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U.S. Department of Justice

Immigration and Naturalization Service

*OFFICE OF ADMINISTRATIVE APPEALS*
*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

[redacted]

FILE: [redacted] Office: Seattle Date: NOV 20 2000

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the District Director, Seattle, Washington, who certified his decision to the Associate Commissioner, Examinations, for review. The district director's decision will be affirmed.

The petitioner is a 17-year-old native and citizen of Mexico 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).

The district director determined that after investigation and careful review of the facts, statements, and evidence, including counsel's reply to the Notice of Intent, there was insufficient information to establish that the petitioner qualifies as a special immigrant juvenile.

In response to the notice of certification, counsel asserts that the petitioner is in fact a neglected child who was deprived of the most basic necessities of life due to his mother's total failure to provide minimally adequate food, shelter, clothing, medical care, and education. He further asserts that the juvenile court made the appropriate findings of neglect, that it would not be in the child's interest to return him to Mexico, and that the petitioner is eligible for, and has been placed in, long-term foster care where he is flourishing. Counsel claims that it is both illegal and cruel to deny the petition based on legal theories that are nowhere in the statute, and speculation about what might be in the record but is not.

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 longterm 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 servicing 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.

The record reflects that the petitioner claimed to have entered the United States without inspection near Douglas, Arizona, on March 10, 1999. On May 5, 1999, a self-petition was filed by the petitioner seeking classification as a special immigrant juvenile. The petitioner was subsequently paroled indefinitely into the United States in order to pursue his self-petition after returning from a visit with his family in Mexico on January 11, 2000.

In support of the petition, the petitioner submits a copy of an Order issued on [redacted] by the Superior Court of the State of Washington for King County, Juvenile Division. The Order indicates that based upon the findings and conclusions, and having considered the agency's dispositional report to the court submitted in compliance with RCW 13.34.110 and .120, the court found the petitioner dependent under the supervision of juvenile court, that the child is eligible for long-term foster care due to neglect and shall be placed under the supervision of [redacted] for placement with the [redacted] family, and that it would not be in the petitioner's best interest to be returned to Mexico.

Section 101(a)(27)(J) of the Act, as amended by section 113 of Public Law 105-119, effective November 26, 1997, clearly defines and restricts who may benefit from this provision, specifying that any juveniles declared dependent on a juvenile court, or placed in the custody of an agency of the state, and deemed eligible for long-term foster care due to **abuse, neglect, or abandonment** (emphasis added to highlight new language) may be granted this status. The insertion of this new language makes clear the intent of Congress that relief is reserved for children who are victims of those particular circumstances and conditions. The amendment also requires juvenile courts to obtain the Attorney General's consent to a dependency order as a precondition to the grant of special immigrant juvenile status.

The district director determined that after investigation and careful review of the facts, statements, and evidence, including counsel's reply to the Notice of Intent, there was insufficient information to establish that the petitioner qualifies as a special immigrant juvenile. He based his denial on the following:

1. Failure to comply with the requirements of Chapter 37 of the Vienna Convention on Consular Affairs. The district director indicated that the Service does not agree with the petitioner that the treaty does not apply to dependency proceedings.

On appeal, counsel states that the Juvenile Court Order of [redacted] shows that consular officers of the government of Mexico were notified. He further states that the supplemental motion and order, page 2, paragraph 4, contains the findings of the Juvenile Court that "the Mexican government has been notified of the juvenile court proceedings through telephone conversations with the child, the foster mother, and written notice to the Mexican Consulate in Seattle."

While counsel claims that additional evidence, attached to the appeal, shows that the requirements of the Vienna Convention have been complied with, neither this evidence, the written notice to the Mexican Consulate in Seattle, nor the Court Order of April 12, 2000, is contained in the record of proceeding.

2. The only allegation of neglect was a financial inability to provide medical and dental care as well as education. The district director stated that neither the State of Washington nor [redacted] has offered any assistance to the mother to restore the family, because the mother is in Mexico, and that in other cases the Service is aware of instances of the State returning children to Mexico with the assistance of the Mexican government. He further stated that in cases such as this where a private party has brought the dependency proceeding rather than the state, there is an even greater need to have consular officer involvement to insure that no proper inducement has been offered the mother for her consent.

