



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

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

MATTER OF M-R-C-S-

DATE: SEPT. 12, 2016

APPEAL OF LONG ISLAND, NEW YORK 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-born children in the United States who cannot reunify with one or both parents because of abuse, neglect, abandonment, or a similar a similar basis under state law.

The District Director, New York, New York, denied the petition, concluding that the Petitioner did not establish the required non-viability of reunification with his father because he only provided a temporary court order, and that there was an insufficient factual basis to warrant United States Citizenship and Immigration Services (USCIS) consent.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and additional evidence. The Petitioner asserts that there was a permanent non-viability of reunification finding in the court order, that he provided sufficient evidence to show that there was a reasonable factual basis for the court's findings and to warrant USCIS consent, and that USCIS should not require any additional information beyond the court orders.

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

I. 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

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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 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 primarily to obtain immigrant status.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, 376 (AAO 2010).

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The record reflects that the Petitioner is a citizen of Ecuador who was born on [REDACTED] On [REDACTED] 2015, the Family Court of the State of New York, [REDACTED] (juvenile court), entered an order (juvenile court order), in which the juvenile court made specific findings as described at sections 101(a)(27)(J)(i)-(ii) of the Act relevant to whether the Petitioner qualifies for SIJ classification. In a separate Temporary Order Appointing Guardian of the Person (temporary

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

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order), the juvenile court also appointed T-S-² as temporary guardian for the Petitioner. The temporary order expired on [REDACTED] 2015, the Petitioner's [REDACTED] birthday.

The Petitioner filed the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (SIJ petition), based on the juvenile court order. The Director denied the SIJ petition because the orders were deficient as they were temporary, and USCIS consent to a grant of SIJ status was not warranted because the record did not establish that he sought the juvenile court order primarily for the purpose of obtaining relief from abuse, abandonment, or neglect, rather than for the purpose of obtaining an immigration benefit.

On appeal, the Petitioner submits a brief and copies of previously submitted evidence.³ We have reviewed all of the evidence submitted below and appeal, even if not specifically mentioned in the following decision.

III. 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 relevant evidence in the record does not establish that the Petitioner is eligible for SIJ classification because the juvenile court order is deficient under section 101(a)(27)(J)(i) of the Act.⁴ The plain language of the statute requires that an SIJ petitioner demonstrate that "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." Section 101(a)(27)(J)(i) of the Act. Therefore, a juvenile court must make, in essence, two separate findings: first, that a petitioner has been subjected to abuse, neglect, or abandonment, or a similar basis found under state law; and second, that "due to [such] abuse, neglect, abandonment, or a similar basis found under State law[,] reunification with one or both parents is not viable as a result. The Act explicitly defers findings on issues of child welfare under state law to the expertise and judgment of the juvenile court. *See id.* However, in adjudicating an SIJ petition, we examine the juvenile court order to determine if the court made the requisite findings of dependency or custody, non-viability of reunification with one or both parents, and the best interests determination, required by sections 101(a)(27)(J)(i) and (ii) of the Act.

Here, because the order placing the Petitioner under the guardianship of T-S- was temporary, the juvenile court's finding of nonviability-of-reunification with the Petitioner's father was also issued on a temporary basis. This temporary determination does not establish that "family reunification is

² Initials are used throughout this decision to protect the identities of the individuals.

³ The Petitioner asserts that the Director erred in not considering the transcript of the court proceedings, which he submitted after the deadline for the response to his Notice of Intent to Deny, and just three days before the issuance of the Director's decision. As the transcript was not timely submitted, we find no error on the Director's part in not considering it, but the point is moot as we have considered the transcript on appeal.

⁴ The Director found that the Petitioner's request for SIJ classification was not *bona fide* and did not merit USCIS' consent, but as the order is otherwise deficient, we do not reach the issue of consent in this decision.

no longer a viable option” because the Petitioner has not shown that the court ultimately appointed T-S- as the Petitioner’s permanent guardian. See section 235(d)(5) of the Trafficking Victims Protection and Reauthorization Act (TVPA 2008), Pub. L. 110-457 (providing that a court-appointed custodian who is acting as a temporary guardian is not considered a legal custodian for purposes of SIJ eligibility); see also Neufeld Memorandum, *supra*, at 2.

