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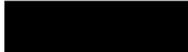
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FILE:



Office: MIAMI

Date:

**JUL 03 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, Miami, 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 18-year-old native and citizen of the Nicaragua who 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 issued a decision on October 26, 2006 denying the petition for special immigrant juvenile (SIJ) status. Specifically, the district director found that: the applicant failed to establish her age or identity; the applicant did not establish that she is an abused, neglected, or abandoned child, and; the applicant is no longer eligible for long-term foster care in the State of Florida. *Decision of the District Director*, dated October 26, 2006. The district director commented that it does not appear that the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Juvenile Division (juvenile court) was apprised of all relevant information in the applicant's case, or that the applicant's SIJ petition is an attempt to obtain relief from abuse, abandonment, or neglect. *Id.* at 3. The district director further suggested that the applicant failed to obtain the required specific consent of the Secretary of Homeland Security to the jurisdiction of the juvenile court. *Id.* at 2.

On appeal, counsel for the applicant contends that the district director failed to explain the specific provisions under the Act and regulations that the applicant allegedly failed to meet. *Brief in Support of Appeal*, submitted January 19, 2007. Counsel asserts that the applicant has submitted sufficient evidence to show that she filed her SIJ petition to obtain protection from abandonment and neglect. *Id.* at 11-15. Counsel states that the district director's refusal to consent to the juvenile court's order is an attempt to make an unlawful determination of abuse, abandonment or neglect. *Id.* at 23-24. Counsel asserts that the district director's concerns regarding the applicant's age and identity are without merit. *Id.* at 23-24. Counsel contends that the applicant was not required to obtain the specific consent of the Secretary to the juvenile court's jurisdiction because the applicant was neither in the actual or constructive custody of the Secretary. *Id.* at 24-27. Counsel states that the applicant continues to be eligible for long-term foster care, as family reunification is no longer a viable option. *Id.* at 37-45.

The record contains a brief from counsel in support of the appeal; a statement from counsel on Form I-290B; documentation in connection with the applicant's prior application for asylum in the United States; records of the applicant's school attendance; a copy of the applicant's mother's death certificate; a document from the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement reflecting that the applicant was released into the custody of her sister; letters from U.S. Immigration and Customs Enforcement (ICE) officials describing ICE practices regarding specific consent to a juvenile court's jurisdiction; a copy of a special interest order of the juvenile court, dated May 3, 2006; a copy of an adjudicatory order of the juvenile court, dated May 3, 2006; a copy of an order from the juvenile court dated January 9, 2007; a copy of the applicant's birth certificate; a copy of the applicant's high school identification card; an affidavit from counsel submitted to the juvenile court verifying the applicant's mother's death and a diligent search for the applicant's father; copies of petitions filed with the juvenile court addressing the applicant's circumstances; copies of statements from the applicant's sisters; a report

documenting efforts to locate the applicant's natural father, and; a predispositional study submitted to the juvenile court. The entire record was considered in rendering a decision on the current appeal.

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;
- (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.

Florida Statute section 39.013(2) provides the following, in pertinent part:

Procedures and Jurisdiction. . . . If a petition for special immigrant juvenile status and an application for adjustment of status have been filed on behalf of a foster child and the petition and application have not been granted by the time the child reaches 18 years of age, the court may retain jurisdiction over the dependency case solely for the purpose of allowing the continued consideration of the petition and application by federal authorities. Review hearings for the child shall be set solely for the purpose of determining the status of the petition and application. The court's jurisdiction terminates upon the final decision of the federal authorities. Retention of jurisdiction in this instance does not affect the services available to a young adult under [section] 409.1451. The court may not retain jurisdiction of the case after the immigrant child's 22nd birthday.

