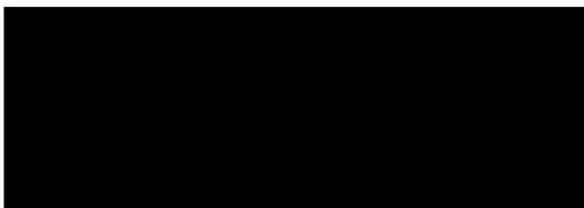


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U.S. Department of Homeland Security
Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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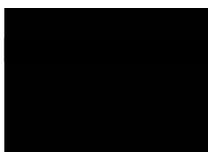
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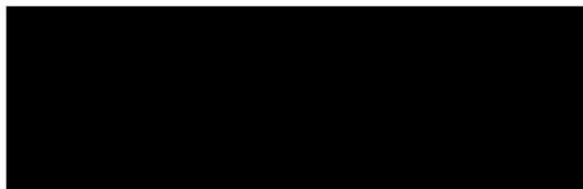
Office: DETROIT

Date: AUG 06 2009

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), as amended by section 235(d) of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (2008)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a 19-year-old native and citizen of South Korea 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).

The Field Office Director issued a revised decision on October 22, 2008, denying the petition for SIJ classification, finding that the petitioner failed to meet the eligibility requirements. Specifically, the Field Office Director found that the petition for SIJ classification was incomplete at the time of filing and at the time of decision because it did not include an order terminating parental rights, or a finding that the petitioner could not return to South Korea.

On appeal, the petitioner contends through counsel that the Field Office Director erred in denying his SIJ petition. First, the petitioner claims that termination of parental rights is not required by statute or regulations. Second, the petitioner contends that he has met all of the statutory and regulatory requirements for SIJ classification.

The record contains, *inter alia*, an Amended Petition for Child Protective Proceedings, dated August 21, 2007, requesting the Berrien County, Michigan Judicial Circuit – Family Division (hereinafter “juvenile court”) to take temporary custody of the petitioner and to remove him from the home of [REDACTED] and [REDACTED]; an Order After Preliminary Hearing (Children Protective Proceedings), issued by the juvenile court on August 24, 2007, placing the petitioner with the Department of Human Services for placement, care and supervision; an Order of Disposition, Child Removed from Home (Child Protective Proceedings), issued by the juvenile court on January 23, 2008, referring the petitioner to the Michigan Department of Human Services for placement and care and recommending placement in licensed foster care with potential guardianship approval; a Petition to Terminate Parental Rights, submitted to the juvenile court by the petitioner’s counsel on or around April 11, 2008; an Order issued by the juvenile court on April 17, 2008, continuing the hearing on the Petition to Terminate Parental Rights until May 28, 2008; the petitioner’s response to the Request for Evidence, dated April 28, 2008; and a brief in support of the appeal, dated November 20, 2008.

The AAO reviews these proceedings de novo. *See* 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”). The entire record was considered in rendering a decision on the appeal.

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 Donald Neufeld, 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) (available at http://www.uscis.gov/files/nativedocuments/TVPRA_SIJ.pdf) (hereinafter *TVPRA – SIJ Provisions Memo*). The SIJ provisions of the TVPRA are applicable to this appeal. 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, as amended by section 235(d) of the TVPRA, describes a “special immigrant” 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 chapter;

8 U.S.C. § 1101(a)(27)(J), as amended.

The TVPRA amended the SIJ definition by expanding the group of aliens eligible for SIJ classification to include aliens who have been placed under the custody of “an individual or entity appointed by a State or juvenile court.” See TVPRA section 235(d)(1)(A); *TVPRA – SIJ Provisions Memo* at 2. Second, the TVPRA removed 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); *TVPRA – SIJ Provisions Memo* at 2.¹ Third, the TVPRA provides age-out protection to SIJ petitioners so that after December 23, 2008, a petition for SIJ classification may not be denied based on age “if the alien was a child on the date on which the alien applied for such status.” TVPRA section 235(d)(6); *TVPRA – SIJ Provisions Memo* at 2-3. USCIS interprets the use of the term “child” in the TVPRA to refer to “an unmarried person under 21 years of age.” *TVPRA – SIJ Provisions Memo* at 3. Fourth, the TVPRA requires USCIS to adjudicate SIJ petitions within 180 days of filing. See TVPRA section 235(d)(2); *TVPRA – SIJ Provisions Memo* at 4.

