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U.S. Department of Homeland Security
Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: MEMPHIS, TN

Date:

OCT 14 2010

IN RE:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Acting Memphis Field Office Director denied the special immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is an 18-year-old citizen of Honduras 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), and as defined at section 101(a)(27)(J) of the Act, 8 U.S.C. § 1101(a)(27)(J). The applicant was apprehended by the U.S. Border Patrol on October 20, 2007. He was subsequently served with a Notice to Appear for removal proceedings and placed in the custody of the Office of Refugee Resettlement (ORR) within the U.S. Department of Health and Human Services (HHS). On January 16, 2008, ORR released the petitioner to his uncle. On February 20, 2009, the Juvenile Court of Davidson County, Tennessee entered a dependency order finding that the petitioner had been abandoned by his parents and granting custody to his uncle. The petitioner filed the instant Form I-360 on March 19, 2009.

The Acting Field Office Director (the director) denied the petition because: (1) the petitioner had not obtained the “specific consent” of U.S. Immigration and Customs Enforcement (ICE) to the state juvenile court’s jurisdiction; and (2) the petition was not bona fide as his mother did not abandon him, but sent him to the United States to live with his uncle to whom she granted custody. The director adjudicated the petition under the former version of section 101(a)(27)(J) of the Act.

On appeal, counsel asserts that (1) the petitioner was not required to obtain ICE’s “specific consent” under either the prior or amended statute; and (2) the petition is bona fide because the petitioner’s mother did not grant custody to the petitioner’s uncle until weeks after the petitioner came to the United States and because the Tennessee Juvenile Court determined that he “met the standard for abandonment and dependency and neglect under Tennessee law.”

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Review of the entire record, including the evidence and brief submitted on appeal, demonstrates that the petitioner is eligible for and merits classification as a special immigrant juvenile.

The Applicable Law

Section 203(b)(4) of the Act allocates immigrant visas to qualified special immigrant juveniles as described in section 101(a)(27)(J) of the Act, 8 U.S.C. § 1101(a)(27)(J). On December 23, 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), was enacted. *See* Pub. L. No. 110-457, 122 Stat. 5044 (2008). Section 235(d) of the TVPRA amended the eligibility requirements for SIJ classification at section 101(a)(27)(J) of the Act, and accompanying adjustment of status eligibility requirements at section 245(h) of the Act, 8 U.S.C. § 1255(h). *Id.*; *see also* Memo. from [REDACTED] Acting Assoc. Dir., U.S. Citizenship and Immig. Servs., et al., to Field Leadership, *Trafficking Victims Protection Reauthorization Act of*

2008: *Special Immigrant Juvenile Status Provisions* (Mar. 24, 2009) (hereinafter *TVPRA – SIJ Provisions Memo*). The SIJ provisions of the TVPRA are applicable to this case. See Section 235(h) of the TVPRA (stating that the TVPRA shall “apply to all aliens in the United States in pending proceedings before the Department of Homeland Security” on December 23, 2008).

Section 101(a)(27)(J) of the Act now defines a special immigrant juvenile as:

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, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
- (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 Secretary of Homeland Security consents 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 custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services 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 TVPRA amended the SIJ definition by removing the need for a juvenile court to deem a juvenile eligible for long-term foster care due to abuse, neglect or abandonment, and replaced it with a requirement that the juvenile court find that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law. See TVPRA section 235(d)(1)(A).¹

¹ USCIS has long defined “eligible for long-term foster care” to mean “that a determination has been made by the juvenile court that family reunification is no longer a viable option.” See 8 C.F.R. § 204.11(a) (1993).

Additionally, the TVPRA modified the two forms of consent—formerly “express” consent and “specific” consent—required for SIJ petitions. First, instead of “expressly consent[ing] to the dependency order serving as a precondition to the grant of special immigrant juvenile status,” the new definition requires the Secretary of Homeland Security, through USCIS, to “consent[] to the grant of special immigrant juvenile status.” TVPRA section 235(d)(1)(B). This consent determination “is an acknowledgement that the request for SIJ classification is bona fide,” *TVPRA – SIJ Provisions Memo* at 3, meaning that neither the dependency order nor the best interest determination 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,” H.R. Rep. No. 105-405 at 130 (1997). Approval of an SIJ petition is evidence of the Secretary’s consent. *TVPRA – SIJ Provisions Memo* at 3. Second, the TVPRA transferred the “specific consent” function, which applies to certain juveniles in federal custody, from the Secretary of Homeland Security, as previously delegated to ICE, to the Secretary of Health and Human Services. TVPRA section 235(d)(1)(B).