On appeal, the Petitioner asserts that under New York state law, T-S- was not acting *in loco parentis* because *in loco parentis* applies to situations where rights are derived from parental consent or temporary necessity. He asserts that USCIS erred in relying on a flawed and inaccurate interpretation of section 235(d)(5) to conclude that a temporary guardianship order is not a qualifying dependency order. He distinguishes the guardianship proceedings here from the proceedings referenced in section 235(d)(5) addressing scenarios where a state appointed person or entity acts *in loco parentis* temporarily towards the minor child. The Petitioner maintains that unlike guardianship proceedings in New York which invests permanent legal responsibilities on the legal guardian, the *in loco parentis* doctrine applies only in short-term circumstances in which the parents explicitly entrust the person acting *in loco parentis* with the care of their child or for a short period of time in an emergency situation. This distinction, he asserts, is sufficient to demonstrate that a temporary guardianship order can establish legal guardianship for purposes of the dependency requirements of the Act.

The Petitioner is correct that a New York guardianship order may meet the dependency and/or custody requirements of section 101(a)(27)(J)(i) of the Act.⁵ However, as noted, the guardianship order here was issued as a temporary order and did not result in a final resolution of the underlying guardianship petition. Even when applying the Petitioner’s interpretation that the *in loco parentis* doctrine is legally distinct from a court order of temporary guardianship or custody, section 235(d)(5)’s reference to the doctrine serves to illustrate that temporary or short-term appointments of guardianship or custody by a juvenile court cannot satisfy the dependency and/or custody requirement under section 101(a)(27)(J)(i) of the Act. See also Neufeld Memorandum, *supra*, at 2. The Petitioner does not cite to any legal or binding authority to the contrary.

The Petitioner also contends that the guardianship order and SIJ court orders here are separate and distinct and thus, the temporary nature of the guardianship order did not affect or negate the finality of the juvenile court’s findings (including the non-viability determination) in the separate SIJ order. However, our review of the record shows that the two orders go hand in hand, having been issued together on the same date in the same guardianship proceedings. Although separate filings must be made for a guardianship and SIJ juvenile court order, case law in New York shows that the two orders are intertwined. See generally *In re Maria C.R.*, 35 N.Y.S.3d 416 (N.Y. App. Div. 2016); *Fifo v. Fifo*, 6 N.Y.S.3d 562 (N.Y. App. Div. 2015); *In re Hei Ting C.*, 969 N.Y.S.2d 150, 154 (2013); *Tung W.C. v. Sau Y.C.*, 940 N.Y.S.2d 791, 794 (Fam. Ct. 2011) (Family Court has permitted

⁵ On appeal, the Petitioner also contends that USCIS erred in classifying the temporary guardianship order as “ex-parte” and as a “custody” order. However, the use of incorrect terminology in the Director’s decision has no effect on the outcome of the appeal, as discussed above.

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a SIJS application only where dependency upon the court has been established by way of a guardianship or adoption). Ultimately, the Petitioner's court proceedings did not result in a final disposition of the underlying guardianship petition to establish the finality of the juvenile court findings.⁶ Accordingly, the record does not demonstrate that the SIJ court order is a final order. Moreover, regardless of whether the juvenile court had rendered the requisite non-viability determination in a separate and final order, as noted, the temporary nature of the guardianship order is not compatible with and cannot satisfy the statutory requirement that the Petitioner demonstrate that "family reunification is *no longer* a viable option." Section 101(a)(27)(J)(i) of the Act (emphasis added).⁷ As the juvenile court order here is not a final order, the Petitioner has not established his eligibility for SIJ classification under the Act.

IV. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

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⁶ We disagree with the Petitioner's assertion on appeal that although the order was temporary, the guardianship was permanent "in practice" because the validity of the order lasted only until the Petitioner reached █ years of age (both by the terms of the order and by statute) and was thus, permanent with respect to the duration of her childhood. A temporary award of guardianship is indicative that a final disposition on issues of dependency and guardianship remain outstanding during the relevant period of the Petitioner's minority under New York law. As discussed, such a temporary order of dependency or guardianship cannot establish that parental reunification is not viable as required under the Act.

⁷ On appeal, the Petitioner asserts that the purpose of the TVPRA 2008 modifications was to expand the number of children who qualify for SIJ status. However, the Petitioner's arguments regarding congressional intent and USCIS policy considerations are improperly before us, as we lack authority to waive the requirements of the statute, as implemented by the regulations. See *United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (as long as regulations remain in force, they are binding on government officials).