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 the USCIS District Director, to “consent[] to the grant of special immigrant juvenile status.” TVPRA section 235(d)(1)(B); *TVPRA – SIJ Provisions Memo* at 3. This consent determination “is an acknowledgement that the request for SIJ classification is bona fide,” meaning that neither the dependency order nor the best interests determination were “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.” See Memo. from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship and Immig. Servs., to Reg. Dirs. & Dist. Dirs., *Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions* (May 27, 2004) at 2 (available at http://www.uscis.gov/files/pressrelease/SIJ_Memo_052704.pdf) (quoting H.R. Rep. No. 105-405 at 130 (1997) (hereinafter *SIJ Memo #3*)). “An approval of an SIJ petition itself shall be evidence of the Secretary’s consent.” *TVPRA – SIJ Provisions Memo* at 3. Second, the TVPRA transferred the “specific consent” function, which applies to juveniles in federal custody, from the Secretary of Homeland Security, as previously delegated to U.S. Immigration and Customs Enforcement, to the Secretary of Health and Human Services. *Id.*

The record reflects that the petitioner entered the United States on July 24, 2006, with a J-1 visa. See *Form I-485, Application to Register Permanent Residence or Adjust Status*, filed Nov. 8, 2007. On August 28, 2007, USCIS granted the petitioner’s application to change his nonimmigrant status from J-1 to B-2, valid from August 27, 2007 to December 12, 2007. See *Form I-797A, Notice of Action*. After his arrival, the petitioner lived with [REDACTED] and [REDACTED].

¹ Note that 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).

██████████, licensed foster parents in Berrien County, Michigan. *See Amended Petition for Child Protective Proceedings, supra.* The petitioner's brother, ██████████ also resided in the ██████████ home, along with two adopted children and four foster children. *See id.* On August 3, 2007, the Berrien County Children's Protective Services received a referral regarding abuse of some of the children in the Conrad residence. *Id.* The petitioner and his brother were removed from the ██████████ home on August 7, 2007. *See Order After Preliminary Hearing, supra.* According to the allegations in the Petition for Child Protective Proceedings, counsel for the petitioner stated that the petitioner "came to the United States with the intent of being placed in a guardianship with" the ██████████, and that the "ultimate plan was for ██████████ and ██████████ to adopt" the brothers. *See Amended Petition for Child Protective Proceedings, supra; Decision of the Field Office Director, supra* at 3.

The juvenile court held a preliminary hearing on August 7, 2007, which was adjourned to provide notice to the petitioner's parents in South Korea. *See Order After Preliminary Hearing, supra.* On or around August 10, 2007, telephone contact was made with the petitioner's parents in South Korea. *See Amended Petition for Child Protective Proceedings, supra.* According to the allegations in the Petition for Child Protective Proceedings, the petitioner's parents were informed of the abuse allegations, but stated that they wanted the petitioner to return to the Conrad residence, and that they would not come to the United States to pick up the petitioner. *See id.* The petitioner's mother was informed of the time and date of the adjourned preliminary hearing, but declined to participate by phone. *Id.* According to the allegations in the Petition for Child Protective Proceedings, the state child protective officer contacted U.S. Immigration and Customs Enforcement, and was informed that as long as the petitioner's visa was valid, he could not be forced to leave the United States. *Id.*

The adjourned preliminary hearing was held on August 22, 2007; the petitioner's parents did not participate. *See Order After Preliminary Hearing, supra.* Regarding the petitioner and his brother, the juvenile court found:

The children are without proper care and custody as, even though they are legally in the United States, there is no power of Attorney or guardianship over the children and the parents refuse to come to America to pick up the children. It is NOT in the children's best interests to be returned to the Republic of Korea. It is NOT in the children's best interest to be returned to the family with whom they were staying in the United States (██████████ and ██████████).

Id. (emphasis in original). The juvenile court placed the petitioner with the Department of Human Services for care and supervision. *Id.* The juvenile court reserved parenting time until further order of the court, and found that "[r]easonable efforts shall be made to preserve and reunify the family to make possible [sic] for the children to safely return home." *Id.*

On January 23, 2008, the juvenile court issued an Order of Disposition, Child Removed from Home (Child Protective Proceedings), finding the "[p]lacement/continuation of the child's

residence in the home of parents or guardians (at time of removal) is contrary to the welfare of the child(ren) because: home environment fosters abuse of minors.” *See Order of Disposition, supra*. The juvenile court based this determination on five exhibits which are not part of the record in this appeal. *Id.* The juvenile court placed the petitioner in the temporary custody of the juvenile court, referring the petitioner to the Michigan Department of Human Services for placement and care, and recommending placement in licensed foster care with potential guardianship approval. *Id.* The juvenile court reserved parenting time of the petitioner’s parents “pending [the] parents contacting [the] Department requesting contact with minors.” *Id.*

The petitioner filed his request for SIJ classification with USCIS on November 8, 2007. *See Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant*. The petitioner was interviewed by USCIS on his SIJ petition on March 4, 2008. The interviewing officer questioned the petitioner’s alleged inability to return to his family in South Korea, and afforded the petitioner 60 days to submit documentation reflecting the termination of parental rights and the inability to return to South Korea. *See Form I-72, dated March 4, 2008*.

On or around April 11, 2008, the petitioner submitted a Petition to Terminate Parental Rights to the juvenile court. *See Petition to Terminate Parental Rights, dated Apr. 11, 2008*. The petitioner, through counsel of record, alleged that his parents have provided no financial or emotional support since he was placed in state custody; that he has made a number of unsuccessful attempts to contact his parents by phone and email; and that his parents have made no attempt to participate in any of the juvenile court hearings. *See id.* The petitioner further alleged that it was in his best interest for the court to terminate parental rights in order for him to legally remain in the United States. *See id.* The juvenile court issued an order on April 17, 2008, continuing the hearing on the Petition to Terminate Parental Rights until May 28, 2008, to allow for further briefing. *See Juvenile Court Order, dated Apr. 17, 2008*. The record does not contain any evidence regarding the juvenile court’s determination on the Petition to Terminate Parental Rights.