The Petitioner is Eligible for Special Immigrant Juvenile Classification

The director determined that the petitioner was required to, but did not obtain the “specific consent” of ICE before he sought a dependency order from the juvenile court. The director was mistaken as the statute requires the specific consent of HHS (not ICE) only when the child is in the custody of HHS. Section 101(a)(27)(J)(iii)(I) of the Act, 8 U.S.C. § 1101(a)(27)(J)(iii)(I). The record in this case shows that on January 16, 2008, HHS released the petitioner from its custody into the care and custody of his uncle. The HHS release occurred nearly 11 months before the petitioner’s uncle filed his petition to adjudicate dependency and neglect with the Tennessee Juvenile Court on December 1, 2008. Accordingly, at the time the dependency petition was filed, the petitioner was no longer under the custody of HHS and was not required to obtain that agency’s specific consent to the juvenile court’s jurisdiction.²

The director’s determination that the petition was not bona fide was also misguided, both factually and legally. The director determined that the petitioner’s request for SIJ classification was not bona fide because the record indicated that his mother granted his uncle custody before the petitioner left Honduras and that his uncle paid the fees for the petitioner to be smuggled into the United States. The director concluded that the juvenile court dependency order was not sought to alleviate the petitioner’s parents’ abandonment, but was sought solely to obtain relief from removal and lawful permanent residency in the United States. However, the record shows that the petitioner’s mother did not grant custody to the petitioner’s uncle until after the petitioner had come to the United States. The record further indicates that the petitioner’s father abandoned the petitioner when he was approximately three years old and has never supported him. The record

² Even under the prior version of the statute, the petitioner would not have been required to obtain ICE’s specific consent because he had been released from ICE custody at the time the juvenile court assumed jurisdiction over his dependency petition. [REDACTED] USCIS Adopted Decision [REDACTED].

also contains medical certification that the petitioner's mother suffers from extensive cardiomyopathy due to Chagas disease and requires frequent hospitalization for congestive heart failure. Accordingly, the record does not support the director's factual determinations regarding the circumstances leading to the petitioner's request for SIJ classification.

The director's determination also relied on a misinterpretation of the law. When adjudicating a petition for special immigrant juvenile status, U.S. Citizenship and Immigration Services (USCIS) examines the juvenile court order only to determine if the record contains a reasonable factual basis for the court's order and that the order contains the requisite findings of dependency or custody; nonviability of reunification due to abuse, neglect or abandonment; and that return is not in the petitioner's best interests, as stated in section 101(a)(27)(J)(i)-(ii) of the Act. USCIS is not the fact finder in regards to these issues of child welfare under state law. Rather, the statute explicitly defers such findings to the expertise and judgment of the juvenile court. Section 101(a)(27)(J)(i)-(ii) of the Act, 8 U.S.C. § 1101(a)(27)(J)(i)-(ii) (referencing the determinations of a juvenile court or other administrative or judicial body).³ The juvenile court order in this case contains the explicit findings that the petitioner was adjudged, under the applicable state law, to be a dependent and neglected child who was abandoned by his parents and that it was not in the petitioner's best interest to return to Honduras. The record contains the evidence submitted with the petitioner's uncle's dependency petition, including an attestation to the petitioner's father's abandonment, the medical certification of his mother's heart condition and her notarized letter granting custody of the petitioner to his uncle. Accordingly, the petitioner is eligible for and merits special immigrant juvenile classification.

In this case, as in all visa petition proceedings, the petitioner bears the burden of proof to establish his eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). The petitioner has met his burden and the appeal will be sustained. The July 2, 2009 decision of the director will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained. The petition is approved.

³ See also USCIS Memorandum No. 3 – Field Guidance on Special Immigrant Juvenile Status Petitions, 4-5 (May 25, 2004) (where the record demonstrates a reasonable factual basis for the juvenile court's order, USCIS should not question the court's rulings).