

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

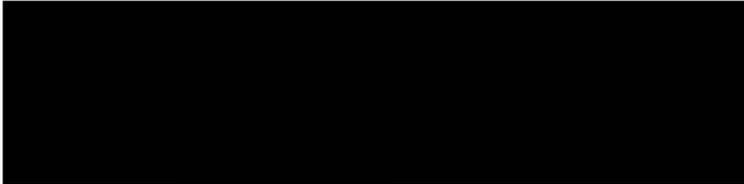
U.S. Department of Homeland Security
20 Mass. Ave, N.W. Rm. 3000
Washington, DC 20529



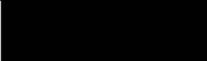
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

C1



FILE:

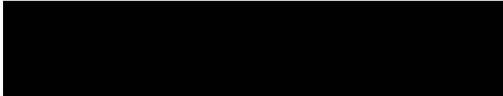


Office: BOSTON

Date:

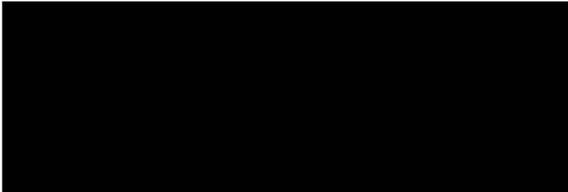
MAR 11 2008

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Boston, denied the special immigrant visa petition. The matter came before the Administrative Appeals Office (AAO) on appeal, and the appeal was dismissed. The matter is now before the AAO on motion to reopen and motion to reconsider. The motions will be granted and the matter will be reexamined. The petition will be denied

The applicant is a 20-year-old native and citizen of Honduras. She 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 record includes, but is not limited to, documents submitted or created in connection with the present petition for SIJ status; orders from the juvenile court; documentation in connection with the applicant's proceedings in Immigration Court, before the Board of Immigration Appeals, and before the Ninth Circuit, and; documentation in connection with the applicant's custody. On motion, the applicant supplements the record with additional evidence, including a new brief from counsel; a letter from an attorney confirming that the applicant relocated back to Massachusetts to receive care and support from Lutheran Social Services of New England (LSS); two letters from the Senior Program Manager of the Unaccompanied Refugee Minor (URM) Program at LSS; copies of two Voluntary Placement Agreements (VPA) between the applicant and the Massachusetts Department of Social Services (DSS); a new court order from the Commonwealth of Massachusetts Trial Court, Probate and Family Court Department (juvenile court); a copy of a fax from LSS to DHS, and; a motion filed by the U.S. Office of Immigration Litigation (OIL) in connection with the applicant's proceedings before the Ninth Circuit. The entire record was considered in rendering a decision on the current appeal.

Applicable Law

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Section 203(b)(4) of the Act provides classification to qualified special immigrant juveniles as described in section 101(a)(27)(J) of the Act, which pertains to an immigrant who is present in the United States—

- (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;

- (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and
- (iii) in whose case the Attorney General [Secretary of Homeland Security] expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that—
 - (I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction; and
 - (II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

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.

Motions

Upon review, the applicant has met the requirements of a motion to reopen, as she has presented new evidence that was not available in the prior proceeding. Specifically, the applicant provides evidence that she returned to Massachusetts and reentered services with LSS. The applicant submits a Voluntary Placement Agreement between her and DSS, executed on December 1, 2007, after the prior AAO decision was issued. The applicant further provided a new order from the juvenile court that was issued after the prior decision of the AAO. Thus, the applicant has stated new facts that are supported by documentary evidence, and the motion to reopen will be granted and the petition will be reevaluated in light of the new evidence. 8 C.F.R. § 103.5(a)(2).

The applicant has met the requirements of a motion to reconsider, as counsel has asserted that the AAO decision was based on an erroneous application of law, and has referenced pertinent evidence and legal authority to support her position. *Id.* Accordingly, the motion to reconsider will be granted and the petition will be reevaluated in light of the counsel's legal assertions. *Id.*

Facts and Procedure

The record reflects that the applicant was born in Honduras on April 26, 1987. The applicant asserted that, when she was age 15, she was transported to the United States by hired smugglers who drugged and raped her. The applicant indicated that, upon arrival to the United States, she was held, sexually assaulted, and verbally and physically abused by another group of smugglers. She was taken into custody by U.S. immigration authorities approximately one week after her arrival to the United States, and she was placed into Immigration Court proceedings through the issuance of a Notice to Appear on August 2, 2002.

