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U.S. Citizenship
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Services

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FILE:

Office:

BOSTON

Date:

AUG 16 2006

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

cc

DISCUSSION: The Interim District Director, Boston (district director) denied the special immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant seeks to have his nephew, the beneficiary, a nineteen-year-old native and citizen of Morocco, classified 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).

The district director issued a decision on August 11, 2004, denying the visa petition noting that no additional credible evidence had been submitted in response to the district director's "Notice of Intent to Deny Petition" dated May 4, 2000, which found that the applicant failed to establish that the beneficiary meets the definition of special immigrant juvenile (SIJ) set forth in the statute and regulations. *See District Director's Decision*, dated August 11, 2004. In general, the district director found that the evidence submitted originally, and in response to the NOID, was not specific enough regarding the alleged abuse, neglect or abandonment, and was evidence largely of a self-serving nature from interested parties. Accordingly, the district director denied the Petition for Special Immigrant Juvenile (Form I-360). *Id.*

On appeal, counsel submits a brief in support of the Notice of Appeal (Form I-290B), in which she contests the findings of the district director and asserts that he "failed to consider the substantial, persuasive evidence provided" which, according to counsel, establishes the abuse and neglect that the beneficiary suffered at the hands of his father. Counsel also contends that the district director incorrectly based his decision on the finding that the applicant had failed to present evidence of medical or psychological harm from "official medical or academic authorities in the United States." *See Counsel's Brief*, at p. 9. In addition to the appeal brief, counsel submits a clarified order of the state court judge, entered as a *nunc pro tunc* order, made effective as of the original date of the guardianship, in order to correct a deficiency in the order identified by the district director's decision. The entire record has been reviewed in rendering this decision.

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 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;
- (3) Is unmarried;
- (4) 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;
- (5) Has been deemed eligible by the juvenile court for long-term foster care;
- (6) 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
- (7) 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

Information contained in the record reflects that the beneficiary initially entered the United States on February 28, 2001, at the age of fifteen, pursuant to a B-2 visitor visa. The beneficiary's uncle subsequently enrolled him at Malden High School, in Malden, Massachusetts. The former Immigration and Naturalization Service (INS) denied a subsequently filed Application to Extend/Change Nonimmigrant Status (Form I-539) and a related motion, on October 23, 2001 and July 29, 2003 respectively. The beneficiary later appeared before the INS in order to register for special registration under the NSEERS program. The INS placed him into removal proceedings when it discovered that he was in the United States without authorization.

After the beneficiary was placed into removal proceedings, the petitioner sought a dependency order from the Middlesex County Probate and Family Court ("court") on September 25, 2003. The court issued an order on November 10, 2003, appointing the uncle as the beneficiary's guardian, and finding that: the beneficiary's parents reside in Morocco; the beneficiary's father suffers from alcoholism and is violent and abusive; the beneficiary's mother is unable to protect him from domestic abuse in Morocco; it is not in the best interest of

the beneficiary to be returned to Morocco, and; it is in the best interest of the beneficiary to remain with his uncle in the United States. *Order of the Middlesex Probate and Family Court, Massachusetts*, dated November 10, 2003.

On September 16, 2004, the court issued a second order addressing the November 10, 2003 order and associated proceedings. *Order of the Middlesex Probate and Family Court, Massachusetts*, dated September 16, 2004. The court indicated that it is the proper forum to determine the dependency and best interests of the beneficiary. *Id.* at 1. The court explained that it found the beneficiary dependent on the court relative to guardianship proceedings, and awarded guardianship to the beneficiary's uncle due to the fact that the beneficiary was abused and neglected by his father. *Id.* The court stated that its finding of abuse and neglect was based on its review of substantial evidence, including affidavits from the beneficiary and his brother, an affidavit from the beneficiary's uncle, a medical certificate from the Moroccan Ministry of Health documenting the beneficiary's father's alcoholism and psychiatric problems, and statements from various members of the beneficiary's family. *Id.* at 1-2. The court described its understanding of the abuse and neglect suffered by the beneficiary, and asserted that family reunification is no longer a viable option. *Id.* at 2.

