dependent" and "deemed eligible for long-term foster care." The court further found that "it is not in the best interest of the minor to be returned to his or his parents' previous country of nationality . . . Guatemala. It is in the minor's best interest to remain in the United States." The court stated, "the above findings were made due to abuse, neglect, and/or abandonment of the minor."

The first issue to be addressed in this proceeding is whether the Secretary, Department of Homeland Security (formerly the Attorney General) (Secretary) properly withheld his consent to the dependency order. This consent is an absolute statutory prerequisite to the granting of a special immigrant juvenile petition. Section § 101(a)(27)(J)(iii) of the Act, 8 U.S.C. § 1101(J)(iii). Since the statute provides no standards indicating when the Secretary should, or should not, grant this consent, whether to grant this consent is necessarily a matter entrusted to the Secretary's discretion.

In cases of juveniles not in the custody of Citizenship and Immigration Services (CIS, formerly known as the Immigration and Naturalization Service), such as this, the Secretary's consent to the dependency order must be obtained as a precondition to the grant of special immigrant juvenile status. A dependency order is sufficient only if two elements are established: first, a juvenile court must have deemed the juvenile eligible for long-term foster care due to abuse, neglect, or abandonment; and second, it must have been determined in administrative or judicial proceedings that it would not be in the juvenile's best interest to be returned to the juvenile's or parent's previous country of nationality or country of last habitual residence. Section 101(a)(27)(J)(iii) of the Act.

In the present case, the Washington Superior Court deemed the petitioner eligible for long-term foster care due to abuse, neglect and/or abandonment and determined that it would not be in the petitioner's best interest to be returned to his or his parents' previous country of nationality or country of last habitual residence. See Washington Superior Court order dated February 5, 2002. The petitioner has established the dependency order satisfies the statutory requirements in this instance. The evidence on the record contains ample corroborating evidence of abuse, neglect and abandonment.

The next issue to be addressed in this proceeding is whether the district director properly denied the petition for abandonment pursuant to 8 C.F.R. § 103.2(b)(13).

8 C.F.R. § 103.2(b)(13), as amended, states in pertinent part:

If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

In a denial notice dated September 3, 2003, the district director stated:

On March 19, 2003, you were interviewed by an Officer of the Bureau of Citizenship and Immigration Services (now Citizenship and Immigration Services) regarding your Special Immigrant Juvenile Petition. At the time of interview, the Officer requested that you provide the DSHS case plan. Instead of submitting the requested documents, your attorney responded that the plan is considered confidential by the State. No other documents of equivalency have been submitted to Citizenship and Immigration Services.

* * *

Your attorney responded that, . . . "the confidentiality restrictions on the Court file preclude me from producing the underlying evidence to the BCIS as Washington State law makes absolutely clear that such records and evidence shall be confidential and shall be released to other participants in the juvenile justice or care system only when an investigation or case involving the juvenile in question is at issue.

According to RCW 13.50.010, Definitions (1)(a) - *Juvenile justice of care agency* means any of the following: "Police, diversion units, court, prosecuting attorney, defense attorney, detention center, attorney general" As the legacy Immigration and Naturalization Service¹ [is] under the Attorney General, it appears that Citizenship and Immigration Services is considered as the Juvenile justice or care agency, thus, entitled to the requested documents.

¹ Now known as Citizenship and Immigration Services (CIS).

In review, the district director's decision to deny the petition on the basis of abandonment was in error. Parallel regulations and case law that address abandonment establish that the classification of abandonment is reserved for cases where the petitioner fails to respond to a request for evidence,² the applicant fails to appear at a hearing or interview,³ or if the petitioner or applicant departs from the U.S. during the pendency of an application or motion.⁴ Further, the petitioner responded to the district director's request for additional evidence. In a reply dated June 26, 2003, the petitioner submitted additional documentation, including an amended dependency petition that states that the petitioner's father had never demonstrated an ability or willingness to care for the petitioner and that the petitioner was physically abused and neglected in his home. Counsel informed the district director that the Juvenile court accepted testimony provided by the petitioner's sister and information provided by the State's Department of Child and Family Services (DCFS) social worker assigned to investigate the case, to make its findings. The petitioner submitted an affidavit in which the petitioner describes the abuse and abandonment he experienced. It is noted that the record of proceeding contains Immigration Court transcripts of the testimony of the petitioner, his brother, and cousin regarding the abuse the petitioner suffered. The record also contains an Immigration Judge's order that include his findings, "the [petitioner] has recounted a sad and depressing story of his being physically 'whipped' and 'hit with a stick' when [his stepmother] would be dissatisfied with the [petitioner]. The [petitioner's] natural father had a 'broken spine' from an accident, and he was either unwilling or unable to prevent this misconduct."

The district director erred in determining that the petitioner had abandoned his petition within the meaning of 8 C.F.R. § 103.2(b)(13). Counsel for the petitioner expressly stated that Washington State law prohibited the release of the petitioner's juvenile court record. The petitioner replied to the request for additional evidence in a timely manner.

² *In re Yasser Mohammed-Hasan Suleiman-Ali*, 17 Immig. Rptr. B1-123 (BIA, March 21, 1996) (acting district director invoked 8 C.F.R. § 103.2(b)(13) because the petitioner failed to submit evidence of beneficiary's dissolution of marriage in application for relative status as spouse to U.S. citizen).

³ *Maldonado-Perez v. INS*, 865 F.2d 328, 333 (D.C. Cir. 1989) (asylum applicant deemed to have abandoned prior applications for relief when he failed to appear at an adjourned hearing).

⁴ See *Matter of Yih-Hsiung Wang*, 17 I&N Dec. 565 (BIA 1980) (departure from United States during course of a motion to reopen or reconsider constitutes abandonment).

The district director raised a subsidiary issue in his denial notice when he asserted that "as the legacy Immigration and Naturalization Service is under the Attorney General, it appears that CIS is considered as the juvenile justice or care agency, thus entitled to the requested documents." The district director's reasoning is defective in two regards. First, the state law insuring the confidentiality of juvenile court records, refers to the state attorney general and not the attorney general of the United States. Second, INS (now CIS) is no longer under the direction of the Attorney General. Since March 1, 2003 CIS is an agency within the newly created Department of Homeland Security and is no longer subordinate to the Attorney General and the Department of Justice.

The last issue raised by the district director is whether the petitioner was required to comply with Article 37 of the Vienna Convention on Consular Relations (VCCR). The regulations and statute are silent as to a requirement for consular notification as an element of adjudication of a special immigrant juvenile petitioner. Article 37 of the VCCR, titled *Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents*, provides, in part:

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

* * *

(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State.

In review, the AAO concurs with the petitioner's counsel that the above treaty provision is inapplicable to a juvenile court dependency determination and the adjudication of a special immigrant juvenile petition.

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden. Therefore, the appeal will be sustained.

ORDER: The appeal is sustained.