On three occasions, the applicant, through counsel, requested that the Secretary consent to the juvenile court's jurisdiction to determine the applicant's dependency status. On each occasion, the Secretary, as represented by the Deputy Assistant Director and the National Juvenile Coordinator of the U.S. Immigration and Customs Enforcement (ICE) Office of Detention and Removal, denied the request for specific consent. *Letters from the Deputy Assistant Director of ICE Office of Detention and Removal*, dated May 20, 2004 and August 31, 2004; *Letter from the National Juvenile Coordinator of ICE Office of Detention and Removal*, dated April 1, 2005. On October 22, 2004, an Immigration Judge ordered the applicant removed from the United States. The applicant filed an appeal before the BIA on November 22, 2004. On March 2, 2005, the BIA dismissed the applicant's appeal, and the order of removal became final.

The applicant obtained a letter from the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) declaring her eligible for benefits under section 107(b) of the Trafficking Victims Protection Act of 2000, with an eligibility date of April 19, 2005. The letter from ORR indicated

that the applicant was eligible to apply for benefits and services under any Federal or State program or activity funded or administered by any Federal agency to the same extent as an individual who is admitted to the United States as a refugee under section 207 of the INA, "provided [she met] other eligibility criteria." *Eligibility Letter from Office of Refugee Resettlement*, with an eligibility date of April 19, 2005. Guidance from HHS reflects that, "[o]nce an unaccompanied minor is determined eligible for refugee benefits, and an ORR-funded Unaccompanied Refugee Minor (URM) placement is designated, the child is released from federal custody and becomes dependent by the local court." *Assessing Unaccompanied Children for Placement in ORR/DUCS Foster Care – Interim Guidance*, HHS Administration for Children and Families, dated September 28, 2005. The applicant submitted a copy of email correspondence from an ORR Program Specialist that reported that the applicant would be "released from federal custody into the custody of the [S]tate of Massachusetts on April 21, 2005." *Correspondence from Program Specialist, Office of Refugee Resettlement*, dated April 20, 2005. The applicant provided a statement from the Senior Program Manager for the URM Program at LSS that indicates that, pursuant to the Eligibility Letter from ORR, on April 19, 2005 the applicant left the DUCS program and entered the URM program. *Statement from Senior Program Manager for the Unaccompanied Refugee Minor Program, Lutheran Social Services of New England*, at 2, dated December 10, 2007.

On April 21, 2005, the juvenile court issued a temporary order committing the applicant to the custody of DSS, appointing counsel for the applicant, and indicating that the appointment of counsel would survive the applicant's eighteenth birthday by 30 days, with the possibility of extensions by motion with notice. *Juvenile Court Temporary Order*, dated April 21, 2005. The record contains a second order from the court, dated April 25, 2005, finding that: 1) it is not in the applicant's best interests to be returned to Honduras; 2) it is in the applicant's best interests to continue to reside in Massachusetts; 3) it is in the applicant's best interests for DSS and LSS to continue to be her lawful custodians and to provide her care and nurturance. *Juvenile Court Order*, dated April 25, 2005. The juvenile court's April 25th, 2005 order referenced the fact that the applicant was placed, under the auspices of the URM Program of LSS, at the Greentree Girls Program on May 6, 2005.¹ *Id.*

On April 26, 2005, the applicant executed a VPA with DSS placing her under their care. *Initial Voluntary Placement Agreement*, dated April 26, 2005. On May 16, 2005, the applicant filed the present Form I-360 petition for SIJ status.

The applicant appealed the BIA's order of March 2, 2005 to the U.S District Court for the district of Arizona, yet on May 16, 2005 the appeal was dismissed and the applicant's request to stay her removal was denied. On May 31, 2005, the applicant filed a motion to reopen proceedings before the BIA based on the fact that the juvenile court declared her a ward of the State of Massachusetts and she had filed the present petition for SIJ status. On July 20, 2005, the BIA granted the applicant's motion to reopen, remanded the case to the Immigration Court, and granted the applicant's request for a stay of removal. The BIA noted that it was "unable to determine whether the [juvenile court] actually had jurisdiction to determine the [applicant's] custody status inasmuch as [the record indicated] that the [applicant was] currently detained by the DHS."

¹ As the juvenile court's order of April 25, 2005 referenced the applicant's placement on May 6, 2005, it is evident that the order was backdated. However, the court did not indicate that its order was issued nunc pro tunc.

On or about August 16, 2005, DHS filed a motion to reconsider before the BIA, arguing that the juvenile court order was invalid, as the applicant was in federal custody at the time the order was issued and the Secretary did not consent to the juvenile court's jurisdiction. On October 19, 2005, the BIA granted the motion of DHS.²

The applicant appealed the BIA's decision to the Ninth Circuit. On November 18, 2005, the Ninth Circuit granted the applicant a stay of removal pending a decision on the merits.