*See also* Fla. Child Welfare Administrative Rule 65C-31.010(1)(b)(2). The first issue in this proceeding is whether the applicant has sufficiently established her age and identity. As listed above, the record contains numerous documents and statements that reflect the applicant's identity. The district director found that the applicant's birth certificate is unreliable evidence, as it was issued on October 2004, one month prior to the applicant's departure from Nicaragua, and the applicant's last name in the birth certificate [REDACTED] differs from the one she used prior to its issuance [REDACTED]. The district director stated that CIS received correspondence from the American Consulate in Managua, Nicaragua indicating that the Nicaraguan

National Registry Office does not contain a birth certificate in the names of either [REDACTED] or [REDACTED]

The district director further found that the Nicaraguan school records provided by the applicant are not sufficient evidence of her age and identity. Specifically, the district director noted that, although the applicant's former principal specified the applicant's age at the times she passed second, third, fourth, fifth, and sixth grade, he did not state the basis for his knowledge of the applicant's age during the periods in question.

Upon review, the applicant has established her age and identity by a preponderance of the evidence. The record reflects that the applicant did not reside with her biological father, [REDACTED]. She resided with her biological mother, [REDACTED] and [REDACTED], the father of some of the applicant's siblings. The applicant stated in an interview in connection with the present proceeding that [REDACTED] registered the applicant's birth prior to her departure from Nicaragua in order to legitimize her. This fact is supported by the applicant's birth certificate, as [REDACTED] is named as her father. Based on the representations of the applicant, one would not expect to find birth records in the Nicaraguan National Registry Office under the names of [REDACTED] or [REDACTED]. Thus, the absence of such records does not undermine the applicant's claims of her age and identity.

As correctly noted by counsel, the fact that the applicant's birth certificate was issued years after the applicant's birth does not, by itself, call into question the authenticity or evidentiary weight of the document. It is noted that the applicant's birth certificate has not been submitted to appropriate U.S. government authorities for forensic examination. Thus, there is no evidence that the document is not an authentic birth certificate issued by the government of Nicaragua. No statements or evidence in the record contradict the information presented on the birth certificate. Accordingly, it bears weight in establishing the applicant's identity.

The district director questioned the evidentiary weight of the applicant's school records, as her former principal did not state the basis for his knowledge of the applicant's age during the referenced periods. Generally a statement's probative value is bolstered when the author establishes a clear basis for the facts asserted within. The statement from the applicant's former principal is presumably based on the school's records. The fact that the principal did not claim to have viewed evidence of the applicant's birth date does not undermine the evidentiary value of the statement or the school records.

In SIJ petition proceedings, the applicant bears the burden to establish relevant facts by a preponderance of the evidence. *Matter of Brantigan*, 11 I&N Dec. 151 (BIA 1965). An applicant's true age and identity are material concerns regarding whether she is eligible for special immigrant juvenile status. In the present proceeding, the record contains numerous, consistent references to the applicant's identity and age. Thus, the AAO finds that the applicant has shown her identity and birth date by a preponderance of the evidence.

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<sup>1</sup> The district director noted that [REDACTED] was the applicant's biological father's last name, suggesting that the applicant's birth could have been registered using the name [REDACTED]

The second issue in this proceeding is whether the applicant required the specific consent of the Attorney General (now Secretary of DHS) in order for the juvenile court to take jurisdiction over her custody status or placement, pursuant to section 203(b)(4)(iii)(I) of the Act. While the district director did not state that the lack of specific consent to the juvenile court's jurisdiction was a basis for denying the present petition, she noted that the applicant failed to establish that she did obtain the specific consent of the Secretary. Section 203(b)(4)(iii)(I) of the Act reflects that an applicant only needs such specific consent when she is in the actual or physical custody of DHS.