The petitioner has provided copies of the documentation that was under consideration by the court in issuing the order of November 10, 2003.

The district director's finding that the applicant failed to show that he was subjected to abuse, neglect, or abandonment was essentially a finding that the applicant failed to establish a sufficient evidentiary basis for the court's order, such that the Secretary should expressly consent to the applicant's dependency order serving as a precondition to the grant of special immigrant juvenile status. *See* section 101(a)(27)(J)(iii) of the Act.

Express consent means that the Secretary, through the CIS District Director, has "determine[d] that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.]"

Memorandum of William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, *Field Guidance on Special Immigrant Juvenile Status Petitions*, HQAND 70/23 (May 27, 2004)(quoting H.R. Rep. No. 105-405, at 130 (1997)).

Citizenship and Immigration Services (CIS) is not bound to accept the determination of a state juvenile court that an applicant is an abused, neglected or abandoned minor, or that it is not in his best interest to be returned to his country of nationality, without sufficient documentation of the basis for the decision. While such an order is required to establish eligibility under section 101(a)(27)(J) of the Act, it does not relieve the applicant from the burden of submitting sufficient documentation to satisfy the district director that the order was supported by relevant facts, and that it may serve as a basis for special immigrant juvenile status.

[E]xpress consent [to an order] should be given only if the adjudicator is aware of the facts that formed the basis for the juvenile court's rulings on dependency (or state custody),

eligibility for long-term foster care based on abuse, neglect, or abandonment, and non-viability of family reunification, or the adjudicator determines that a reasonable basis in fact exists for these rulings.

Memorandum of William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, *Field Guidance on Special Immigrant Juvenile Status Petitions* at 4.

In the present matter, the record contains sufficient documentation to support the court's findings in the November 10, 2003 order.

The record reflects that the petitioner's counsel filed a motion with the court on or about September 25, 2003, seeking the appointment of the beneficiary's uncle as his guardian and a finding that it was not in the best interest of the beneficiary to return to Morocco. See *Motion for Guardianship and Findings of Fact*, dated September 25, 2003. This motion, which was accompanied by a second document entitled, *Memorandum in Support of Guardianship and Findings of Fact*, dated September 25, 2003, was submitted when the beneficiary and his brother were four months away from their eighteenth birthdays, and according to counsel's motion the request to the court was made, "to enable the minor children to establish a permanent and stable family life with the Petitioner in Massachusetts." *Id.*

A review of the motion and memorandum submitted to the court indicates that the petition was supported by the following facts. The petition asserted that that the beneficiary was the son of the petitioner's brother, [REDACTED] and the brother's wife [REDACTED] who reside in Morocco. The motion before the court asserted that the uncle had been serving in the de facto capacity of guardian to the beneficiary and his brother since the time of their arrival in the United States three years earlier. *Motion for Guardianship and Findings of Fact*, at p. 1. According to the motion, the beneficiary came to the United States as a visitor in August of 2000, and "begged not to be sent back" to his father, whom the motion asserted is "alcoholic and violently abusive." *Id.* According to the same motion, the uncle had supported the beneficiary and his brother during the preceding three years, had enrolled them in high school, and "tried, without success, to change their status to student status." *Id.* By filing the motion, the uncle sought to have the court formally recognize him as the legal guardian, and requested that the court make a finding that it was not in the best interest of the beneficiary to be sent back to Morocco. The motion noted that the attached order was necessary for the beneficiary to apply for permanent residence. *Id.*

In support of the motion, counsel's memorandum referenced and was accompanied by various items of evidence. The assertion made to the court was that the beneficiary was afraid to return home to his parents in Morocco. The asserted reason was that the father was an alcoholic who was violently abusive, and the mother was unable to protect the beneficiary from the father's abuse. *Memorandum*, at p. 1. According to counsel's memorandum, the beneficiary's father would become drunk, would frequently beat the mother and threaten to kill her, and would beat the beneficiary and his brother if they intervened. *Id.* The memorandum additionally noted that the beneficiary and his brother had flourished in the United States, and that "both of their natural parents have consented to the guardianship." *Id.*