On April 4, 2007, the District Director issued a Notice of Intent to Deny the applicant's petition, noting that the applicant failed to establish that she continues to be dependent on a juvenile court and eligible for long-term foster care in the State of Massachusetts, as required by 8 C.F.R. § 204.11(c)(5). The District Director stated that "[w]ith few limited exceptions, none applicable here, a minor is no longer dependent upon the juvenile court or eligible for long-term foster care once they reach the age of majority, determined to be age 18." *Notice of Intent to Deny* at 3, dated April 4, 2007. Thus, the District Director suggested that the applicant was no longer dependent on the juvenile court or eligible for long-term foster care once she reached age 18. *Id.* The District Director further noted that the applicant moved to Freeport, New York once she reached the age of 18. *Id.*

The record reflects that the applicant left the care of DSS and relocated to Freeport, New York sometime before April 30, 2007. *Facsimile from Lutheran Social Services of New England*, dated April 30, 2007. A facsimile from LSS reflects that the applicant was no longer involved with their services as of April 30, 2007, as the author explained that the organization considered what they could do "to let [the applicant] know that she would be welcome back to the program." *Id.* at 3.

On May 29, 2007, the District Director denied the petition, finding that the applicant failed to obtain the specific consent of the Secretary of the Department of Homeland Security (the Secretary) to the jurisdiction of the juvenile court over the applicant for the purpose of issuing an order regarding her dependency and eligibility for SIJ status. *Decision of the District Director*, dated May 29, 2007. The District Director further found that the applicant did not show that the specific consent of the Secretary was not required. *Id.* at 2. The District Director cited section 101(a)(27)(J)(iii)(I) of the Act to support that "no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the [Secretary] unless the [Secretary] specifically consents to such jurisdiction." *Id.* at 2. Thus, the District Director determined that the applicant failed to show that the juvenile court's orders of April 21 and 25, 2005 may serve as a basis for SIJ status. *Id.* at 1-2. The District Director further found that the applicant failed to show that she continues to be dependent on the juvenile court and eligible for long-term foster care, as required by 8 C.F.R. § 204.11(c)(5). *Id.* at 2.

² It is noted that the BIA focused on the issue of whether the Secretary expressly consented to the juvenile court's order serving as precondition for a grant of SIJ status, as required by section 101(a)(27)(J)(iii) of the Act. Yet, the Secretary's lack of specific consent to the juvenile court's jurisdiction under section 101(a)(27)(J)(iii)(I) of the Act was at issue, not the Secretary's express consent. The BIA did not address the matter of the applicant's custody status. Thus, the issue of specific consent was not raised to the Ninth Circuit.

On June 27, 2007, the applicant appealed the District Director's decision to the AAO. On appeal, counsel asserted that the District Director raised new grounds for denial that were not discussed in the previously issued Notice of Intent to Deny the petition. *Brief in Support of Appeal*, dated June 26, 2007. Specifically, counsel stated that the District Director did not previously raise the issues of whether the applicant required the specific consent of the Secretary to the juvenile court's jurisdiction, or whether the applicant continues to be dependent on the juvenile court and eligible for long-term foster care. *Id.* at 1-2. Counsel asserted that raising new issues in the district director's denial contravened CIS regulations and constitutes as denial of due process. *Id.* at 2, 8 (citing *Yeboah v. United States*, 223 F.Supp 2d 650, 660 (E.D. Pa. 2002), 8 C.F.R. § 103.2(b)(8)(iv), and an unpublished decision of the AAO).

Counsel asserted that the applicant was not in federal custody at the time the juvenile court issued its order on April 25, 2005, and thus she did not require the Secretary's consent to the juvenile court's jurisdiction. *Id.* Specifically, counsel contended that the applicant was released into the custody of the State of Massachusetts on April 21, 2005, pursuant to her status as an unaccompanied minor deemed eligible for benefits by HHS. *Id.* at 5, 12. Counsel suggested that the applicant automatically entered the URM Program on the date she became eligible, and she thus entered into the custody of Massachusetts by operation of federal law. *Id.* at 12-13 (citing 8 U.S.C. § 1522(d)(2)(B)(ii) and 45 C.F.R. § 400.115(a)).

Counsel asserted that the applicant was dependent on the juvenile court at the time she filed her petition for SIJ status. *Id.* at 2, 14. Counsel contended that the District Director applied an erroneous interpretation of the regulations, as she required the applicant to show that she continues to be dependent on the juvenile court at the time her petition is adjudicated. *Id.* Counsel asserted that the Act does not require an applicant to show that she continues to be dependent on a juvenile court at the time her petition is adjudicated, and that the District Director's imposing of such a requirement was contrary to the Act. *Id.* at 16-17.