On appeal, counsel asserts that the Protection Officer of the Mexican Consulate talked at length with the child, the foster parents, and counsel, and had the opportunity to intervene in the proceedings if she so chose. He states that the initial dependency order shows that the mother was represented by a lawyer and agreed to the entry of the dependency order and the placement of the child in long-term foster care. He further states that based on the Permanency Planning Findings and Order, the Juvenile Court specifically found that reasonable efforts were made to review case plan services; [redacted] has determined that they cannot provide services in Mexico, and the local Mexican government has indicated that they cannot provide services to this family; and the court further found that the child cannot be returned home because of "clear and present danger to the child's health, safety, and welfare."

While counsel claims that this additional information, therefore, satisfies this concern of the district director, the Permanency

Planning Findings and Order referred to by counsel are not contained in the record of proceeding.

3. The notification of consular officers is important because not only must the child be dependent, but also it must be in the child's interest not to be returned to Mexico. The district director stated that there is no factual basis in the documents offered to the Service for a Court to conclude it is not in the child's best interest to be returned to Mexico. He noted that the petitioner had been in the United States for less than two months.

Counsel, on appeal, asserts that the Juvenile Court, with the consent of the child's mother who was represented by court-appointed counsel, found that this particular child had been neglected and that it would not be in the juvenile's best interest to be returned to Mexico. He quoted Acting Assistant Commissioner of Adjudications Division's Memorandum #2: Clarification of Interim Field Guidance (Special Immigrant Juveniles) dated July 9, 1999, in part:

> In the case of juveniles not in INS custody, INS officials should not become involved in juvenile court proceedings in order to consent to dependency orders. Rather, the Attorney General's consent to the dependency order should be reflected in a grant or denial of the petition for SIJ status....First, a juvenile court must have deemed the juvenile eligible for long-term foster care due to abuse, neglect and abandonment. Second, it must have determined in administrative or judicial proceedings that it would not be in the juvenile's best interest to be returned to the juvenile or parents' previous country of nationality or country of last habitual residence. If both elements are established, consent to the order serving a precondition must be granted.

Counsel states that the Juvenile Court orders show that both elements are present. He further states that the Juvenile Court's finding that it would be a clear and present danger to the child's health, safety and welfare to return the child to Mexico provides a factual basis for the court's conclusion that it is not in the best interest of the child to be returned home. He argues that the denial finds this child ineligible for SIJ status because he still loves and cares about his mother in Mexico, even though she has not been able to provide a proper home or care for him, and that "estrangement" is not a requirement of the statute, the regulations, or the applicable Service memoranda. Counsel further argues that the court made a decision only after hearing testimony of the child, hearing from the mother through her court appointed attorney, taking the testimony of the foster mother about her

personal investigation of the situation in Mexico, and taking the testimony of the child's social worker.

Memorandum #2, however, states that in the case of juveniles not in INS custody, the Attorney General's consent to the dependency order must be obtained as a precondition to the grant of SIJ status. While the memorandum states that INS officials should not become involved in juvenile court proceedings in order to consent to dependency orders, it also states that the Attorney General's consent to the dependency order should be reflected in a grant or denial of the petition for SIJ status.

Further, as noted by the district director, there is no factual basis in the documents offered to the Service for a court to conclude it is not in the child's best interest to be returned to Mexico.

4. The petitioner has failed to offer proof of continuation of the dependency order past October 27, 1999. The district director stated that although counsel for the petitioner discussed the process in his reply to the notice of intent, he failed to offer proof that it occurred in this case, or to offer the report that counsel refers to as being required.

Counsel, on appeal, states that the court orders of April 12, 2000 prove that the Juvenile Court never lost jurisdiction and still maintains jurisdiction, contrary to the speculation contained in the notice of denial. As previously noted, however, this court order referred to by counsel is not contained in the record of proceeding.