In the instant matter, the applicant was taken into DHS custody beginning on November 17, 2004 upon her attempt to enter the United States at Brownsville, Texas. She was placed in the custody of the HHS Office of Refugee Resettlement, and ultimately released to her sister's custody in January 2005. The record does not show that the applicant has returned to DHS custody since January

The applicant did not obtain the Secretary's specific consent to the juvenile court taking jurisdiction over her custody status or placement. On May 3, 2006, the juvenile court issued a Special Interest Order finding that: 1) the applicant is dependent on the court due to abandonment and neglect; 2) the applicant is eligible for long-term foster care, as family reunification is not a viable option; 3) it is not in the applicant's best interest to be returned to Nicaragua; 4) it is in the applicant's best interests to remain in the United States, and; 5) the juvenile court will retain jurisdiction over the applicant until her 22<sup>nd</sup> birthday. *Order from the Circuit Court of the Eleventh Judicial Circuit In and For Miami-Dade County, Florida, Juvenile Division* (special interest order), dated May 3, 2006. As the juvenile court issued its order after the applicant was released from DHS custody, it is evident that he was not in the actual custody of the Secretary at the time of issuance of the order as contemplated by section 101(a)(27)(J)(iii)(I) of the Act.

The district director implied that the applicant was in the constructive custody of the Secretary at the time the juvenile court issued the special interest order, thus, the district director suggested that the applicant required the specific consent of the Secretary in order for the juvenile court to properly take jurisdiction. Thus, the district director implied that in light of the decision of the District Court of Appeal of the State of Florida, Fourth District in *P.G. v. Department of Children and Family Services*, 867 So.2d 1248 (Fla. 4<sup>th</sup> DCA 2004), the juvenile court's special interest order was not valid and may not serve as a basis for SIJ status.

On appeal, counsel contends that the applicant did not require the specific consent of the Secretary in order for the juvenile court to take jurisdiction over her. *Brief from Counsel* at 24-37, submitted January 9, 2007. Counsel asserts that the decision of the District Court of Appeal of the State of Florida, Fourth District in *P.G. v. Department of Children and Family Services* is not controlling in the present matter, as the holding was based on a mistaken legal premise, and it was decided in the Fourth District of the State of Florida while the present matter arises within the jurisdiction of the Third Circuit of the State of Florida. *Id.* at 31-37.

Counsel discusses the unpublished decision of the United States Court of Appeals for the Ninth Circuit in *Pena v. Meissner*, 232 F.3d 896 (9<sup>th</sup> Cir. 2000). *Id.* at 27-28. Counsel explains that the Ninth Circuit held that an individual is in the constructive custody of DHS only when he is subject to a final order of deportation. *Id.* at 27. Counsel contends that, as the applicant was not subject to a final order of removal at

the time the juvenile court issued the Best Interest Order, the applicant did not require the Secretary's specific consent to the juvenile court's jurisdiction.

The applicant submits two letters from Immigration and Customs Enforcement (ICE) officials regarding situations similar to her own. In one such letter, the deputy assistant director, Office of Detention and Removal, Field Operations of ICE, stated the following:

In your letter, you stated that the Honorable Judge Bowman requested that you obtain a letter from the Department of Homeland Security, Immigration and Customs Enforcement (ICE), stating that he has jurisdiction in a juvenile dependency matter relating to your client, [name redacted].

As you know, [name redacted] has been released from the custody of the federal government and has not received an order of removal. The current practice within ICE in [name redacted]'s situation is to not require ICE consent before a state juvenile court can exercise jurisdiction to make rulings relevant to a juvenile's pursuit of special immigrant status under the Immigration and Nationality Act, specifically Section 101(a)(27)(j), and the accompanying regulations.

*Letter from Deputy Assistant Director, Office of Detention and Removal, Field Operations of ICE, dated January 20, 2004. In the second letter provided by the applicant, the national juvenile coordinator, Office of Detention and Removal, Field Operations Division of ICE, reiterated the statement quoted above. Letter from the National Juvenile Coordinator, Office of Detention and Removal, Field Operations Division of ICE, dated January 24, 2005.*

Upon review, the applicant has shown that she did not require the Secretary's specific consent to the juvenile court's jurisdiction under section 101(a)(27)(J)(iii)(I) of the Act. Specifically, under current DHS guidance and practice, the applicant was not deemed to be in the constructive custody of the Secretary at the time the juvenile court issued its order, as contemplated by section 101(a)(27)(J)(iii)(I) of the Act.