Counsel asserted that CIS guidance requires expedited processing for SIJ petitions where there is a risk that the applicant will age out of eligibility. *Id.* at 15-16. Counsel contended that, as the applicant's petition was adjudicated two years after she filed it, the District Director was estopped from denying the petition on that basis. *Id.* at 16.

On November 14, 2007, the AAO dismissed the appeal. The AAO found that the applicant did not show that she obtained the specific consent of the Secretary to the juvenile court's jurisdiction to determine her custody status, as contemplated by section 101(a)(27)(J)(iii)(I) of the Act. The AAO further found that the applicant failed to establish that the Secretary's specific consent was not required. Accordingly, the AAO determined that the applicant did not show that the orders of the juvenile court may serve as a basis for SIJ status, as required by section 101(a)(27)(J)(i) of the Act.

The AAO further found that the applicant failed to show that she was dependent on a juvenile court, or that she was legally committed to, or under the custody of, an agency or department of the State of Massachusetts. Section 101(a)(27)(J)(i) of the Act.

On or about December 1, 2007, the applicant returned to Massachusetts to again receive care from LSS. On December 1, 2007, she executed a new VPA, placing her under the care of DSS. *New VPA*, dated December

1, 2007. The new VPA reflects that it continues until June 1, 2008 unless it is extended or terminated by the parties. *Id.* at 4.

On December 13, 2007, the juvenile court issued an order confirming that the applicant “is in the care of the Department of Social Services/Lutheran Social Services which will continue to provide her care and nurturance until she reaches the age of 21.” *New Juvenile Court Order*, dated December 13, 2007.

Counsel’s Assertions on Motion

On Motion, counsel asserts that the applicant now shows that she is legally committed to, or under the custody of, an agency or department of the State of Massachusetts. *Motion to Reopen and Reconsider*, at 2-3, dated December 17, 2008. Specifically, counsel contends that the applicant has been committed to the care and custody of DSS/LSS and continues to be under the care and custody of DSS/LSS pursuant to her executed VPAs and the juvenile court’s orders of April 21, 2005, April 25, 2005, and December 13, 2007. *Id.*

Counsel further asserts that the applicant did not need the specific consent of the Secretary in order for the juvenile court to properly take jurisdiction over the applicant’s custody status, as the applicant was not in the actual or constructive custody of the federal government. *Id.* at 4.

Counsel renews her assertion that the applicant was released into the custody of the State of Massachusetts on April 21, 2005, pursuant to her status as an unaccompanied minor deemed eligible for benefits by ORR. *Id.* Counsel suggests that the applicant automatically entered the URM Program on the date she became eligible, suggesting that she entered into the custody of Massachusetts by operation of federal law. *Id.*

Counsel contends that the applicant has submitted sufficient evidence to show that she was in fact transferred to the custody of Massachusetts on April 21, 2005, before the juvenile court issued its first order. *Id.* Specifically, counsel references an email from an ORR Program Specialist that states that the applicant would be “released from federal custody into the custody of the [S]tate of Massachusetts on April 21, 2005.” *Correspondence from Program Specialist, Office of Refugee Resettlement* at 1. Counsel quotes a statement from the Senior Program Manager for the URM Program at LSS that confirms that, on April 19, 2005, the applicant left the DUCS program and entered the URM program, thus she was “released from federal custody.” *Id.* at 4-5 (quoting *Statement from Senior Program Manager for the URM Program, LSS*, at 2). Counsel further quotes a fax from LSS to DHS that states that the eligibility letter from ORR provided that the applicant was released from federal custody to the custody of the State of Massachusetts on April 21, 2005. *Id.* at 5 (quoting *Fax from LSS to DHS*, dated July 12, 2005).

Counsel states that, “although the AAO concluded that ‘8 U.S.C. § 1522(d)(2)(B) does not reflect that, without further action, an HHS designation of eligibility for benefits constitutes transfer of custody to a State,’ *there was further action.*” *Id.* (quoting *AAO Decision*, at 8, dated November 14, 2007)(emphasis in original). Thus, counsel asserts that, as of the date the juvenile court issued its order of April 21, 2005, the applicant was no longer in actual federal custody. *Id.*

Counsel contends that the applicant was not in the constructive custody of the Secretary as of the dates of the juvenile court's orders. *Id.* Counsel emphasizes that there is no statutory or regulatory definition of constructive custody. *Id.* Counsel further asserts that there is no basis for the AAO's finding that "all immigrant children under a final order of removal are automatically deemed to be in the constructive custody of the federal government." *Id.* Counsel contends that the CIS adopted decision, *Matter of Perez-Quintanilla*, does not support the AAO's finding, as the applicant in that case was not subject to a final order of removal and thus the effect of a final order of removal on custody status was not a basis for the AAO's decision. *Id.* (discussing *Matter of Perez-Quintanilla*, CIS Adopted Decision, dated June 7, 2007).