5. The petitioner has returned to Mexico in spite of the express determination that it was against his best interest. He noted that counsel explains this as a trip to explore family reunification. The district director stated that if the foster parents have taken the petitioner to Mexico contrary to the Court's determination that it was against his best interest, then they are the only parties to the process who have made any effort to comply with the express goal of family reunification set out in the state law as well as the general policy of the INA to promote family unity. Citing 8 C.F.R 204.11(a), the district director indicated that the juvenile court should not make a finding on the need of long-term foster care if reunification is possible.

Counsel, on appeal, states that the court specifically found that the trip to Mexico was not inconsistent with the court's finding that it is not in the long-term interest of the child to be returned to Mexico, and that: "This was a temporary trip in the care and custody of the foster parents. The evidence presented in court confirms the court's prior findings that the child previously suffered from neglect, and as a result is now dependent on the

Juvenile Court and in need of long-term foster care. Family reunification is not a viable option, and it would be contrary to the best interests of the child to return him to Mexico."

The evidence presented to the court on which the court based its confirmation of the prior finding that the child previously suffered from neglect, however, is not contained in the record of proceeding.

6. The Service concludes that the legislative purpose was to deal with children who were abandoned or neglected in the United States and for whom no program could be established due to their illegal status. The district director stated that in this case, the child came to the United States with a cousin seeking a better life as an emancipated young man and within a month of entry sought lawful permanent residence.

Counsel, on appeal, asserts that the denial in this paragraph is based on a conclusion by the Service that only children abandoned or neglected by the parents in the United States are eligible for SIJ status. He states that prompt action by [redacted] and the foster parents to bring the legal action that would be necessary to legally place the needy child in a foster home, and to begin proceedings with the Service under the applicable law, should be the course encouraged by the Service, not punished. Counsel indicates that while the denial notice states that the child is "emancipated," a specific finding of the Juvenile Court in the Supplemental Motion and Order states:

> The child has not been emancipated, but continues to be dependent on the Juvenile Court in accordance with state law. He continues to be eligible for long-term foster care, the prior court order and declaration not having been vacated, terminated, or otherwise ended.

As previously noted, however, this court order referred to by counsel is not contained in the record of proceeding.

7. The Service requested the various reports that were to have been submitted to the juvenile court to determine the basis for the juvenile court to proceed on an agreed order, but the petitioner has not provided them. The district director stated that guidance from Service headquarters requires evidence that it would not be in the child's best interest to return to his country, and that this guidance reflects that the best and most reliable evidence would be the documents filed with the juvenile court. He noted that apparently the mother consented by telephone from Mexico on the dependency, but the Service has no evidence that she admitted neglect. He determined that absent such documents or other proof, the Service is left to speculate, and it is the petitioner's burden to satisfy reasonable questions such as these.

8. The agreed dependency order reflects that the parties represented in the proceedings were the child, and the mother. There was no neutral party such as a guardian ad litem or the state. The district director stated that the findings were submitted to the court as stipulated and there is no indication that the court received any testimony or report in making its findings of fact. He further stated that the finding that it was not in the best interest of the child to be returned to Mexico appears to be based entirely on the agreement of the petitioner and his mother with no factual basis offered.

9. 8 C.F.R. 204.11(c)(3) requires that the determination of dependency be "in accordance" with state law. The district director stated that the Service had repeatedly requested the necessary documents to ascertain that the action is in accordance with state law with no compliance on the part of the petitioner, and none of the required reports have been offered. The agreed order was prepared by the petitioner's attorney and consented to by the petitioner and his mother's attorney. The child and were represented by the same attorney. There is no record that the "counsel for the child" acted as the required guardian ad litem or in lieu of said guardian.