On April 28, 2008, the petitioner submitted a response to the USCIS request for evidence. *See Petitioner’s Response to Request for Information, dated Apr. 28, 2008*. The petitioner alleged that he met the requirements for SIJ classification, and that termination of parental rights was not required by law. *Id.* However, he requested a 90-day extension of time to submit the additional evidence requested. *Id.* The Field Office Director issued an initial denial on July 7, 2008. *See Decision of the Field Office Director, dated July 7, 2008* (incorrectly noting that appeal could be made to the Board of Immigration Appeals). The Field Office Director issued a revised denial on October 23, 2008. *See Decision of the Field Office Director, dated Oct. 23, 2008*.

On appeal, the petitioner contends that the Field Office Director erred by requiring a juvenile court order terminating parental rights because termination is not a requirement set forth in the statute or regulations. *See Appeal Brief*. The petitioner further contends that his response to the request for evidence provided adequate support to establish his eligibility for SIJ classification. *See id.*

The petitioner is correct that there is no requirement in the Act or in the SIJ regulations to prove termination of parental rights. *See* 8 U.S.C. § 1101(a)(27)(J), as amended; 8 C.F.R. § 204.11 (1993). However, the petitioner has not met all of the requirements for SIJ classification because he has not provided a juvenile court finding that reunification with his parent(s) is not viable as a result of abuse, neglect, or abandonment. *See* Section 101(a)(27)(J)(i) of the Act, as amended (requiring a finding that “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”).

The petitioner would likewise not qualify for SIJ classification under the previous INA section 101(a)(27)(J)(i), which was in effect when the petitioner sought SIJ classification. That section required that a juvenile be deemed “eligible for long-term foster care due to abuse, neglect, or abandonment,” and 8 C.F.R. § 204.11(a) & (c) (1993) defines “eligible for long-term foster care” as a juvenile court determination that “family reunification is no longer a viable option.” Under the previous statute, therefore, family reunification must not have been viable due to abuse, neglect, or abandonment. In this case, there is evidence to show that the petitioner was removed from the [REDACTED] residence and placed in foster care due to the abusive environment in the [REDACTED] household. *See Order After Preliminary Hearing, supra; Order of Disposition, supra.* However, there is insufficient evidence in this record to show that the juvenile court determined that the petitioner could not be reunited with his parents in South Korea due to abuse, neglect or abandonment. For instance, the juvenile court found that the petitioner’s “parents refuse to come to America to pick up the children.” *See Order After Preliminary Hearing, supra.* The juvenile court also determined, without explanation, that it was not in the petitioner’s best interest to be returned to the Republic of Korea. *Id.* However, the evidence does not show that the court made these two findings because of abuse, neglect, or abandonment by the petitioner’s parents. Further, although the court’s January 23, 2008 Order of Disposition found that the petitioner’s “home environment fosters abuse of minors,” it appears that this finding was related to the home environment in the Conrad household, rather than the petitioner’s home environment in South Korea. *See Order of Disposition, supra.* The petitioner appears to contend that his parents have abandoned him because they have not been responsive to his attempts to make contact with them, and have provided no monetary support after his placement in foster care. *See Appeal Brief.* However, counsel’s assertions in a brief are not evidence, *see Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (noting that the unsupported assertions of counsel do not constitute evidence), and the record does not show that the juvenile court adopted these contentions. In sum, the petitioner has not provided a juvenile court finding that reunification with his parents in South Korea is not viable due to abuse, neglect, or abandonment as required by both the TVPRA and the former statute prior to its amendment by the TVPRA.

Additionally, as explained above, the consent of the Field Office Director is required for SIJ classification. Here, the record supports a determination that the petitioner’s request for SIJ classification was not bona fide. Specifically, the Amended Petition for Child Protective Proceedings reports that the petitioner and his brother “came to the United States with the intent of being placed in a guardianship with [REDACTED] and [REDACTED]” and that they were “in the process of finalizing paperwork so the boys could stay in the country with them and complete

school.” *Amended Petition for Child Protective Proceedings, supra; Decision of the Field Office Director, supra* at 3. Further, in his Petition to Terminate Parental Rights, the petitioner alleged that it was in his best interest for the court to terminate parental rights in order for him to legally remain in the United States. *See Petition to Terminate Parental Rights*. Given this record, the petitioner has not met his burden of showing by a preponderance of the evidence that he sought the juvenile court order primarily for the purpose of obtaining relief from abuse, neglect or abandonment, rather than for the purpose of obtaining an immigration benefit. *See TVPRA – SIJ Provisions Memo, supra* at 3; *SIJ Memo #3, supra* at 2.

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 Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). In this case, the petitioner has not proven eligibility for the benefit sought.

ORDER: The appeal is dismissed