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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

C6

FILE:

Office: DENVER, CO

Date: MAR 17 2009

IN RE:

Petitioner:

PETITION:

Petition for Special Immigrant Juvenile Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described in 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.


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The special immigrant visa petition was denied by the District Director, Denver, Colorado, and subsequently appealed to the Administrative Appeals Office (AAO). The appeal will be sustained.

The petitioner is a 20-year-old native and citizen of Mexico. He seeks classification as a special immigrant juvenile pursuant to sections 203(b)(4) and 101(a)(27)(J) of the Immigration and Nationality Act (the Act); 8 U.S.C. §§ 1153(b)(4) and 1101(a)(27)(J).

The district director concluded that the order of the juvenile court regarding the petitioner's eligibility for long term foster care did not state that abuse, neglect or abandonment served as the underlying basis for the order. The district director further found that the order only determined that the petitioner was neglected by his father, not his mother, who is residing in the United States, and that a letter from the Department of Human Services, City and County of Denver, dated May 8, 2008 stated that the mother's parental rights remained intact. The petition was denied, finding that the court order regarding the petitioner's eligibility for long-term foster care was not predicated on abuse, neglect or abandonment, and therefore, express consent could not be granted.

On appeal, counsel asserts that the petitioner was placed into foster care out of concern for lack of parental supervision, the presence of the petitioner's mother's abusive boyfriend, and other neglect concerns regarding his mother. Counsel further states that the petitioner was placed into foster care in 2004 with the goal of parental reunification, however, his mother failed to comply with the components of the parenting plan, and a new plan of long-term foster care until emancipation was put into effect in December 2006. In June 2008, an emergency hearing was held in which the judge was fully briefed on the requirements for special immigrant juvenile status, and the petitioner's history. The judge agreed that sufficient evidence was presented to maintain jurisdiction to ensure that the petitioner be classified as a special immigrant juvenile. Counsel states that though the court order does not specifically contain the words "due to abuse, abandonment or neglect" there were several references to parental neglect elsewhere in the evidence submitted to support the court's order, and USCIS should have found this to be a reasonable basis in fact to show that the court's finding of eligibility for long-term foster care "because it was in the Petitioner's best interest and parental reunification is no longer a viable option," was made in light of parental abuse, abandonment or neglect. Counsel further notes that neither the statute nor the regulations require that the words "due to abuse, abandonment or neglect" appear in the court order. With regard to the district director's finding that the petitioner's mother retained her parental rights, counsel notes that loss of parental rights is a different matter and does not preclude a finding of abuse, abandonment or neglect. She notes that state law requires that parental reunification should be a goal wherever possible and that termination of parental rights is relatively rare in cases involving older children and teens who are less likely to be adopted. Counsel concludes that the director's decision was in error and should be reconsidered.

In addition to her brief, counsel provided affidavits from [redacted] City and [redacted] and [redacted] both attesting to their participation in the petitioner's placement in foster care and application for special immigrant juvenile status. Also included is a copy of the Petition in Dependency or Neglect submitted on the petitioner's

behalf on April 20, 2004 (2004 Petition), and referred to in the May 20, 2004 Adjudicatory Order and Treatment Plan Order of the Juvenile Court, City and County of Denver (2004 Court Order).

The record also contains a copy of the 2004 Court Order, and December 19, 2006, June 11, 2008 and October 15, 2008 orders from the Juvenile Court, State of Colorado confirming the petitioner's continued dependency on the court and need for long-term foster care. The entire record has been reviewed in rendering this 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. Section 101(a)(27)(J) of the Act defines a "special immigrant juvenile" in pertinent part 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 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 [now, Secretary of the Department of Homeland Security (DHS)] expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status

The regulatory provisions contained in 8 C.F.R. § 204.11(a) and (c), clarify, in pertinent part that:

- a) *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 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.

....

- (c) *Eligibility*. 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.

A May 27, 2004, Interoffice Memorandum entitled, "Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions", by [REDACTED], Associate Director for Operations, U.S. Citizenship and Immigration Services (CIS) (Henceforth referred to as "Memo"), states in pertinent part that:

Following the 1997 amendments to Sec. 101(a)(27)(J) and the Homeland Security Act of 2002, a juvenile alien seeking classification as a special immigrant juvenile based on a juvenile court's dependency order must have, in all cases, the "express consent" of the Secretary of the DHS [Department of Homeland Security].

....

Express consent means that the Secretary, through the CIS District Director, has "determine[d] that neither the dependency order nor the administration or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.] In other words, express consent is an acknowledgement that the request for SIJ classification is bona fide.

See Memo at 2. The Memo provides further that:

The District Director, in his or her discretion, shall expressly consent to dependency orders that establish – or are supported by appropriate evidence that establishes – that the juvenile was deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and that it is in the juvenile's best interest not to be

returned to his/her home country. Such express consent should be given only if the adjudicator is aware of the facts that formed the basis for the juvenile court's rulings on dependency (or state custody), eligibility for long-term foster care based on abuse, neglect, or abandonment, and non-viability of family reunification, or the adjudicator determines that a reasonable basis in fact exists for these rulings. The adjudicator generally should not second-guess the court rulings or question whether the court's order was properly issued. Orders that include or are supplemented by specific findings of fact as to the above-listed rulings will usually be sufficient to establish eligibility for consent. Such findings need not be overly detailed, but must reflect that the juvenile court made an informed decision.

The role of the District Director in determining whether to grant express consent is limited to the purpose of determining special immigrant juvenile status, and not for making determinations of dependency status.

Upon review of the record, the AAO finds that the Juvenile Court of Colorado was aware of the abuse and neglect inflicted upon the petitioner by both parents and, therefore, had a reasonable basis for issuing its initial order of May 20, 2004. Though that order does not specifically address the abuse and neglect imposed on the petitioner by his mother, the record clearly reflects that the petitioner's case was brought before the court on that and subsequent occasions due to the inability of his mother to provide a proper living environment and that was the reason he was placed in foster care. The affidavits presented on appeal provide a credible outline of the various actions taken on behalf of the petitioner regarding his placement in foster care, court proceedings and application for special immigrant juvenile status. They note that the initial plan was for the petitioner to be reunited with his mother, thus, her parental rights were not terminated. They also note that the petitioner's mother was not compliant with the requirements of the reunification plan, requiring the 2006 and 2008 petitions to the court and the orders extending the petitioner's eligibility for long-term foster care. These affidavits, viewed in conjunction with the court orders and the 2004 Petition, which clearly lists the petitioner's mother as a respondent, present a clear picture that the abuse and neglect by the petitioner's mother was a consideration in the determination 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 as required by Section 203(b)(4)(ii) of the Act. The present record thus reflects the basis on which the juvenile court's order was made, and it reflects that the juvenile court made an informed decision. Based on the above factors, the AAO finds that the district director's denial of express consent to the petitioner's I-360 petition was in error.

In visa petition proceedings, the burden of proof rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner in the present matter has met his burden. The district director's decision denying the I-360 petition is withdrawn and the appeal is sustained.

ORDER: The appeal is sustained. The petition is approved.