



U.S. Citizenship
and Immigration
Services

C6

[REDACTED]

FILE: [REDACTED] Office: ALBUQUERQUE, NEW MEXICO Date: **DEC 03 2009**

IN RE: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Acting Field Office Director, Albuquerque, New Mexico, 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 2-year-old native and citizen of Mexico 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 Director issued a decision on February 13, 2009, denying the petition for SIJ classification finding that the petitioner was not eligible for the benefit because he was adopted in Mexico before the juvenile court issued the guardianship orders. *See Decision of the Director*. The Director also declined to consent to the guardianship orders serving as a predicate for SIJ classification, finding that the juvenile court's orders were sought primarily for immigration purposes, rather than for relief from abuse, neglect or abandonment. *See id.*

On appeal, the petitioner contends through counsel that U.S. Citizenship and Immigration Services (USCIS) erred in denying his petition for SIJ classification. *See Brief on Appeal*. Specifically, the petitioner asserts that the juvenile court's guardianship orders comport with the findings required for SIJ classification, and as such, express consent was mandatory. *See id.* The petitioner also contends that his adoption, which predated the juvenile court's guardianship orders, does not preclude classification as a special immigrant juvenile. *See id.*¹

The record contains, *inter alia*, a copy of the petitioner's birth certificate; a copy of an adoption decree issued by the First Instance Civil Court at Tenancingo, Mexico, on April 20, 2007; an unsigned copy of a Petition for Guardianship, Confirmation of Foreign Adoption Decree and Issuance of New Mexico Birth Certificate; an Order Granting Petition for Guardianship, Confirmation of Foreign Adoption Decree and Issuance of New Mexico Birth Certificate, issued by the First Judicial District Court of Santa Fe, New Mexico (hereinafter "juvenile court") on June 2, 2008; a Notice of Intent to Deny, dated October 27, 2008; a Response to the Notice of Intent to Deny, dated November 26, 2008; a Second Amended Order Granting Petition for Guardianship, Confirmation of Foreign Adoption Decree and Issuance of New Mexico Birth Certificate, issued by the juvenile court on November 19, 2008; and a Brief on Appeal. 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.

¹ The petitioner correctly contends that USCIS erred in failing to notify him of the right to appeal, which is required under 8 C.F.R. § 204.11(e). The petitioner has suffered no prejudice, however, because his appeal was timely filed.

§ 1255(h). *Id.*; see also Memo. from [REDACTED], U.S. Citizenship and Immig. Servs., et al., to Field Leadership, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions* (Mar. 24, 2009) (hereinafter *TVPRA – SIJ Provisions Memo*).² The SIJ provisions of the TVPRA are applicable to this proceeding. 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 Act[.]

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 located in the United States.” See TVPRA section

² The *TVPRA – SIJ Provisions Memo* is available at http://www.uscis.gov/files/nativedocuments/TVPRA_SIJ.pdf

235(d)(1)(A). 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).³ Third, the TVPRA provides age-out protection to SIJ petitioners so that after December 23, 2008, a petition for SIJ status 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). 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.

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). This consent determination “is an acknowledgement that the request for SIJ classification is bona fide,” *TVPRA – SIJ Provisions Memo* at 3, meaning that neither the dependency order nor the best interest determination was “sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect,” H.R. Rep. No. 105-405 at 130 (1997); *see also* Memo. from [REDACTED] 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 (hereinafter *SIJ Memo #3*).⁴ “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 certain 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. TVPRA section 235(d)(1)(B).

The record reflects that the petitioner was born on February 22, 2007, in Mexico. *See Birth Certificate for* [REDACTED]. On April 23, 2007, the First Instance Civil Court at Tenancingo, Mexico, approved an adoption of the petitioner by [REDACTED] and [REDACTED]. *See Adoption Decree*. The petitioner’s adoptive parents are natives and citizens of Mexico, and lawful permanent residents of the United States. *See Permanent Resident Cards*. Counsel states, without evidentiary support, that the petitioner’s adoptive parents attempted, without success, to obtain a B-2 visa for the petitioner to enter the United States. *See Appeal Brief*; *see also Matter of Obaighbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (noting that unsupported assertions of counsel do not constitute evidence). Counsel also contends that the parents “found out for the first time that an adopted child had to be in the lawful custody of the adopted parents for two years before an I-130 could be filed on [the petitioner’s] behalf.” *See Appeal Brief*. The petitioner

³ 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).

⁴ SIJ Memo #3 is available at http://www.uscis.gov/files/pressrelease/SIJ_Memo_052704.pdf.

asserts that he entered the United States with his adoptive parents on or around June 14, 2007.⁵ *See Form I-360, supra.*

In or around May, 2008, the petitioner's adoptive parents filed a Petition for Guardianship, Confirmation of Foreign Adoption Decree and Issuance of New Mexico Birth Certificate with the juvenile court. *See Petition for Guardianship.* The pleading alleged that "[t]he purpose of this Petition is to protect the minor child and to allow him to be eligible for filing an application for Lawful Permanent Residence in the United States pursuant to 8 USC § 1101(a)(27)(J)(i), (ii)." *Id.* On June 2, 2008, the juvenile court issued an order granting the Petition for Guardianship, Confirmation of Foreign Adoption Decree and Issuance of New Mexico Birth Certificate. *See Guardianship Order, supra.* The juvenile court appointed the couple as guardians for the petitioner under section 45-5-204 of New Mexico Statutes Annotated, and determined that "[i]t is not in the best interests of the child to return to his country of nationality," and that his "welfare and best interests require the court's approval of the parental appointment of guardians." *Id.* The juvenile court also recognized the Mexican adoption decree, and ordered the issuance of a New Mexico birth certificate for the petitioner. *Id.* The petitioner filed a Petition for Special Immigrant (Form I-360), and an Application to Adjust Status (Form I-485), on June 22, 2008. *See Forms I-360, I-485.*