It is noted that the Act and regulations do not provide a clear definition of "constructive custody." Nor are there any precedent decisions from U.S. courts or the AAO that are binding on the present matter. Thus, the AAO will look to internal guidance and the past practice of DHS.

On May 27, 2004, William R. Yates, Associate Director for Operations, Citizenship and Immigration Services ("CIS"), issued guidance to CIS Regional Directors and District Directors to provide policy and procedural clarification on the adjudication of SIJ petitions. *Memorandum #3 - Field Guidance on Special Immigrant Juvenile Status Petitions* ("Yates Memo"), William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, HQADN 70/23 (May 27, 2004). Mr. Yates briefly discussed specific consent as follows:

The adjudicator must be satisfied that the petitioner obtained specific consent from ICE where necessary. If specific consent was necessary but not timely obtained, a juvenile court

dependency order is not valid and the petition must be denied. INA § 101(a)(27)(J)(iii)(I); 8 C.F.R. § 204.11(c)(3). Please check with the local ICE juvenile coordinator who handled the case to determine whether specific consent was required, and if so, whether it was timely granted.

*Id.* at 5. The record does not reflect whether the district director consulted ICE regarding whether specific consent was required in the applicant's case. However, the applicant has submitted copies of letters from two different Deputy Assistant Directors of the ICE Office of Detention and Removal, dated January 20, 2004 and January 24, 2005. These letters serve as evidence of ICE's policy on specific consent. As quoted above, when an applicant "has been released from the custody of the federal government and has not received an order of removal . . . , [t]he current practice within ICE in [the applicant's] situation is to not require ICE consent before a state juvenile court can exercise jurisdiction to make rulings relevant to a juvenile's pursuit of special immigrant status . . . ." *Letter from Deputy Assistant Director, Office of Detention and Removal, Field Operations of ICE* at 1.

Accordingly, the applicant has submitted sufficient evidence to show that she was not deemed by ICE to be in constructive custody at the time the juvenile court issued the special interest order. As the applicant was not in the actual custody of the Secretary, and he was not subject to a final order of removal, ICE practice dictated that specific consent was not necessary in order for the juvenile court to properly take jurisdiction over the applicant's custody status and placement. *See Letter from Deputy Assistant Director, Office of Detention and Removal, Field Operations of ICE* at 1; *See Letter from the National Juvenile Coordinator, Office of Detention and Removal, Field Operations Division of ICE* at 1.

As per the May 27, 2004 CIS memorandum from William R. Yates, adjudicators should look to current ICE practice to determine whether specific consent is required for a particular case. *Yates Memo* at 5. ICE, not CIS, will adjudicate requests for specific consent to a juvenile court's jurisdiction when necessary. Thus, in the absence of a clear definition of constructive custody in the Act, regulations, or precedent decisions, ICE policy as of the date of the juvenile court's order determines whether an applicant bears the burden of obtaining the Secretary's specific consent to the juvenile court's jurisdiction pursuant to section 101(a)(27)(J)(iii)(I) of the Act. *Yates Memo* at 5.

As noted above, the district director referenced the decision of the District Court of Appeal of the State of Florida, Fourth District in *P.G. v. Department of Children and Family Services*, 867 So.2d 1248 (Fla. 4<sup>th</sup> DCA 2004). *Decision of the District Director* at 2. However, the decision in *P.G. v. Department of Children and Family Services* was issued by a court of the State of Florida, and thus it does not serve as binding precedent on CIS officers. Accordingly, the AAO does not find that the reasoning or holding in *P.G. v. Department of Children and Family Services* dictates that the applicant required the specific consent of the Secretary pursuant to section 101(a)(27)(J)(iii)(I) of the Act.

