



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

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

MATTER OF M-H-R-

DATE: MAY 3, 2016

MOTION ON ADMINISTRATIVE APPEALS 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), 1154(a)(1)(G). The 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 Director, Charlotte Field Office, denied the petition. The Director concluded that the Petitioner was not eligible for SIJ classification because the juvenile court order was temporary and, therefore, did not make a permanent finding of nonviability-of-reunification with the Petitioner's mother. We dismissed a subsequent appeal.

The matter is now before us on a motion to reopen and a motion to reconsider. On motion, the Petitioner submits a brief and additional evidence. The Petitioner claims that the petition should be approved because the additional evidence includes a *nunc pro tunc* order indicating that the juvenile court order was as permanent as possible under applicable state law.

Upon review, we will deny the motions.

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;

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(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[.]

Subsection 101(a)(27)(J)(iii) of the Act requires the Secretary of the Department of Homeland Security, through U.S. Citizenship and Immigration Services (USCIS), to consent to the grant of SIJ classification. This consent determination is an acknowledgement that the request for SIJ classification is *bona fide*, which means that the juvenile court order and the best-interest determination were sought primarily to gain relief from parental abuse, neglect, abandonment or a similar basis under state law, and not solely or primarily to obtain an immigration benefit.¹

A motion to reopen must state the new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

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 (AAO 2010).

II. RELEVANT FACTS AND PROCEDURAL HISTORY

The Petitioner was born in El Salvador on [REDACTED] and entered the United States on or about May 29, 2013, without inspection, admission, or parole. She was apprehended by U.S. Border

¹ H.R. Rep. No. 105-405 at 130 (1997); *see also* Memorandum from Donald Neufeld, Acting Associate Director for Domestic Operations, USCIS, HQ 70/8.5, *Trafficking Victims Protection Reauthorization Act of 2008; Special Immigrant Juvenile Status Provisions 3* (March 24, 2009), <https://www.uscis.gov/laws/policy-memoranda>.

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Patrol agents at the time of her entry near [REDACTED] Texas, and was issued a Form I-862, Notice to Appear, and placed in removal proceedings. She was then taken into custody of the Office of Refugee Resettlement (ORR) and subsequently released from ORR custody to her father, M-H-P-²

On [REDACTED] 2014, the General Court of Justice District Court Division, [REDACTED] North Carolina (juvenile court), granted an *ex parte* emergency order awarding temporary custody to her father, and scheduled a subsequent hearing for [REDACTED] 2014 “to determine custody of the minor child.” The subsequent hearing never took place because the Petitioner turned [REDACTED] on [REDACTED] [REDACTED] 2014, and was no longer considered a minor under North Carolina law as of [REDACTED] 2014.

As noted above, the Director denied the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, based on a finding that the *ex parte* emergency order was temporary and, therefore, did not make a permanent finding of nonviability-of-reunification with the Petitioner’s mother. In our dismissal of the Petitioner’s appeal, we determined that because the juvenile court’s findings were made on an emergency basis, subject to a subsequent custody hearing, the *ex parte* emergency order was not a qualifying juvenile court dependency order when it was issued, as required by section 101(a)(27)(J) of the Act. Our previous decision is incorporated herein by reference.

III. ANALYSIS

On motion, the Petitioner submits an “Order for Judgment Nunc Pro Tunc” from the juvenile court (*nunc pro tunc* order), which corrects the prior *ex parte* emergency order to include the following findings of fact:

The Court determines that: (1) it has jurisdiction over [the Petitioner] and that she is dependent upon this Court; (2) Reunification with the biological mother is not viable due to neglect and abandonment under state law; (3) it is not in [the Petitioner’s] best interest to return to El Salvador; and (4) it is [the Petitioner’s] best interest for temporary and permanent custody to be awarded to the Plaintiff.

The *nunc pro tunc* order also provides “[t]hat due to [the Petitioner’s] age at the time the [*ex parte* emergency] order was entered, the [*ex parte* emergency] order was as permanent as possible under North Carolina Law.”

The juvenile court awarded the Petitioner’s father temporary custody pursuant to North Carolina General Statutes (NCGS) 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 2013).

² Name withheld to protect identity.

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The Petitioner's *ex parte* emergency order provided that its terms were to remain in effect and the court was to retain jurisdiction over the matter until a subsequent hearing to determine the custody of the Petitioner, which was scheduled for ██████████ 2014. Because the Petitioner turned ██████ one day before the next scheduled hearing date, the juvenile court's jurisdiction expired when the Petitioner turned ██████, as did the terms of the *ex parte* emergency order granting temporary custody to her father.

The *nunc pro tunc* order submitted on appeal declares that reunification with the Petitioner's biological mother is not viable due to neglect and abandonment under North Carolina law. Although this new order addresses a deficiency found by the Director with respect to the lack of a non-viability of reunification determination in the *ex parte* emergency order, the Petitioner still remains without a qualifying juvenile court order as required under section 101(a)(27)(J)(i) of the Act.

