



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

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

MATTER OF K-J-C-A-

DATE: SEPT. 30, 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 cannot reunify with one or both parents because of abuse, neglect, abandonment, or a similar basis under state law.

The Field Office Director, Charlotte, North Carolina, denied the petition, concluding that the Petitioner's custody order was temporary in nature and did not make a finding that reunification with one or both parents was permanently not viable. The Director further found that the court order did not include specific factual findings regarding abuse, abandonment, or neglect, and that as such, United States Citizenship and Immigration Services (USCIS) consent was not warranted.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and copies of previously submitted evidence. The Petitioner claims that the Act does not require a permanent finding of non-viability of reunification with one or both parents, or that alternately, the court order contained some permanent findings even though it was a temporary order.

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

**I. LAW**

Section 203(b)(4) of the Act allocates immigrant visas 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 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

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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 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.<sup>1</sup>

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

## II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The record reflects that the Petitioner is a citizen of Honduras who was born on [REDACTED] On [REDACTED] 2013, the General Court of Justice, District Court Division, [REDACTED] North Carolina (juvenile court) granted an *ex parte* emergency custody order (temporary court order) to J-P-M,<sup>2</sup> whom the court identified as a family friend of the Petitioner. The temporary court order set another hearing for [REDACTED] 2013. The Petitioner contends that at the hearing on [REDACTED] 2013, the

<sup>1</sup> 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* (Mar. 24, 2009), <https://www.uscis.gov/laws/policy-memoranda>.

<sup>2</sup> Initials are used to protect individuals' identity.

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juvenile court closed the custody case as it no longer had jurisdiction to enter orders regarding custody in the Petitioner's case as she was no longer a minor.

The Petitioner filed the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (SIJ petition) on October 13, 2015, based on the [REDACTED] 2013, temporary juvenile court order. The Director denied the SIJ petition because the order was deficient as it was a temporary order and therefore did not contain a permanent finding of non-viability of reunification with the Petitioner's parents and because the SIJ Petition did not warrant USCIS consent.<sup>3</sup> All the evidence in the record has been reviewed, even if all of the evidence is not discussed in the 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.

#### A. The Court Order does not Contain a Permanent Finding of Non-Viability of Reunification with the Petitioner's Parents

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. 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. The Act explicitly defers findings on issues of child welfare under state law to the expertise and judgment of the juvenile court.<sup>4</sup> 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 J-P-M- was temporary, the juvenile court's finding of nonviability-of-reunification with the Petitioner's parents was also issued on a temporary basis. This temporary determination does not establish that "family reunification is no longer a viable option" because the Petitioner has not shown that the court ultimately granted

<sup>3</sup> The Director also seems to have implied that the court did not make a finding of abuse, neglect, or abandonment by the Petitioner's parents. As this is unclear and we are dismissing the appeal on other grounds, we will not address this further.

<sup>4</sup> 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 27, 2004), <https://www.uscis.gov/archive/archive-laws/archive-memos> (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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permanent custody to J-P-M-. See section 235(d)(5) of the Trafficking Victims Protection and Reauthorization Act (TVPRA 2008), Pub. L. 110-457, 122 Stat. 5044 (2008) (providing that a court-appointed custodian who is acting as a temporary guardian is not considered a legal custodian for purposes of SIJ eligibility).

The deficiency of the Petitioner's *ex parte* emergency order relates back to the language of the TVPRA 2008. The TVPRA 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 Petitioner's North Carolina *ex parte* emergency order because the juvenile court and J-P-M- were acting in *loco parentis* until such time as a final hearing could be 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)). At the hearing that would have determined on a final basis the questions of custody by J-P-M- and, by extension, the viability of the Petitioner's reunification with one or both parents, the court did not make a final determination on permanent placement because the Petitioner had previously turned [redacted] years of age and thus the court lost jurisdiction. Accordingly, the *ex parte* emergency custody order was not sufficient to satisfy section 101(a)(27)(J)(i) of the Act at the time it was issued because the court and J-P-M- were acting in *loco parentis* and there was no finality to the proceedings.