Counsel discusses the unpublished decision of the Ninth Circuit in *Pena v. Meissner*, 232 F.3d 896 (9<sup>th</sup> Cir. 2000). *Brief from Counsel* at 27-28. Counsel explains that the Ninth Circuit held that an individual is in the constructive custody of DHS only when he is subject to a final order of deportation. *Id.* at 9. The reasoning of the Ninth Circuit in *Pena v. Meissner* is consistent with ICE practice at the time the juvenile court issued

the special interest order. However, it is noted that the present matter arises within the jurisdiction of the Eleventh Circuit of the United States Court of Appeals, not the Ninth Circuit. Thus, while the decision of the Ninth Circuit in *Pena v. Meissner* is instructive, it does not serve as binding precedent in the instant matter. Additionally, as an unpublished decision, the Ninth Circuit indicated that its disposition in *Pena v. Meissner* “is not appropriate for publication and may not be cited to or by the courts of [the Ninth Judicial Circuit] except as provided by Ninth Circuit Rule 36-3.” *Pena v. Meissner*, 232 F.3d at 232. Thus, the Ninth Circuit limited the precedential value of *Pena v. Meissner*, as Ninth Circuit Rule 36-3 states that “[u]npublished dispositions and orders of [the Ninth Circuit] are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.” *Ninth Circuit Rule 36-3*.

Based on the foregoing, the applicant has established that she did not require the specific consent of the Secretary in order for the juvenile court to properly take jurisdiction over her custody status and placement. Thus, the special interest order is valid and may serve as a basis for SIJ status.

The third issue in the present proceeding is whether DHS should give express consent to the juvenile court’s special interest order serving as a precondition for SIJ status pursuant to section 101(a)(27)(J)(iii) of the Act. As noted above, the juvenile court issued a special interest order finding that: 1) the applicant is dependent on the court due to abandonment and neglect; 2) the applicant is eligible for long-term foster care, as family reunification is not a viable option; 3) it is not in the applicant’s best interests to be returned to Nicaragua; 4) it is in the applicant’s best interests to remain in the United States, and; 5) the juvenile court will retain jurisdiction over the applicant until her 22<sup>nd</sup> birthday.

In the order, the juvenile court stated factual findings that supported its legal conclusions. Specifically, the juvenile court stated that that the applicant’s mother died when the applicant was six years old, and that the applicant’s natural father has had no contact with the applicant throughout her life. *Juvenile Court’s Special Interest Order*, dated May 3, 2006. The juvenile court noted that the applicant’s stepfather deserted her when the applicant’s mother died. The juvenile court found that the applicant had been abandoned in that her mother made no provisions for her ongoing care, and her father never made efforts to communicate and support her financially or emotionally. *Id.* The juvenile court indicated that both of the applicant’s parents deprived her of necessary food, clothing and shelter, and they permitted her to live in an environment that caused her physical, mental and emotional health to be impaired. *Id.*

The record contains documentation that was available to the juvenile court that supports the juvenile court’s findings, including; a copy of the applicant’s mother’s death certificate; an affidavit from counsel verifying the applicant’s mother’s death and a diligent search for the applicant’s father; a report documenting efforts to locate the applicant’s natural father; copies of petitions filed with the juvenile court addressing the applicant’s circumstances; copies of statements from the applicant’s sisters, and; a predispositional study that describes that applicant’s history of abuse, neglect, and abandonment by her parents.

The district director called into question whether the applicant was in fact abandoned. The district director observed that the applicant has received care from her sisters, and that she has maintained some contact with and material support from her stepfather. *Decision of the District Director* at 3. The district director commented that it does not appear that the juvenile court was apprised of all relevant information in the

applicant's case, or that the applicant's SIJ petition is an attempt to obtain relief from abuse, abandonment, or neglect. *Id.* Thus, the district director suggested that the applicant has not established a sufficient basis for the juvenile court's findings, such that DHS should expressly consent to the special interest order serving as precondition to a grant of SIJ status.

