



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: DETROIT, MI

Date:

MAR 07 2008

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), as described at Section 101(a)(27)(J) of the Act, 8 U.S.C. § 1101(a)(27)(J)

ON BEHALF OF PETITIONER:

[Redacted]

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, Detroit, 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 a 20-year-old native and citizen of Guatemala. He 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 found that the applicant failed to show that the U.S. Department of Homeland Security (“DHS”) consented to the jurisdiction of the State of Michigan 17th Judicial Circuit Court, Family Division, Kent County (juvenile court) to determine his custody status, as provided in section 101(a)(27)(J)(iii)(I) of the Act. *Decision of the District Director*, dated January 23, 2007. The District Director further found that the applicant failed to show that the juvenile court found him eligible for long-term foster care based on abuse, neglect, or abandonment. *Id.* at 2. The petition was denied accordingly.

On appeal, counsel for the applicant contends that the juvenile court issued its dependency orders based on the fact that the applicant showed he was subjected to abuse, neglect, and abandonment. *Brief from Counsel*, at 5, dated February 22, 2007. Counsel asserts that the applicant did not require the specific consent of the Secretary to the juvenile court’s jurisdiction, as he was no longer in the actual or constructive custody of DHS as of the date that the juvenile court issued its dependency order. *Id.* at 6-7.

The record contains a brief and correspondence from counsel; a psychological evaluation of the applicant; a petition filed before the juvenile court; an order from the juvenile court, dated March 30, 2006; an order from the juvenile court, dated May 18, 2006; a statement from the applicant; a document titled “Interim Placement Authorization” addressing the applicant’s placement with Bethany Christian Services by the Department of Health and Human Services (“HHS”), Office of Refugee Resettlement (“ORR”), Division of Unaccompanied Children’s Services, dated August 25, 2005, and; a statement from the applicant. 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.

The first 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 his custody status or

placement, pursuant to section 101(a)(27)(J)(iii)(I) of the Act. Section 101(a)(27)(J)(iii)(I) of the Act states that an applicant needs such specific consent only when he is in the actual or constructive custody of DHS.

In the instant matter, the applicant was born on January 10, 1988. He was taken into DHS custody in May 2005 due to his presence in the United States without a legal immigration status, when he was age 17. On August 25, 2005, when the applicant was still age 17, the HHS/ORR Division of Unaccompanied Children's Services placed the applicant under the physical custody of Bethany Christian Services for his daily care and protection. *Interim Placement Authorization*, dated August 25, 2005. ORR indicated that the applicant remained "in the legal custody of the Federal government." *Id.* at 1. ORR further indicated that the reason for the applicant's placement was that he was "[a]n unaccompanied minor who [met] the definition of an unaccompanied alien child, 6 U.S.C. [§] 279(g)(2), and [was] in federal custody by reason of his . . . immigration status." *Id.* at 2. Thus, at the time the applicant was released from the physical custody of DHS, he was still deemed to be in the constructive custody of the Secretary.

On or about December 13, 2005, the applicant submitted a request to U.S. Immigration and Customs Enforcement ("ICE") to provide specific consent to the juvenile court's jurisdiction over his custody and dependency. The record contains evidence that the request for specific consent was received by ICE, but that no action was taken on the request. ICE records reflect that the request was considered closed as of the date the applicant turned 18, January 10, 2006.

The record reflects that the juvenile court first conducted a hearing regarding the applicant on January 10, 2006, on the applicant's eighteenth birthday. *Petition Supplement Filed Before the Juvenile Court*, dated January 10, 2006. The juvenile court issued two subsequent orders, on March 30 and May 18, 2006, that serve as the basis for the present petition for SIJ status.

The record shows that the applicant was not in the actual custody of DHS on the date that the juvenile court held proceedings and issued orders regarding his dependency status.

It is noted that the Act and regulations do not provide a clear definition of "constructive custody." U.S. Citizenship and Immigration Services ("CIS") Adjudicators must look to current ICE practice to determine whether specific consent is required for a particular case. *Matter of Perez Quintanilla*, CIS Adopted Decision, at 6-7 (June 7, 2007); *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, at 5 (May 27, 2004). 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 or regulations, 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. *Matter of Perez Quintanilla* at 6-7; *Yates Memo* at 5.

In the present matter, the record contains evidence that ICE no longer deemed specific consent to the juvenile court's jurisdiction necessary once the applicant reached age 18, on January 10, 2006. As the juvenile court held proceedings and issued orders on or after that date, the juvenile court properly exercised jurisdiction and its orders may serve as a valid basis for SIJ status.

The second issue in the present matter is whether the juvenile court's dependency orders were based on the fact that the applicant showed that he was subjected to abuse, neglect, and abandonment, such that the Secretary should give express consent to the orders serving as a precondition to the grant of SIJ status.

As noted above, section 101(a)(27)(J)(iii) of the Act provides that the Secretary of DHS must expressly consent to the applicant's dependency order serving as a precondition to the grant of special immigrant juvenile status.

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.]"

Yates Memo at 4 (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 his best interest to be returned to his 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 rulings.

Yates Memo at 4.

In the present matter, the record supports that the juvenile court's orders were supported by relevant facts. The applicant filed a petition before the juvenile court that alleged that he never knew his father, and that his mother abandoned him when he was seven years old. *Petition Supplement Filed Before the Juvenile Court* at 1. The petition explains that the applicant resided with his grandparents until they became too feeble to care for him. *Id.* The petition states that the applicant then resided with his uncle, yet he was subjected to verbal and physical abuse which prompted him to leave and come to the United States. *Id.*

In the juvenile court's orders of March 30 and May 18, 2006, the juvenile court found that "the material allegations of the Petition authorized to be filed on January 10, 2006, were proven by a preponderance of the evidence." *Juvenile Court Orders*, at 1. Thus, the juvenile court's orders reflect that the applicant established that he was abandoned and abused, which served as a basis for his dependency. *Id.*

Accordingly, the juvenile court's order, in light of assertions in the initial petition, establishes the facts that formed the basis for the orders, such that CIS will give express consent to the orders serving as a precondition to SIJ status. *See Yates Memo* at 4.

Conclusion

Based on the foregoing, the applicant has established that he did not require the specific consent of the Secretary in order for the juvenile court to properly take jurisdiction over his dependency status. The applicant has shown that the juvenile court's orders were based on findings of abandonment and abuse, such that CIS will give express consent to the orders serving as a precondition to SIJ status. The AAO finds that the applicant 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.