Counsel further asserts that *Matter of Perez-Quintanilla* was decided more than two years after the juvenile court issued its orders, thus it does not serve as evidence of CIS or ICE policy on final orders and constructive custody as it applies to the present matter. *Id.* at 6. Counsel notes that, under the authority of *Matter of Perez Quintanilla*, ICE policy on constructive custody at the time the juvenile court issued its orders is determinative of whether the applicant required the specific consent of the Secretary to the juvenile court's jurisdiction. *Id.*

Counsel contends that DHS has made a representation to the Ninth Circuit that is inconsistent with the AAO's application of ICE policy on final orders and constructive custody in the present matter. *Id.* Counsel observes that the U.S. Office of Immigration Litigation (OIL) stated in a motion before the Ninth Circuit that "there is no plausible argument that [the applicant] is currently in DHS's constructive or actual custody or that DHS would make such an argument absent a change in facts." *Id.* (quoting *Respondent's Reply to its Motion to Dismiss for Lack of Jurisdiction Due to Mootness*, U.S. Office of Immigration Litigation, dated July 10, 2007.)

Counsel references a 1998 memorandum from Thomas Cook, Acting Commissioner for Adjudications, Immigration and Naturalization Service, as evidence of the definition of constructive custody as of the dates the juvenile court issued its orders. *Id.* at 7. Counsel further references INS and DOJ Legal Opinions § 95-11 and 97-6, from 1995 and 1997 respectively, as evidence of the definition of constructive custody. *Id.*

Counsel asserts that, as the applicant was not in the actual or constructive custody of the Secretary as of the dates the juvenile court issued its orders, she did not require the specific consent of the Secretary to the juvenile court's jurisdiction, and thus the orders may serve as a basis for her eligibility for SIJ status. *Id.*

Analysis

1. Specific Consent

Upon review, the applicant has not established that she meets the requirements for SIJ status. Specifically, the applicant has not shown that she obtained the specific consent of the Secretary to the juvenile court's jurisdiction to determine her custody status, as contemplated by section 101(a)(27)(J)(iii)(I) of the Act. Nor has the applicant established that the Secretary's specific consent was not required. Accordingly, the applicant has not shown that the orders of the juvenile court may serve as a basis for SIJ status, as required by section 101(a)(27)(J)(i) of the Act.

Section 101(a)(27)(J)(iii)(I) of the Act states that “no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the [Secretary] unless the [Secretary] specifically consents to such jurisdiction.”

During the time that the applicant was in the actual custody of DHS, on three occasions she requested the specific consent of the Secretary to the juvenile court’s jurisdiction. One each occasion, the Secretary, as represented by the Deputy Assistant Director and the National Juvenile Coordinator of the U.S. Immigration and Customs Enforcement (ICE) Office of Detention and Removal, denied the request for specific consent. *Letters from the Deputy Assistant Director of ICE Office of Detention and Removal*, dated May 20, 2004 and August 31, 2004; *Letter from the National Juvenile Coordinator of ICE Office of Detention and Removal*, dated April 1, 2005. Specifically, the Secretary found that the applicant failed to submit sufficient explanation and evidence to support that she was neglected, abandoned, or abused by her parents, or that family reunification is not viable. *Id.* Thus, the Secretary determined that the applicant failed to show that she was reasonably likely to meet her burden of proof in establishing eligibility for SIJ status. *Id.* At no time has the applicant obtained the specific consent of the Secretary to the juvenile court’s jurisdiction over her custody status.

a. Actual Custody

Counsel asserts that the applicant was transferred to the custody of the State of Massachusetts on April 19, 2005, pursuant an eligibility letter from ORR, thus the applicant was not in the actual custody of the Secretary as of the date the juvenile court issued its first order. Upon review, the applicant has supplemented the record with sufficient documentation to show by a preponderance of the evidence that she was transferred from federal to State custody on April 19, 2005.

The applicant received a letter from ORR declaring her eligible for benefits under section 107(b) of the Trafficking Victims Protection Act of 2000, with an eligibility date of April 19, 2005. However, this letter alone was not deemed sufficient to show that the applicant’s custody was automatically transferred.

