

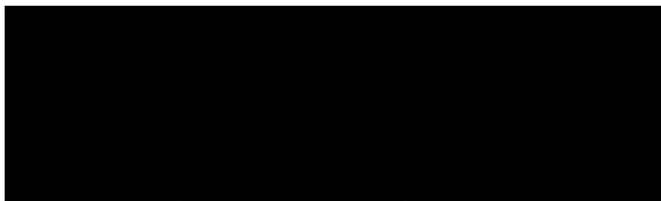
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U.S. Department of Homeland Security  
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**U.S. Citizenship  
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Services**

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JUN 05 2007

FILE:



Office: MIAMI

Date:

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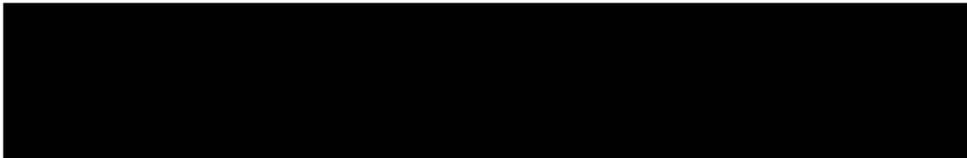
IN RE: Petitioner:

Beneficiary:



PETITION: Petition for Special Immigrant Juvenile Pursuant to Section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(J) of the Act, 8 U.S.C. § 1101(a)(27)(J)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Miami, denied the special immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is an 18-year-old native and citizen of the Bahamas. 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”) specifically consented to a juvenile court’s jurisdiction to determine his custody status, as provided in section 101(a)(27)(J)(iii)(I) of the Act. The petition was denied accordingly.

On appeal, counsel for the applicant contends that the applicant did not require the specific consent of DHS in order for the juvenile court to take jurisdiction over him. *Statement from Counsel on Form I-290B*, dated January 10, 2007. Counsel further asserts that, as that the Circuit Court of the Eleventh Judicial Circuit In and For Miami-Dade County, Florida, Juvenile Division (“juvenile court”) extended its jurisdiction over the applicant until his 22<sup>nd</sup> birthday, he continues to be “eligible for long-term foster care,” as required by the regulation at 8 C.F.R. § 204.11(c)(5). *Brief from Counsel*, submitted March 9, 2007.

The record contains a statement from counsel on Form I-290B; a brief from counsel; a letter from a Florida foster care agency, Neighbor to Family; a copy of the applicant’s birth certificate; copies of orders from the juvenile court, dated December 12, 2006 and January 12, 2007; a copy of the applicant’s school identification card; death certificates for the applicant’s mother and father; a document titled “Verified Petition for Dependency” that was submitted to the juvenile court on the applicant’s behalf; a copy of a letter from counsel to the National Juvenile Coordination Unit of U.S. Immigration and Customs Enforcement (ICE) regarding whether the applicant required specific consent to the juvenile court’s jurisdiction; copies of two letters from ICE in connection with separate matters regarding whether specific consent is required when an individual has been released from custody yet is not under a final order of removal, and; a copy of the applicant’s mother’s prior application for asylum in the United States. 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 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 only needs such specific consent when he is in the actual or constructive custody of DHS.

In the instant matter, the record does not show that the applicant has ever been in the actual custody of the Secretary as contemplated by section 101(a)(27)(J)(iii)(I) of the Act. Though the applicant was placed into removal proceedings on November 10, 2003 due to the allegation that he was in violation of section 237(a)(1)(B) of the Act, he was not placed into federal custody. The applicant's sister cared for him until

October 2006 when he was placed into foster care by the Florida Department of Children and Families (FDfC.) *Brief from Counsel* at 2-3.

The applicant did not obtain the Secretary's specific consent to the juvenile court taking jurisdiction over his custody status or placement. On December 19, 2005, the juvenile court issued a Best Interest Order finding that: 1) the applicant is dependent on the court due to abuse, neglect, or abandonment; 2) the applicant is eligible for long-term foster care, as family reunification is not a viable option; 3) it is not in the applicant's best interests to be returned to his home country or country of last habitual residence; 4) it is in the applicant's best interests to remain in the United States, and; 5) the juvenile court will retain jurisdiction over the applicant until his 22<sup>nd</sup> birthday pursuant to Florida Statutes §§ 39.013 and 39.5075. *First Order of the Juvenile Court*, dated December 12, 2006. The Executive Office for Immigration Review Immigration Court in Miami terminated the applicant's removal proceedings on January 12, 2007. *Order of the Immigration Judge*, dated January 12, 2007. On January 12, 2007, the juvenile court reissued a best interest order in which it reiterated the findings listed above. *Second Order of the Juvenile Court*, dated January 12, 2007.