The record reflects that a variety of documents were submitted in support of the request for the court order of guardianship. The principal documents submitted were a joint affidavit from the beneficiary and his brother,

and an affidavit from the uncle. The beneficiary's affidavit indicated that the family lived in Morocco in a multi-family house occupied by the beneficiary's immediate family and various uncles and their own immediate family members, and with another uncle who resided with the beneficiary's grandmother. Each family unit occupied a different floor or apartment of the house, with the beneficiary's family, which included his parents, his brother and a younger sister, occupying the ground floor. *See Affidavit of [REDACTED] and [REDACTED]* dated July 22, 2003. According to the information in the affidavit, there was never peace in his household, as the beneficiary's mother and the children were beaten or yelled at by the father. According to the affidavit, the father would frequently drink with friends, often spending his earnings, or would bring friends home for dinner, leaving no food for the family. *Id.* The affidavit also states that the father would fly into rages and would beat the children, including a younger sister, when they tried to defend their mother. In terms of the actual harm inflicted by the father, the affidavit states "he would often take his leather belt and whip us on the back, on the front of our bodies or across our arms and hands." *Id.* The beneficiary describes the father as an "alcoholic and prone to violence when he is drunk." He states that the children "would sometimes get away by running upstairs to our grandmother's place. But then, if our father followed us upstairs, the fighting would begin with our uncles." *Id.* The beneficiary states that the uncles were "never able really to protect us; mainly because even extended families cannot interfere with a father's treatment of his children. Yet our uncles tried to sometimes put themselves between our father and us." *Id.*

The affidavit describes the mother's inability to escape her mistreatment by her husband, noting that she tried to run away a few times, but was often encouraged by family members to return to the family home. The beneficiary attributes this to Moroccan culture, which blames the wife for trouble in the home. The beneficiary indicates that the mother would not divorce the father due to the children, and was unable to seek protection from the police because of their reluctance to interfere in domestic disputes. The affidavit relates a specific incident where the beneficiary's mother was allegedly taken to the hospital by the beneficiary's aunt. According to the affidavit, "she had a black eye and bruises all over her body, from where her father had beat her. She thought she had broken ribs as well. So, she went to the hospital, was treated, and returned home." *Id.*

The beneficiary's affidavit describes his relationship (and that of his brother) with his uncle, and states that the uncle "was someone we could always count on." *Id.* The brothers advised him about what was happening in the home, and the uncle promised that he was always there for them and that things would improve. When the beneficiary and his brother were fourteen, the uncle told them they could come to visit the United States, and during that trip the brothers advised the uncle that they did not wish to leave and begged him not to return them to Morocco. *Id.* The affidavit concludes with the beneficiary asserting that only the uncle is able to protect him from the father, and that while the grandmother was able to offer temporary protection, her advancing age and ill health make it impossible for her to protect the brothers or their sister from the father's abuse. Consequently, the beneficiary states that he wishes to remain in the United States with his uncle who is the only father figure he has known, and where he has a peaceful home life. *Id.*

The second principal document submitted in support of the guardianship motion was the affidavit of the beneficiary's uncle, [REDACTED] the petitioner in the instant case. The uncle's affidavit states that he is a naturalized United States citizen and lives with his then seventeen year-old twin nephews. *See Affidavit of [REDACTED]* dated September 5, 2003. The uncle asserts that his nephews are living with him because their