On appeal, counsel asserts that all reports and pleadings in their possession have been submitted to the Service, either previously or attached with the appeal. He states that the Juvenile Court Supplemental Motion and Order of finds that "the petition and dependency orders in this case meet the requirements of state law. All required reports have been filed, and are confidential under state law." He further states that presumably, this is why no other reports are available or in their possession, and that the denial cannot be justified by the unavailability of confidential documents not required to be provided by law or regulation, where all the available evidence shows the child is fully qualified under the law. He asserts that the pleadings and findings of the court prove that the mother, through court-appointed counsel, consented to the entry of finding of fact and conclusions of law that the child suffered from neglect. He further asserts that the testimony and reports that the Juvenile Court says it relied upon are certainly sufficient, given the death of the father and the total inability of the mother to provide the basic necessities of life.

Counsel states that the Juvenile Court order finds that: "The child is over the age of 13, and is represented by independent counsel. Therefore, no guardian ad litem should be appointed, as the guardian ad litem provisions of RCW 13.34.100 are satisfied by the independent counsel for the child." Counsel added that was an independent social service agency ement of the child in the licensed foster home, and subsequently reported to the court over the past year.

As previously noted, this court order is not contained in the record of proceeding. Further, Memorandum #2 states that in the case of juveniles not in INS custody, the Attorney General's consent to the dependency order must be obtained as a precondition to the grant of SIJ status. The memorandum further states that if a dependency order or other supporting documentation submitted with an SIJ petition does not establish the consent elements, the district director must refuse a consent to the order and eligibility for SIJ need not be considered.

Memorandum #2 further states, in part:

> Evidence that a dependency order was issued on account of abuse, neglect, or abandonment, and that it would not be in the juvenile's best interest to be removed from the United States is crucial to obtaining the Attorney General's consent to the dependency order. Documents filed with the juvenile court would be the most reliable evidence of these elements of consent. However, in many States documents submitted to or issued by the juvenile court in dependency proceedings may be subject to privacy restrictions. Therefore, if a dependency order does not include information establishing these crucial elements and State laws prevent court documents from being submitted to INS, a statement summarizing the evidence presented to the juvenile court during the dependency proceeding and the court's findings should be sufficient to establish the elements. **In order for a statement to serve as acceptable evidence of these elements, the statement should be in the form of an affidavit or other signed, sworn statement, and be prepared by the court or the State agency or department in whose custody the juvenile has been placed.** All other evidence the petitioner submits to establish the consent elements must also be considered in determining whether or not to consent to the dependency order.

(Emphasis added). The record of proceeding, however, is devoid of statements from the court or the state agency or department in whose custody the juvenile has been placed as a substitute for juvenile court documents if, in fact, the documents are subject to privacy restrictions as argued. As determined by the district director, the petitioner had not provided the Service with documentation filed with the court which establishes neglect as the underlying cause for the court's dependency order.

Further, statements furnished on appeal from the petitioner's parish priest, from his school teacher, and from a government representative at the town where the petitioner's family live, indicate that after the death of the petitioner's father, his mother had to work in the field to provide for her five children,

and that subsequently the petitioner quit school and found employment in order to help his mother support the family. None of the statements indicate that the petitioner was neglected by his mother. The inability of the mother to provide the basic necessities of life, as determined by counsel, or the deprivation of food, clothing, medical care, and education due to poverty, or due to economic, political, and social problems in one's country cannot be found to constitute negligence, nor does it meet the definition of negligence.

As previously noted, the record of proceeding does not contain copies of documents filed with the court to establish that the petitioner has been neglected as claimed. Nor is there evidence in the record that parental rights or control over the petitioner were terminated.

The petitioner has failed to establish that he qualifies as a special immigrant juvenile pursuant to sections 203(b)(4) and 101(a)(27)(J) of the Act. Furthermore, the Attorney General's consent to the dependency order is a precondition to the grant of status and the petition failed to establish the requirements for consent.

In visa petition proceedings, the burden of proof is on the petitioner to establish eligibility for the benefit sought by a preponderance of the evidence. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966); Matter of Soo Hoo, 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 shown eligibility for the benefit sought. Therefore, the decision of the district director to deny the petition will be affirmed.

**ORDER:** The district director's decision is affirmed.