



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF K-M-O-P-

DATE: AUG. 11, 2016

APPEAL OF CHARLOTTE, NORTH CAROLINA FIELD OFFICE DECISION

PETITION: FORM I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL
IMMIGRANT

The Petitioner seeks classification as a special immigrant juvenile (SIJ). See Immigration and Nationality Act (the Act) sections 101(a)(27)(J) and 204(a)(1)(G), 8 U.S.C. §§ 1101(a)(27)(J) and 1154(a)(1)(G). SIJ classification protects foreign children in the United States who have been abused, neglected, or abandoned, and found dependent on a juvenile court in the United States.

The Field Office Director, Charlotte, North Carolina, denied the petition. The Director concluded that the juvenile court order was not valid because it was temporary in nature.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and additional evidence. The Petitioner claims that she is the subject of a valid juvenile court order.

Upon *de novo* review, we will dismiss the appeal.

I. APPLICABLE LAW

Section 204(a)(1)(G) of the Act allows an individual to self-petition for classification as an SIJ. Section 101(a)(27)(J) of the Act defines an SIJ 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

(b)(6)

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(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 burden of proof is on a petitioner to demonstrate eligibility for SIJ classification by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

A full review of the record, as supplemented on appeal, does not establish the Petitioner's eligibility. The appeal will be dismissed for the following reasons.

The record reflects that the Petitioner was born in Guatemala on [REDACTED] and entered the United States without inspection, admission, or parole at the age of [REDACTED]. On [REDACTED] 2014, when the Petitioner was [REDACTED] years old, the General Court of Justice, District Court Division, in [REDACTED] North Carolina (juvenile court) issued an Order Granting *Ex Parte* Emergency Custody (emergency custody order) awarding the temporary care, custody, and control of the Petitioner to D-P-E-,¹ her mother. The juvenile court awarded D-P-E- emergency custody pursuant to North Carolina General Statutes (N.C. Gen. Stat. Ann.) section 50A-204(a), which provides for temporary emergency jurisdiction of a State court "if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. Ann. § 50A-204(a) (West 2012). The juvenile court scheduled a further hearing on [REDACTED] 2014, after the Petitioner's [REDACTED] birthday, at which time the juvenile court concluded that it did not have jurisdiction over the Petitioner because she was no longer a minor. *See* N.C. Gen. Stat. Ann. section 50A-102(2), which defines "child" as an individual who has not attained 18 years of age. The Petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (SIJ petition), before her 21st birthday.²

¹ Initials are provided throughout the decision to protect the identities of the individuals.

² The Petitioner filed a previous SIJ petition [REDACTED] which the Director denied. The Director subsequently invited the Petitioner to request United States Citizenship and Immigration Services (USCIS) to reopen the SIJ petition based on the settlement agreement in *Perez-Olano v. Holder*, No. CV 05-3604 (C.D. Cal. 2005) (*Perez-Olano Settlement Agreement*).

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The Act requires the Petitioner to demonstrate that reunification with one or both of her parents is not viable. Section 101(a)(27)(J)(i) of the Act. The Director correctly determined that the Petitioner was not the subject of a valid court order because the emergency custody order was not finalized and accordingly did not demonstrate that permanent reunification with J-C-R-, the Petitioner's biological father, and with A-O-O-, whose name appears as the Petitioner's father on her birth certificate, was not viable. On appeal, the Petitioner asserts that although the emergency custody order is a temporary order, the juvenile court's determinations that the Petitioner was neglected and abandoned by both J-C-R- and A-O-O- were permanent. The Petitioner states that under the regulation at 8 C.F.R. § 204.11, the juvenile court's determination that she was eligible for long-term foster care is the same as finding that reunification with J-C-R- and A-O-O- was not viable. She indicates that the juvenile court intended that its temporary custody order would permanently terminate her fathers' parental rights during the remainder of her minority.

The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044 (2008) addressed eligibility for SIJ classification when a juvenile court or court appointed guardian acts in *loco parentis*, and states, in pertinent part, at section 235(d):

(5) STATE COURTS ACTING IN LOCO PARENTIS. A department or agency of a State, or an individual or entity appointed by a State court or juvenile court located in the United States, acting in *loco parentis*, shall not be considered a legal guardian for purposes of this section

Based on the language at section 235(d)(5) of TVPRA 2008, the term "custody" at section 101(a)(27)(J)(i) of the Act is not satisfied by the emergency custody order because the juvenile court and D-P-E- were acting in *loco parentis* until such time as a final hearing was conducted. *See In re Brode*, 566 S.E.2d 858, 860 (N.C. App. Ct. 2002) (stating, "[w]hen a court invokes emergency jurisdiction, any orders entered shall be temporary protective orders only." (citations omitted)). The hearing that would have determined on a final basis the questions of custody by D-P-E-, and, by extension, the viability of the Petitioner's reunification with either of her fathers, did not take place because the Petitioner turned [redacted] years of age prior to the subsequent hearing. Only in a final hearing could the juvenile court have determined the viability of the Petitioner's reunification with one or both parents and the resulting custody issues. *See* section 235(d)(5) of the Trafficking Victims Protection Reauthorization Act of 2008. The emergency custody order was insufficient to satisfy section 101(a)(27)(J)(i) of the Act at the time it was issued because the court and D-P-E- were acting in *loco parentis* and there was no finality to the proceedings.

In her brief on appeal, the Petitioner asserts that the emergency custody order was valid and enforceable under *LaValley v. LaValley*, 564 S.E.2d 913 (N.C. App. Ct. 2002), which allows a temporary custody order to automatically convert into a final order. This assertion is not persuasive for two reasons. First, the juvenile court did not refer to *LaValley* in the emergency custody order. Second, the North Carolina Court of Appeals stated in *LaValley* that an unappealed temporary emergency order "is not designed to remain in effect for extensive periods of time or indefinitely . . . and must necessarily convert into a final order if a hearing is not set within a reasonable time." *See* 564 S.E.2d 913, 915 n.5. When the juvenile court entered the emergency custody order, it set a date

for a subsequent hearing within a few weeks. Accordingly, *LaValley* does not apply to convert the juvenile court's emergency custody order into an order for permanent child custody.

The Petitioner also asserts that she is eligible for SIJ classification under the *Perez-Olano Settlement Agreement* in that she was both under 21 years of age when she filed the SIJ petition, and was the subject of a valid dependency order that was later terminated due to her age. The Petitioner misinterprets the *Perez-Olano Settlement Agreement*. The stipulation enforcing the settlement agreement clarifies that USCIS will not deny, revoke, or terminate an SIJ petition or an SIJ-based Form I-485, Application to Register Permanent Residence or Adjust Status if, at the time of filing the SIJ petition: (1) the petitioner is or was under 21 years of age, unmarried, and otherwise eligible; and (2) the petitioner either is the subject of a valid dependency order or was the subject of a valid dependency order that was terminated based on age prior to filing.³ Contrary to the Petitioner's assertion, the record does not establish that she was ever the subject of a valid juvenile court order.

As placement of the Petitioner with D-P-E- was temporary, the Petitioner has not satisfied the requirements of section 101(a)(27)(J) of the Act and is ineligible for SIJ classification.

III. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of K-M-O-P-*, ID# 17536 (AAO Aug. 11, 2016)

³ See also USCIS Policy Memorandum PM-602-0117, *Updated Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement* 3 (June 25, 2015), <https://www.uscis.gov/laws/policy-memoranda>.