8 U.S.C. § 1522(d)(2)(B)(ii) states:

- (ii) The Director [of the Office of Refugee Resettlement] shall attempt to arrange for the placement under the laws of the States of such unaccompanied refugee children, who have been accepted for admission to the United States, before (or as soon as possible after) their arrival in the United States. During any interim period while such a child is in the United States or in transit to the United States but before the child is so placed, the Director shall assume legal responsibility (including financial responsibility) for the child, if necessary, and is authorized to make necessary decisions to provide for the child's immediate care.

Thus, 8 U.S.C. § 1522(d)(2)(B)(ii) provides that the federal government would retain responsibility for an applicant until such time that she is actually placed with a State agency. Under 8 U.S.C. § 1522(d)(2)(B)(ii), the federal government “shall attempt” to arrange the placement of an applicant with a State. 8 U.S.C.

§ 1522(d)(2)(B)(ii). Thus, 8 U.S.C. § 1522(d)(2)(B)(ii) does not reflect that, without further action, an ORR designation of eligibility for benefits constitutes a transfer of custody to a State.

The regulation at 45 C.F.R. § 400.115(a) provides the following:

- (a) A State must ensure that legal responsibility is established, including legal custody and/or guardianship, as appropriate, in accordance with applicable State law, for each unaccompanied minor who resettles in the State. The State must initiate procedures for establishing legal responsibility for the minor, with an appropriate court (if action by a court is required by State law), within 30 days after the minor arrives at the location of resettlement.

While 45 C.F.R. § 400.115(a) instructs States to ensure that legal responsibility is established for an unaccompanied minor, it does not address a State's responsibility when such legal responsibility has been assumed by the federal government. Thus, 45 C.F.R. § 400.115(a) does not serve as sufficient authority to show that an ORR designation of eligibility for benefits automatically constitutes a transfer of custody to a State.

The ORR letter gave the applicant access to benefits under the URM Program, which is administered by the States. Guidance from HHS reflects that, once an unaccompanied minor is determined eligible for refugee benefits, and an ORR-funded URM placement is designated, the child may be released from federal custody and declared dependent by a local court. *Assessing Unaccompanied Children for Placement in ORR/DUCS Foster Care – Interim Guidance*, HHS Administration for Children and Families, at 4, dated September 28, 2005. However, prior to the present motion, the applicant did not provide adequate evidence to show that she had been released from federal custody and transferred to state custody as of the dates of the juvenile court's orders on April 21 and 25, 2005.

On motion, the applicant has submitted additional evidence to show that she was transferred from federal to State custody on April 21, 2005. The applicant provided a statement from the Senior Program Manager for the URM Program at LSS that confirms that, on April 19, 2005, the applicant left the DUCS program and entered the URM program, thus she was "released from federal custody." *Statement from Senior Program Manager for the URM Program, LSS*, at 2. The Senior Program Manager established a basis for her knowledge of the applicant's case and the processes related to the URM program and custody matters. *Id.* at 1-2. The applicant previously provided documentation to show that she was eligible to have her custody transferred, and that her custody transfer was planned. *Correspondence from Program Specialist, Office of Refugee Resettlement* at 1; *Office of Refugee Resettlement Eligibility Letter* at 1. Yet, she now submits sufficient evidence to reflect that the custody transfer in fact occurred.

Accordingly, the applicant has shown by a preponderance of the evidence that she was transferred from federal to State custody on April 21, 2005. Therefore, she was not in actual federal custody as of the juvenile court's orders on April 21 and 25, 2005.

b. Constructive Custody

Irrespective of whether the applicant remained in the actual custody of the Secretary as of April 19, 2005, the record shows that she continued to be in the constructive custody of the Secretary, such that she required the specific consent of the Secretary to the juvenile court's jurisdiction.

As noted in the AAO's prior decision, the Act and regulations do not provide a clear definition of "constructive custody." To determine whether an applicant is in the constructive custody of the Secretary such that she required specific consent, the AAO looks to internal guidance and the past practice of DHS, particularly ICE. See e.g., *Matter of* [REDACTED] (CIS adopted decision June 7, 2007); see also *Memorandum #3 - Field Guidance on Special Immigrant Juvenile Status Petitions* ("Yates Memo #3"), William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, HQADN 70/23 (May 27, 2004).

The AAO notes that *Matter of* [REDACTED] is a CIS adopted decision. While it serves as internal policy guidance to CIS officers, it does not constitute legal precedent. However, as the decision is instructive and relevant to the present proceeding, the AAO takes administrative notice of the decision and the analysis and discussion therein. The AAO will reference *Matter of* [REDACTED] to reflect the past and current practice of the AAO, as well as the AAO's observations of the practices of ICE.

In *Matter of* [REDACTED] the AAO stated:

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.

Matter of [REDACTED] at 7 (citing *Yates Memo #3* at 5).