father “has neglected and abused them.” *Id.* He asserts that the beneficiary’s father goes out drinking and “comes home angry and violent” noting that he “has a history of hitting his wife, his daughter, and his sons and not taking care of them.” *Id.* The affidavit states that things became worse for the family after the death of the beneficiary’s grandfather who had been able to exercise some control over the father. According to the uncle, after the grandfather’s death, the father would “come home drunk and surly and beat his family.” *Id.* According to the uncle, he brought his brother to the United States in 1999 for a visit, hoping to have him make a new life by sponsoring him. According to the uncle, however, this did not work out, as he “had to kick him out of my house and make him go back to Morocco.” *Id.* Thereafter, according to the affidavit, the beneficiary’s grandmother “begged” him to take the twins from the father, and he therefore brought them to the United States for a vacation at which time the twins told him “the details of what was happening in their home.” *Id.* The uncle states that he enrolled the twins, then fourteen, in high school. He states that he sought to change their visa status from visitors to students, even consulting “a few lawyers” but the applications to change their status were denied. The affidavit further provides that when the NSEERS program was announced, he took them for special registration, whereupon they were placed in removal proceedings. He subsequently sought to be recognized as their guardian in order to protect them from their father’s neglect or abuse. He urges that they be allowed to remain in the United States, asserting that they would have no protection from their father if they returned to Morocco. *Id.*

The medical certificate from the Moroccan Ministry of Health states that the beneficiary’s father “has been seen for the last four years for psychological [turmoil] due to addictive alcoholic behavior.” *Medical Certificate from the Moroccan Ministry of Health*, dated September 12, 2003

Based on the foregoing, the record shows that the court had sufficient evidence to support its determination that the beneficiary has been abused, neglected, or abandoned. The district director’s finding to the contrary will be withdrawn.

However, it is noted that the order of the court is likely deficient, as it does not provide that the beneficiary “[h]as been deemed eligible by the juvenile court for long-term foster care,” as required by 8 C.F.R. § 204.11(c)(4). The order of the court is silent on whether the beneficiary was eligible for long-term foster care. The regulation at 8 C.F.R. § 204.11(c)(4) clearly requires that a juvenile court *has deemed* the applicant eligible for long-term foster care.

The probate court ordered a change in guardianship for the applicant. In Massachusetts, guardianship is not synonymous with foster care. *See* Massachusetts General Law (M.G.L.) Chapter 201 § 14. A child may have a legal guardian who is separate and distinct from his foster parent. Further, Massachusetts regulation defines foster care as placement of a child under the care of an individual who is not related to the child by blood. *See* 102 CMR 5.02, adopted in accordance with M.G.L. chapter 28A. As the beneficiary’s uncle is related to the beneficiary by blood, it is evident that the court did not consider the change in the beneficiary’s guardianship as a placement into foster care. Further, Massachusetts law requires that any prospective foster parent have a criminal background check in order to assess his fitness to act as a foster parent. *See* M.G.L. Chapter 28A § 10A. The record contains no evidence or indication that a criminal background check was performed for the beneficiary’s uncle. Thus, the court’s order and the evidence of record do not establish that the applicant was deemed eligible for long-term foster care.

Accordingly, the applicant has failed to establish eligibility for special immigrant juvenile status under section 101(a)(27)(J) of the Act.

It is further noted that the applicant is no longer eligible for special immigrant juvenile status under section 101(a)(27)(J) of the Act, as he has not established that he continues to be eligible for long-term foster care in Massachusetts. *See* 8 C.F.R. § 204.11(c)(1). The applicant reached age 18 on January 18, 2004. With few limited exceptions, a child is no longer eligible for long-term foster care in Massachusetts upon reaching the age of majority, determined to be age 18. If a child is in foster care upon reaching age 18, in certain circumstances he may elect to remain in foster care for an additional period. Yet, as the record does not reflect that the beneficiary has been in foster care at any point, the petitioner has not shown that he continues to be eligible for long-term foster care. CIS lacks discretion to waive the requirement of 8 C.F.R. § 204.11(c)(1). For this additional reason, the petition may not be approved.

It is further noted that the beneficiary's "age out" was not attributable to affirmative misconduct or negligent delay by CIS, as the Form I-360 petition was filed on November 26, 2003, 53 days prior to the beneficiary's eighteenth birthday. The filing did not include any request for expedited processing or other notation that would have alerted CIS that the case required immediate attention.

Based on the foregoing, the petitioner has failed to establish that the beneficiary is eligible for special immigrant juvenile status under section 101(a)(27)(J) of the Act.

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. 151 (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 petitioner has not proven that the beneficiary is eligible for the benefit sought.

ORDER: The appeal is dismissed.