The juvenile court acknowledges in the *nunc pro tunc* order "[t]hat due to [the petitioner's] age at the time the [*ex parte* emergency] order was entered, the [*ex parte* emergency] order was as permanent as possible under North Carolina Law." However, the North Carolina Court of Appeals has stated that "[w]hen a court invokes emergency jurisdiction, any orders entered shall be temporary protective orders only." *In re Brode*, 566 S.E.2d 858, 860 (N.C. App. Ct. 2002) (citations omitted). As previously noted, the juvenile court invoked its emergency jurisdiction under NCGS section 50A-204(a), and nothing about the *nunc pro tunc* order cures the underlying deficiency of the *ex parte* emergency order, which is that the *ex parte* emergency order was obtained through a proceeding that allows a juvenile court to take temporary jurisdiction over a child when necessary in an emergency to protect the child, and which defers custody determinations to a subsequent hearing.

Accordingly, the *ex parte* emergency order was not a qualifying juvenile court order under section 101(a)(27)(J)(i) of the Act at the time it was issued because there was no finality to the proceedings. Only in the hearing scheduled for ██████████ 2014 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 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044 (2008) (providing that an individual appointed by a juvenile court located in the United States, acting in *loco parentis*, shall not be considered a legal guardian for purposes of section 101(a)(27)(J) of the Act). Consequently, when viewed together the *ex parte* emergency order and the *nunc pro tunc* order are not sufficient to satisfy section 101(a)(27)(J)(i) of the Act.

In our review of the two orders, we also determine that USCIS' consent to the grant of SIJ classification would not be warranted even if the Petitioner had a qualifying juvenile court order. When adjudicating an SIJ Form I-360, USCIS examines the juvenile court order to determine if it contains the requisite findings of dependency or custody, non-viability of reunification with one or both parents, and the best interests determination, as required by sections 101(a)(27)(J)(i) and (ii) of the Act. USCIS requires the factual basis for a juvenile court order so it may fulfill its required consent function.³ Juvenile court orders that include or are supplemented by specific findings of fact

³ A "factual basis" means the facts upon which the juvenile court relied in making its rulings or findings.

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will generally be sufficient to establish eligibility for consent. Although a juvenile court's findings need not be overly detailed, they must reflect that the juvenile court made an informed decision.⁴

In the *ex parte* emergency order, the juvenile court found generally that the Petitioner's biological mother "abandoned and neglected [the Petitioner] in 2008 by stopping to provide safety, shelter, and food for her." However, the record is not supported by facts that the juvenile court relied upon to come to its conclusions. The declaration in the *nunc pro tunc* order that reunification with the Petitioner's biological mother is not viable due to neglect and abandonment under North Carolina law also lacks a sufficient factual basis. As noted by the Director, statements regarding the Petitioner's circumstances while living in El Salvador submitted by the Petitioner and her father in response to a notice of intent to deny (NOID) issued by the Director are dated after the date of the *ex parte* emergency order and the Petitioner does not assert that they were considered by the juvenile court prior to issuance of either the *ex parte* emergency order, or at the time of the *nunc pro tunc* order.

In addition, although the *nunc pro tunc* order states that reunification with the Petitioner's biological mother "is not viable due to neglect and abandonment under state law" the juvenile court does not specify, and the record does not contain, the state law(s) that were considered. Therefore, USCIS' consent to SIJ classification is not warranted, as when viewed together, both the *ex parte* emergency and the *nunc pro tunc* orders do not provide a reasonable factual basis upon which the juvenile court determined the non-viability of the Petitioner's reunification with her mother.

In her brief on appeal, the Petitioner asserts that the juvenile court that issued the *nunc pro tunc* order "held that [the juvenile court order] was as permanent as possible under *LaValley* because the Petitioner aged out four days later." This assertion is not persuasive for two reasons.

First, the juvenile court did not refer to *LaValley v. LaValley*, 564 S.E.2d 913 (N.C. App. Ct. 2002), in either the *ex parte* emergency order or the *nunc pro tunc* order. Second, as we discussed in our prior decision, the North Carolina Court of Appeals held in *LaValley* that an unappealed temporary custody order converts into a final order "if a hearing is not set within a reasonable time" and we noted that, in this matter, when the juvenile court issued the *ex parte* emergency order, the juvenile court also set a date for a subsequent hearing, which was to occur five days later. The subsequent hearing was to occur within a reasonable period of time but it was set for a date one day after the Petitioner's [REDACTED] birthday, which, as noted above and in our prior decision, was when the juvenile court no longer had jurisdiction over the Petitioner. Accordingly, the *ex parte* emergency order issued on [REDACTED] 2014 did not convert into a final order as described in *LaValley*.

In summary, the Petitioner remains ineligible for SIJ classification because the *ex parte* emergency order was not a qualifying juvenile court order when it was issued and the *nunc pro tunc* order does

⁴ See Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQADN 70/23, *Memorandum No. 3 – Field Guidance on Special Immigrant Juvenile Status Petitions*, 4-5 (May 25, 2004) (where the record demonstrates a reasonable factual basis for the juvenile court's order, USCIS should not question the juvenile court's rulings).

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not cure that deficiency. In addition, even if the Petitioner had submitted a qualifying juvenile court order, USCIS' consent to the grant of SIJ classification would not be warranted as the record does not contain evidence of the factual basis for the juvenile court's SIJ findings.

IV. CONCLUSION

As in all visa petition proceedings, the Petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of M-H-R-*, ID# 15875 (AAO May 3, 2016)