The policy and practice of ICE as of April 21, 2005, the date the juvenile court issued its first order, deemed that an applicant with a final order of removal was in the constructive custody of the Secretary. As observed by counsel, there is little written guidance to serve as evidence of this policy, such as statutory or regulatory language, judicial decisions, or written policy from ICE. However, despite the absence of such clear guidance, CIS must ascertain ICE policy and practice regarding the effect of a final order on an applicant's custody status. Through intra-agency communication and examining the actual practice of ICE in similar factual situations, the AAO has determined that ICE policy as of April 21, 2005 deemed that an applicant with a final order of removal was in the constructive custody of the Secretary.³

³ Counsel observed that the AAO previously made reference to "current" ICE policy, rather than ICE policy as of the date of the juvenile court's orders. As correctly noted by counsel, ICE policy as of the date of the juvenile court's orders was determinative of whether the applicant required the specific consent of the Secretary. *Matter of* [REDACTED] at 7. As discussed in this decision, ICE policy regarding the effect of a final order of removal on constructive custody did not change between April 21, 2005, the date of the

Counsel asserts that *Matter of* [REDACTED] does not support that an applicant with a final order is in the constructive custody of the Secretary. Counsel contends that any discussion of the effect of a final order in *Matter of* [REDACTED] was dicta, as the applicant in that matter did not have a final order. However, the AAO finds that *Matter of* [REDACTED] is instructive and relevant.

As noted above, under the guidance of *Matter of* [REDACTED] ICE policy on constructive custody dictates whether the applicant in the present matter was in the constructive custody of the Secretary at the time the juvenile court issued its orders. *Matter of* [REDACTED] at 7. Further, in *Matter of* [REDACTED] [REDACTED] the AAO quoted letters from ICE regarding whether specific consent is required in certain circumstances. *Id.* at 5-7 (quoting *Letter from Deputy Assistant Director, Office of Detention and Removal, Field Operations of ICE*, dated January 20, 2004; citing *Letter from the National Juvenile Coordinator, Office of Detention and Removal, Field Operations Division of ICE*, dated January 24, 2005). While these letters are not part of the current record, they may be examined to the extent that they are quoted and discussed in *Matter of* [REDACTED].

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.

Matter of [REDACTED] at 6 (quoting *Letter from Deputy Assistant Director, Office of Detention and Removal, Field Operations of ICE*, dated January 20, 2004). This letter reflects that, as of the date of the letter, January 20, 2004, when an applicant was not in federal custody and did not have an order of removal, ICE did not require her to obtain specific consent before a juvenile court could properly take jurisdiction over her custody status. It can be inferred that when an applicant was in federal custody or had received an order of removal, ICE required her to obtain specific consent. Thus, the letter supports that ICE policy as of January 20, 2004 deemed that an applicant was in the constructive custody of the Secretary if she had received a final order of removal.

juvenile court's first order, and November 14, 2007, the date of the AAO's prior decision, thus any reference to "current" ICE policy in the AAO's prior decision did not prejudice the applicant.

In *Matter of* [REDACTED], the AAO noted that a January 24, 2005 letter from the National Juvenile Coordinator, Office of Detention and Removal, Field Operations Division of ICE, reiterated the statement quoted above. *Matter of* [REDACTED] at 6 (discussing *Letter from the National Juvenile Coordinator, Office of Detention and Removal, Field Operations Division of ICE*, dated January 24, 2005).

Accordingly, ICE policy regarding the effect of an order of removal on an applicant's need for specific consent did not change between January 20, 2004 and January 24, 2005. Current ICE policy and practice continues to deem that a final order of removal places an applicant in the constructive custody of the Secretary. As such, as of April 21 and April 25, 2005, the dates of the juvenile court's orders, ICE policy and practice dictated that the applicant was in the constructive custody of the Secretary, and she required the Secretary's specific consent before the juvenile court could properly exercise jurisdiction over her custody status and placement.

Counsel contends that DHS has made a representation to the Ninth Circuit that is inconsistent with the AAO's application of ICE policy on final orders and constructive custody in the present matter. Counsel observes that OIL stated in a motion before the Ninth Circuit that "there is no plausible argument that [the applicant] is currently in DHS's constructive or actual custody or that DHS would make such an argument absent a change in facts." *Respondent's Reply to its Motion to Dismiss for Lack of Jurisdiction Due to Mootness*, U.S. Office of Immigration Litigation. However, OIL is a division of the U.S. Department of Justice, not a division of DHS. Thus, representations by OIL are not attributable to DHS, CIS, or ICE.