On appeal, counsel asserts that the applicant has submitted sufficient evidence to show that she filed her SIJ petition to obtain protection from abandonment and neglect. *Brief in Support of Appeal* at 11-15. Counsel states that the district director's refusal to consent to the juvenile court's order is an attempt to make an unlawful determination of abuse, abandonment or neglect. *Id.* at 15-18.

Upon review, the applicant has established that the juvenile court's special interest order may serve as a precondition to the grant of special immigrant juvenile status. As noted above, section 101(a)(27)(j)(iii) of the Act provides that the Secretary of Homeland Security must expressly consent to the applicant's dependency order serving as a precondition to the grant of special immigrant juvenile status.

*Express consent* meant 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.]"

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

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 her best interest to be returned to her country of nationality, without sufficient indication 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 satisfying CIS 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 findings.

*Yates Memo* at 4.

In the present matter, the record supports that the juvenile court's special interest order was supported by relevant facts. The order itself articulates sufficient findings of fact made by the juvenile court that served as the basis for its determination that the applicant is a neglected and abandoned child. Thus, the juvenile

court's order, by itself, establishes the facts that formed the basis for its rulings, such that CIS will give express consent to the order serving as a precondition to SIJ status.<sup>2</sup> See *Yates Memo* at 4. As noted above, the record reflects that the juvenile court had independent documentation available in order to form its factual findings, and such documentation supports the special interest order.

The district director commented that it does not appear that the juvenile court was apprised of all relevant information in the applicant's case. However, the district director did not indicate what relevant facts known to CIS were ostensibly not revealed to the juvenile court. The AAO finds that the record does not reflect that material facts were withheld from the juvenile court. Thus, the district director's comment in this regard is speculative and does not constitute a basis to withhold express consent to the special interest order.

Based on the forgoing, the record establishes that basis for the juvenile court's order of May 3, 2006, such that the Secretary of Homeland Security is inclined to consent to the order serving as a precondition to the grant of special immigrant juvenile status. See section 101(a)(27)(J)(iii) of the Act.

The fourth issue in the present matter is whether the applicant continues to be eligible for long-term foster care, as contemplated by the regulation at 8 C.F.R. § 204.11(c)(5). As noted above, the juvenile court found in its special interest order that: 1) the applicant is dependent on the court due to abandonment and neglect; 2) the applicant is eligible for long-term foster care, as family reunification is not a viable option; 3) it is not in the applicant's best interest to be returned to Nicaragua; 4) it is in the applicant's best interests to remain in the United States, and; 5) the juvenile court will retain jurisdiction over the applicant until her 22<sup>nd</sup> birthday. The juvenile court order stated the following:

[The juvenile court] shall retain jurisdiction of [the applicant's] cause up to [the applicant's] 22<sup>nd</sup> birthday for the purpose of making such further or other orders herein for the welfare of [the applicant] as may be from time to time found necessary.

*Special Interest Order* at 3. The district director noted that the applicant had reached age 18. The district director cited chapter 65C-31.010 of the Florida Department of Children and Families Child Welfare Administrative Rules (FDCFCWAR), which states, in pertinent part:

(1)(b)(1) A youth may petition the court, for continued jurisdiction, anytime before his or her 19<sup>th</sup> birthday. This jurisdiction may continue for a period not to exceed one year beyond the youth's 18<sup>th</sup> birthday. The youth does not maintain "foster care" status as those who are under the age of 18. But instead the courts maintain jurisdiction for the purpose of determining whether the young adult is receiving appropriate adult services . . . .

The district director determined that, pursuant to FDCFCWAR chapter 65C-31.010(1)(b)(1), as of the applicant's 18<sup>th</sup> birthday she was no longer eligible for long-term foster care in the State of Florida.

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<sup>2</sup> It is noted that all documentation in the record is consistent with the juvenile court's findings of fact, and the juvenile court was apprised of all material facts that relate to whether the applicant is an abused, neglected and abandoned child.