As noted above. The applicant was not in the actual custody of the Secretary at the time the juvenile court issued both of its best interest orders. See section 101(a)(27)(J)(iii)(I) of the Act.

The District Director found that the applicant was in the constructive custody of the Secretary due to the fact that he was in removal proceedings at the time that the juvenile court issued its first best interest order. *Decision of the District Director* at 3, dated January 9, 2007. The District Director determined that, in light of the decision of the District Court of Appeal of the State of Florida, Fourth District in *P.G. v. Department of Children and Family Services*, 867 So.2d 1248 (Fla. 4<sup>th</sup> DCA 2004), the juvenile court's first best interest order was invalid, as the Secretary did not consent to the juvenile court's jurisdiction over the applicant. The record does not clearly show whether the District Director reviewed the juvenile court's second order of January 12, 2007 that was issued after the Miami immigration court terminated proceedings against the applicant.

On appeal, counsel contends that the applicant did not require the specific consent of the Secretary in order for the juvenile court to take jurisdiction over him. *Brief from Counsel* at 7-16. Counsel asserts that the decision of the District Court of Appeal of the State of Florida, Fourth District in *P.G. v. Department of Children and Family Services* is not controlling in the present matter, as the holding was based on a mistaken legal premise, and it was decided in the Fourth District of the State of Florida while the present matter arises within the jurisdiction of the Third Circuit of the State of Florida. *Id.* at 14-18.

Counsel discusses the unpublished decision of the United States Court of Appeals for the Ninth Circuit in *Pena v. Meissner*, 232 F.3d 896 (9<sup>th</sup> Cir. 2000). *Id.* at 9-10. Counsel explains that the Ninth Circuit held that an individual is in the constructive custody of DHS only when he is subject to a final order of deportation. *Id.* at 9. Counsel contends that, as the applicant was not subject to a final order of removal at the time the juvenile court issued the best interest order, the applicant did not require the Secretary's specific consent to the juvenile court's jurisdiction.

The applicant submits correspondence from counsel to Immigration and Customs Enforcement (ICE) referencing a discussion between counsel and the National Juvenile Coordinator regarding ICE policy

regarding the fact that specific consent is not required in the applicant's case. *Letter from Counsel*, December 27, 2006. In the letter, counsel requested that ICE report its current policy regarding specific consent to the District Director. *Id.* While the record does not show whether ICE contacted the District Director regarding the instant matter, the applicant submitted three letters from ICE regarding similar cases. In one such letter, the deputy assistant director, Office of Detention and Removal, Field Operations of ICE, stated the following:

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

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

*Letter from Deputy Assistant Director, Office of Detention and Removal, Field Operations of ICE*, dated January 20, 2004. In another letter provided by the applicant, the national juvenile coordinator, Office of Detention and Removal, Field Operations Division of ICE, reiterated the statement quoted above. *Letter from the National Juvenile Coordinator, Office of Detention and Removal, Field Operations Division of ICE*, dated January 24, 2005. In a third letter, the chief of the ICE National Juvenile Coordination Unit again reiterated the statement quoted above. *Letter from the Chief, Office of Detention and Removal, Field Operations Division of ICE*, dated September 1, 2006.

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

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

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

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

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

*Id.* at 5. The record does not reflect whether the District Director consulted ICE regarding whether specific consent was required in the applicant's case. However, the applicant has submitted copies of letters from two different Deputy Assistant Directors and one Chief of the National Juvenile Coordination Unit of the ICE Office of Detention and Removal, dated January 20, 2004, January 24, 2005, and September 1, 2006. These letters serve as evidence of ICE's policy on specific consent. As quoted above, when an applicant is not in the actual custody of the Secretary, and he "has not received an order of removal . . . , [t]he current practice within ICE . . . is to not require ICE consent before a state juvenile court can exercise jurisdiction to make rulings relevant to a juvenile's pursuit of special immigrant status . . . ." *Letter from Deputy Assistant Director, Office of Detention and Removal, Field Operations of ICE* at 1. There is no documentation or indication that ICE policy changed between the September 1, 2006 letter from the Chief of the National Juvenile Coordination Unit of the ICE Office of Detention and Removal and the issuance of the juvenile court's best interest order of December 12, 2006. The record further shows that the applicant was no longer subject to removal proceedings at the time the juvenile court issued its second best interest order on January 12, 2007.