Further, this statement from OIL was made in response to the fact that the applicant ran away from her group home in June 2005 and relocated to another State, thus changing her custody status. Accordingly, the statement was not made regarding the applicant's circumstances as of the date that the juvenile court issued its orders on April 21 and 25, 2005. In the Reply, OIL did not indicate that it was or had conducted an analysis of ICE policy regarding constructive custody as of April 21 and 25, 2005. As OIL made this statement on July 10, 2007, it is not evidence of ICE policy as of April 21 and 25, 2005.

As discussed above, ICE policy and practice dictated whether the applicant's final order of removal placed her in the constructive custody of the Secretary as of April 21 and April 25, 2005. *Matter of* [REDACTED] at 7. The AAO must give effect to ICE policy as of the date of the court orders, irrespective of any apparent differing analysis from OIL. *See id.*

Counsel references a 1998 memorandum from Thomas Cook, Acting Commissioner for Adjudications, Immigration and Naturalization Service (Cook Memo), that discussed the definition of constructive custody. However, the Yates Memo #3 states in the first paragraph that "[t]his guidance memorandum, the third since the 1997 statutory amendment, consolidates and supercedes all previous guidance issued by the Immigration and Naturalization Service." *Yates Memo #3* at 1. Thus, the Yates Memo #3 superceded the Cook Memo on May 24, 2004, approximately one year prior to the juvenile court's first order on April 21, 2005. Accordingly, guidance on constructive custody found in the Cook Memo was not in effect as of the dates the juvenile court issued its orders.

Counsel further references INS and DOJ Legal Opinions § 95-11 and 97-6, from 1995 and 1997 respectively, as evidence of the definition of constructive custody. Yet, as these opinions predate the Cook Memo, the

AAO does not find them to be evidence of ICE policy regarding the effect of final orders on custody status as of April 21, 2005.

In the present matter, the applicant was under a final order of removal at the time the juvenile court issued its orders on April 21 and 25, 2005. Specifically, the applicant was ordered removed by an Immigration Judge on October 22, 2004. On March 2, 2005, the BIA dismissed the applicant's appeal, and the order of removal became final under section 101(a)(47)(B)(i) of the Act. Accordingly, the applicant was in the constructive custody of the Secretary on April 21 and 25, 2005, and she required the Secretary's specific consent to the jurisdiction of the juvenile court. As she did not obtain the Secretary's specific consent, the juvenile court's orders may not serve as a basis for a grant of SIJ status. Section 101(a)(27)(J)(iii)(I) of the Act; *Yates Memo #3* at 5. For this reason, the petition must be denied. *Id.*

2. Juvenile Court Dependency or Commitment to State Care

Counsel asserts that the applicant now shows that she is legally committed to, or under the custody of, an agency or department of the State of Massachusetts. Specifically, counsel contends that the applicant has been committed to the care and custody of DSS/LSS and continues to be under the care and custody of DSS/LSS pursuant to her executed VPAs and the juvenile court's orders of April 21, 2005, April 25, 2005, and December 13, 2007. *Id.*

As of November 14, 2007, the date of the AAO's prior decision, the applicant had left the State of Massachusetts and the care of LSS. *Facsimile from Lutheran Social Services of New England*, dated April 30, 2007. A facsimile from LSS reflected that the applicant was no longer involved with their services, as the author explained that the organization considered what they could do "to let [the applicant] know that she would be welcome back to the program." *Id.* at 3. Accordingly, the applicant had failed to show that she was dependent on a juvenile court, or that she was legally committed to, or under the custody of, an agency or department of the State of Massachusetts. Section 101(a)(27)(J)(i) of the Act.

However, on motion the applicant has presented sufficient evidence to show that she has returned to Massachusetts and begun to again receive services from DSS and LSS pursuant to a VPA. *New VPA*, dated December 1, 2007. The new VPA reflects that it continues until June 1, 2008 unless it is extended or terminated by the parties. *Id.* at 4. The applicant provided a new order from the juvenile court that confirms that the applicant "is in the care of the Department of Social Services/Lutheran Social Services which will continue to provide her care and nurturance until she reaches the age of 21." *New Juvenile Court Order*, dated December 13, 2007.

Based on this new evidence, the AAO finds that the applicant has shown that she is legally committed to, or under the custody of, an agency or department of the State of Massachusetts, as required by section 101(a)(27)(J)(i) of the Act.

Conclusion

Based on the foregoing, the applicant has not shown that she obtained the required specific consent of the Secretary to the juvenile court's jurisdiction, thus the applicant has not shown that the juvenile court's orders

may serve as a basis for a grant of SIJ status. Accordingly, the applicant has not established that she is eligible for SIJ status.

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. 493 (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 not shown eligibility for the benefit sought. Accordingly, the petition is denied.

ORDER: The motion is granted. The petition is denied.