U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-P-P-

DATE: MAY 9, 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). 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 non-viability-of-reunification with one or both of the Petitioner's parents.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief. The Petitioner claims that the petition should be approved because a subsequently-obtained *nunc pro tunc* order indicates that the juvenile court order was as permanent as possible under applicable state law.

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
>
> (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]

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 Guatemala on [redacted] and entered the United States on or about January 14, 2014, without inspection, admission, or parole. He was apprehended by U.S. Border Patrol agents at the time of his entry near [redacted] Texas, and was issued a Form I-862, Notice to Appear, and placed in removal proceedings. He was then taken into the custody of the Office of Refugee Resettlement (ORR) and subsequently released from ORR custody to his brother, M-P-P-.[2] On [redacted] 2015, the General Court of Justice, [redacted] North Carolina (juvenile court), granted an *ex parte* emergency custody order awarding temporary custody to M-P-P- (*ex parte* emergency order).

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[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.

[2] Name withheld to protect identity.

The Petitioner filed the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, based on the *ex parte* emergency order. The Director issued a notice of intent to deny (NOID) the Form I-360 based on a finding that the *ex parte* emergency order was temporary and, therefore, did not make a permanent finding of non-viability-of-reunification with one or both of the Petitioner's parents. The Petitioner responded to the NOID with a brief and an Order for Judgment Nunc Pro Tunc, dated August 28, 2015, which the Director found insufficient to overcome the grounds for the intended denial (*nunc pro tunc* order). The Director denied the Form I-360 and the Petitioner timely appealed.

III. ANALYSIS

In the *nunc pro tunc* order, the juvenile court found and ordered that, because the Petitioner turned [redacted] four days after the *ex parte* emergency order was entered, the *ex parte* emergency order was "as permanent as possible under North Carolina Law." When initially issuing the *ex parte* emergency order, the juvenile court exercised its jurisdiction over the Petitioner pursuant to North Carolina General Statutes (NCGS) section 50A-204, which provides for the juvenile court's temporary emergency jurisdiction over a child "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).

The *ex parte* emergency order provided that its terms were to remain in effect and the juvenile court was to retain jurisdiction over the matter until a subsequent hearing to determine the custody of the Petitioner, which was scheduled for [redacted] 2015. Because the Petitioner turned [redacted] before the next scheduled hearing date, the juvenile court's jurisdiction expired when the Petitioner turned [redacted] as did the terms of the *ex parte* emergency order granting temporary custody to M-P-P-.

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 the *nunc pro tunc* order does not cure 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 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 [redacted] 2015, 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 his brief on appeal, the Petitioner asserts that the *ex parte* emergency order was as permanent as possible under *LaValley v. LaValley*, 564 S.E.2d 913 (N.C. App. Ct. 2002). This assertion is not persuasive for two reasons. First, the juvenile court did not refer to *LaValley* in either the *ex parte* emergency order or the *nunc pro tunc* order. Second, 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." We note that, when the juvenile court entered the *ex parte* emergency order, the juvenile court also set a date for a subsequent hearing, which was to occur less than one month later. The subsequent hearing was to occur within a reasonable period of time, but it was set for a date approximately two weeks after the Petitioner's birthday, when the juvenile court no longer had jurisdiction over the Petitioner.

The Petitioner is ineligible for SIJ classification because the *ex parte* emergency order was not a qualifying juvenile court dependency order pursuant to section 101(a)(27)(J)(i) of the Act when it was issued and the *nunc pro tunc* order does not cure that lack of qualification.

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 appeal is dismissed.

Cite as *Matter of F-P-P-*, ID# 16455 (AAO May 9, 2016)