Accordingly, the applicant has submitted sufficient evidence to show that he was not deemed by ICE to be in constructive custody at the time the juvenile court issued the either of its best interest orders. As the applicant was not in the actual custody of the Secretary, and he was not subject to a final order of removal, ICE practice dictated that specific consent was not necessary in order for the juvenile court to properly take jurisdiction over the applicant's custody status and placement. *See Letter from Deputy Assistant Director, Office of Detention and Removal, Field Operations of ICE* at 1; *see also Letter from to the National Juvenile Coordinator, Office of Detention and Removal, Field Operations Division of ICE* at 1; *see also Letter from the Chief of the National Juvenile Coordination Unit of the ICE Office of Detention and Removal*, dated September 1, 2006 .

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

As noted above, the District Director referenced a decision of the District Court of Appeal of the State of Florida, Fourth District in *P.G. v. Department of Children and Family Services*, 867 So.2d 1248 (Fla. 4<sup>th</sup> DCA 2004). *Decision of the District Director* at 3. However, the decision in *P.G. v. Department of Children and Family Services* was issued by a court of the State of Florida, and thus it does not serve as binding precedent on CIS officers. Accordingly, the AAO does not find that the reasoning or holding in *P.G. v. Department of*

*Children and Family Services* dictates that the applicant required the specific consent of the Secretary pursuant to section 101(a)(27)(J)(iii)(I) of the Act.

Counsel discusses the unpublished decision of the Ninth Circuit in *Pena v. Meissner*, 232 F.3d 896 (9<sup>th</sup> Cir. 2000). *Brief from Counsel* at 9-10. Counsel explains that the Ninth Circuit held that an individual is in the constructive custody of DHS only when he is subject to a final order of deportation. *Id.* at 9. The reasoning of the Ninth Circuit in *Pena v. Meissner* is consistent with ICE practice at the time the juvenile court issued its best interest orders. However, it is noted that the present matter arises within the jurisdiction of the Eleventh Circuit of the United States Court of Appeals, not the Ninth Circuit. Thus, while the decision of the Ninth Circuit in *Pena v. Meissner* is instructive, it does not serve as binding precedent in the instant matter. Additionally, as an unpublished decision, the Ninth Circuit indicated that its disposition in *Pena v. Meissner* “is not appropriate for publication and may not be cited to or by the courts of [the Ninth Judicial Circuit] except as provided by Ninth Circuit Rule 36-3.” *Pena v. Meissner*, 232 F.3d at 232. Thus, the Ninth Circuit limited the precedential value of *Pena v. Meissner*, as Ninth Circuit Rule 36-3 states that “[u]npublished dispositions and orders of [the Ninth Circuit] are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.” *Ninth Circuit Rule 36-3*.

Based on the foregoing, the applicant has established that he did not require the specific consent of the Secretary in order for the juvenile court to properly take jurisdiction over his custody status and placement. Thus, the first and second best interest orders are valid and may serve as a basis for SIJ status.

Counsel raises a second issue in the present matter. Specifically, counsel asserts that the applicant continues to be eligible for long-term foster care, as contemplated by the regulation at 8 C.F.R. § 204.11(c)(5). Counsel provides a redacted decision of the District Director based on similar facts, in which the District Director found that an applicant for SIJ status did not satisfy 8 C.F.R. § 204.11(c)(5). As in the present matter, in the referenced matter the applicant had reached age 18, yet the juvenile court had extended its jurisdiction over the applicant until his 22<sup>nd</sup> birthday, as permitted by Florida Statute section 39.013(2). In the referenced matter, the District Director found that the applicant failed to show that he continued to be eligible for long-term foster care in the State of Florida as required by 8 C.F.R. § 204.11(c)(5), despite that fact that the juvenile court had extended its jurisdiction over the applicant.

In the present matter, the District Director did not state that the applicant failed to satisfy 8 C.F.R. § 204.11(c)(5). Thus, the AAO need not address this issue at length. However, it is noted that the juvenile court provided no indication that its finding of the nonviability of reuniting the applicant with his family would expire on his 18<sup>th</sup> birthday. Thus, by extending its jurisdiction over the applicant until his 22<sup>nd</sup> birthday pursuant to Florida Statute section 39.013(2), it effectively extended its finding of the nonviability of family reunification.

The regulation at 8 C.F.R. § 204.11(a) states that eligibility for long-term foster care “means that a determination has been made by the juvenile court that family reunification is no longer a viable option.” Thus, the regulation at 8 C.F.R. § 204.11(c)(5) does not require an applicant to directly establish that he meets all State requirements to be placed into a foster care program. In light of 8 C.F.R. § 204.11(a), an applicant may meet the foster care component of 8 C.F.R. § 204.11(c)(5) by showing that the juvenile court on which he is dependent continues to find that it is not viable for him to be reunited with his family. 8 C.F.R.

§ 204.11(a). In the present matter, the juvenile court made such a finding, and the applicant continues to satisfy 8 C.F.R. § 204.11(c)(5).

The AAO finds that the applicant has established that he 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.