The Director issued a Notice of Intent to Deny the SIJ petition on October 27, 2008, noting, among other things, that the juvenile court did not make the petitioner a dependent of the court, and did not find the petitioner eligible for long-term foster care due to abuse, neglect, or abandonment. *See Notice of Intent to Deny, supra.* In response to the Notice of Intent to Deny, the petitioner submitted a Second Amended Order Granting the Petition for Guardianship, Confirmation of Foreign Adoption Decree and Issuance of New Mexico Birth Certificate, dated November 19, 2008. *See Second Amended Order, supra.* In the Second Amended Order, the juvenile court found, *inter alia*:

_____ was abandoned and neglected by his parents who are unwilling to care [for] him. Immediately after his birth his parents abandoned him and left him with an agency so that he could be adopted.

* * *

The purpose of this Order is to protect _____ and to prevent his return to a life of abuse and neglect in Mexico. This Order will allow him to remain in the United States, reside with the petitioners, remain a dependent of this court, as well as to be eligible to apply for lawful permanent resident status.

It is not in the best interest of the child to return to his country of nationality.

⁵ Counsel also states, without evidentiary support, that he attempted to obtain a grant of humanitarian parole for the petitioner through the El Paso Port Director. *See Appeal Brief.* When the request for humanitarian parole was denied, the Port Director apparently told counsel that the petitioner should be returned to Mexico. *Id.* After "taking a few weeks to deliberate," the family then "file[d] the I-360 that forms the basis of this appeal." *Id.*

It is in the best interests of the child to be [a] dependent of this Court and to continue to reside in the care of the petitioners and to have petitioners appointed as his guardians.

The child is eligible for long-term foster care and guardianship because he has suffered abuse and neglect due to his abandonment by his parents. Reunification with his parents is not a viable option. The child has nobody who can care for him in Mexico[.]

The Director denied the petition for SIJ classification stating that because the petitioner was adopted before the juvenile court issued its guardianship orders, there was no need for the juvenile court to issue an order relieving the petitioner from abuse or neglect. *See Decision to Deny*. The Director did not consent to the juvenile court orders serving as a basis for SIJ classification because the orders “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.” *Id.* On appeal, the petitioner contends that: (1) the juvenile court orders comport with the SIJ requirements; (2) the petitioner’s adoption does not preclude express consent; and (3) express consent in this case is mandatory. *See Appeal Brief*.

Here, the petitioner correctly contends that the juvenile court’s orders comport with the statutory requirements for SIJ classification. First, the juvenile court placed the petitioner under the custody of court-appointed individuals [REDACTED] and [REDACTED]. *See Guardianship Order, supra*. Second, the juvenile court found that reunification with the petitioner’s birth parents was not a viable option because of abuse, neglect, and abandonment. *See Second Amended Order, supra*. Third, the juvenile court determined that it would not be in the petitioner’s best interest to be returned to his country of nationality. *See Guardianship Order, supra; Second Amended Order, supra*.

Additionally, the petitioner’s contention that his adoption does not necessarily preclude a grant of SIJ classification has merit. The AAO notes that nothing in the statute or the regulations specifically precludes eligibility for SIJ classification where the petitioner has been adopted before the juvenile court issues an order related to the petitioner. *See* section 101(a)(27)(J) of the Act; *see also* 8 C.F.R. § 204.11(a) (1993).

However, the petitioner erroneously contends that the Director’s consent is mandatory where the juvenile court makes the required findings. *See Brief on Appeal, supra*. Rather, USCIS must still determine whether the request for SIJ classification is bona fide, or whether the evidence shows that the juvenile court order was “sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.” *SIJ Memo #3, supra* at 2. Here, the record supports the Director’s determination that consent to the grant of SIJ classification is not warranted based on a finding that the petitioner’s request for SIJ classification was not bona fide.

Specifically, the petitioner concedes that the petition for SIJ classification followed unsuccessful attempts to obtain a B-2 visa and humanitarian parole. *See Appeal Brief*. Additionally, counsel notes that the petitioner's adoptive parents were not eligible to file a Petition for Alien Relative (Form I-130) for the petitioner because they did not have two years of legal custody and joint residence, as required by section 101(b)(1)(E) of the Act, 8 U.S.C. § 1101(b)(1)(E). *See Appeal Brief*. Further, although the Petition for Guardianship did state that the juvenile court order was sought "to protect the minor child," it also explicitly noted that the petition was sought to enable the petitioner to seek SIJ classification under the Act. *See Petition for Guardianship*. Finally, while the Mexican adoption decree may have been necessary to protect the petitioner from abuse or neglect, there is no evidence in the record that the guardianship orders in the United States were necessary to protect him from such abuse.⁶ Special Immigrant Juvenile classification is not intended as an alternative to the laws and regulations that provide specific mechanisms for adopted children to obtain immigrant status in the United States.

Accordingly, a preponderance of the evidence indicates that the guardianship orders 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." *SIJ Memo #3, supra* at 2. The Director's decision will therefore be upheld and the appeal will be dismissed.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. Here, the petitioner has not proven eligibility for the benefit sought.

ORDER: The appeal is dismissed.

⁶ The juvenile court found that [redacted] and [redacted] are qualified to serve as guardians for [the petitioner]." *Second Amended Order*. The record contains no evidence to support the petitioner's contention that he "continued to be a neglected child after the adoption" based on his adoptive parents' failure "to properly obtain a visa, or even have knowledge of the process that [he] would have to go through to remain with them in the U.S." *Appeal Brief*.