Accordingly, the district director found that the applicant did not satisfy the regulation at 8 C.F.R. § 204.11(c)(5), as she failed to show that she “[c]ontinues to be dependent upon the juvenile court and eligible for long-term foster care.”

On appeal, counsel asserts that the juvenile court’s order establishes that the applicant continues to be “eligible for long-term foster care” as contemplated by the regulation at 8 C.F.R. § 204.11(c)(5). *Brief in Support of Appeal* at 37-45. Counsel observes that, in order for an applicant to show that she is “eligible for long-term foster care,” she need only show that a juvenile court has determined that “family reunification is no longer a viable option.” *Id.* at 42-43 (citing 8 C.F.R. § 204.11(a)). Thus, counsel suggests that the applicant need not establish that she meets all of the criteria for placement in foster care in the State of Florida, so long as she shows that the juvenile court found that it is not viable for her to reunite with her family. *Id.* Counsel asserts that, by failing to follow the juvenile court’s findings that family reunification is no longer a viable option for the applicant, the district director made an impermissible *sua sponte* re-determination of the legal conclusions of the juvenile court. *Id.*

Upon review, the applicant has shown that she meets the requirements of 8 C.F.R. § 204.11(c)(5). The special interest order was issued on May 3, 2006, when the applicant was age 17. The juvenile court found that she was eligible for long-term foster care, and that it was no longer viable for the applicant to be reunified with her family. Thus, the applicant met the requirements of 8 C.F.R. § 204.11(c)(3) and (4). Pursuant to its authority under Florida Statute section 39.013(2), the juvenile court ordered that it would retain jurisdiction over the applicant until her 22<sup>nd</sup> birthday. The district director determined that the applicant was no longer eligible for long-term foster care in the State of Florida, effectively finding that the juvenile court’s continued jurisdiction beyond the applicant’s 18<sup>th</sup> birthday did not preserve the applicant’s eligibility for long-term foster care as required by 8 C.F.R. § 204.11(c)(5).

However, the regulation at 8 C.F.R. § 204.11(a) states that eligibility 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.” Thus, the regulation at 8 C.F.R. § 204.11(c)(5) does not require an applicant to directly establish that she meets all State requirements to be placed into a foster care program. In light of 8 C.F.R. § 204.11(a), an applicant may meet the foster care component of 8 C.F.R. § 204.11(c)(5) by showing that the juvenile court on which she is dependent continues to find that it is not viable for her to be reunited with her family. 8 C.F.R. § 204.11(a).

In the present matter, the juvenile court’s order explicitly states that family reunification is no longer a viable option for the applicant. The juvenile court’s determination is based on clearly stated findings of neglect and abandonment of the applicant by her parents. The juvenile court provided that it is retaining jurisdiction over the applicant until her 22<sup>nd</sup> birthday, pursuant to Florida Statute section 39.013(2). The juvenile court made no indication that its finding of the non-viability of family reunification would expire on the applicant’s 18<sup>th</sup> birthday, or at any time prior to her 22<sup>nd</sup> birthday. Nor does the record reflect that the juvenile court has issued a subsequent order amending its findings or its retention of jurisdiction. Thus, by the juvenile court retaining jurisdiction, the applicant remains dependent upon the court and the determination of the non-viability of family reunification remains effective. *Special Interest Order* at 3.

Based on the foregoing, the applicant “continues to be dependent upon the juvenile court and eligible for long-term foster care,” as contemplated by the regulations at 8 C.F.R. §§ 204.11(a) and (c)(5).

The AAO finds that the applicant has established that she meets the requirements for SIJ status as provided in sections 203(b)(4) and 101(a)(27)(J) of the Act and 8 C.F.R. § 204.11(c). Accordingly, the District Director’s decision will be withdrawn 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. 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 applicant has shown eligibility for the benefit sought. Accordingly, the appeal will be sustained and the petition will be approved.

**ORDER:** The appeal is sustained.