On appeal, the Petitioner contends that although the court's custody placement with J-P-M- was temporary, the temporary court order contained some permanent findings, including the declaration that the Petitioner is dependent on the court and that she is a juvenile eligible for long-term foster care. She further asserts that the court must make a threshold finding that the child has been abandoned or abused to exercise emergency jurisdiction. The Petitioner's statements on appeal do not overcome our determination regarding the validity of the juvenile court's order for the purpose of establishing eligibility for SIJ classification. The juvenile court awarded the Petitioner's guardian temporary custody pursuant to N.C. Gen. Stat. sections 50-13.5(c)(1),(2) and 50A-204. N.C. Gen. Stat. sections 50-13.5(c)(1) and (2) allow for a court's jurisdiction to enter orders providing for the custody of a minor child under N.C. Gen. Stat. section 50A-204, the provision for temporary emergency jurisdiction. Temporary emergency jurisdiction of a child is granted under North Carolina law "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 (West 2013). Neither the temporary court order nor the Petitioner cite to any North Carolina statute or state law that shows that the juvenile court had the authority to make any permanent findings regarding dependency during the *ex parte* hearing.

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The Petitioner also contends USCIS misunderstands North Carolina state law, that an emergency order in North Carolina carries the full force of law, and that because the temporary order lasted until the Petitioner reached the age of majority and determined all the issues, it permanently deprived her parents of their parental rights in practice. She adds that the date set for the second hearing cannot be considered reasonable because it was scheduled for a date after the Petitioner turned [redacted] years of age. However; an order is temporary under North Carolina state law if “either (1) it states a clear and specific reconvening time in the order and the time interval between the hearings was reasonably brief; or (2) the order does not determine all issues.” See *Lamond v. Mahoney*, 583 S.E.2d 656, 659 (N.C. App. Ct. 203)(internal citations omitted)(emphasis added). Regardless of whether, as the Petitioner contends, the court scheduled the next hearing for after the Petitioner turned [redacted] it is clear here that the order states a clear and specific reconvening time and the time interval, 14 days, was reasonably brief. Under the *Lamond* test, only one condition must be met, as it was here, for the order to be considered temporary. As such, the juvenile court order was a temporary order. Further, we disagree with the Petitioner’s assertion on appeal that although the order was temporary, it was permanent in practice because the validity of the order lasted until the Petitioner reached the age of majority. 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 North Carolina law. As discussed, such a temporary order of dependency or guardianship cannot establish that parental reunification is not viable as required under the Act.

The Petitioner further asserts that she is protected under the *Perez-Olano Settlement Agreement* because the only reason J-P-M- was not granted permanent custody over her and the juvenile court lost jurisdiction is because she turned [redacted] years old prior to the second hearing.<sup>5</sup> See USCIS Policy Memorandum PM-602-0117, *Updated Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement* (June 25, 2015), <https://www.uscis.gov/laws/policy-memoranda>. Although we recognize that a validly-issued juvenile court order that terminates based solely on age at the time of filing an SIJ petition does not render a petitioner ineligible for SIJ classification, the Director did not deny the Petitioner’s SIJ petition because she had “aged out” of the court’s jurisdiction. The Petitioner’s temporary order was not a valid order for SIJ purposes as it was deficient in that it did not establish a permanent finding of non-viability of parental reunification. As such, the *Perez-Olano Settlement Agreement* does not apply to the Petitioner’s case.

Additionally, the Petitioner contends that the Director incorrectly concluded that he could not go beyond the juvenile court’s order, as policy allows USCIS to interpret the juvenile court order.<sup>6</sup> The Petitioner misinterprets the memorandum. When adjudicating an SIJ petition, USCIS examines the juvenile court order *only* to determine if it contains the requisite findings of dependency or custody; non-viability of reunification due to abuse, neglect, or abandonment; and that return is not in the

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<sup>5</sup> On appeal, the Petitioner also contends that she still needs protection and that she is still a minor under the laws of Honduras. However, this information is irrelevant to her SIJ petition, as the SIJ petition is governed under North Carolina state and U.S. federal law.

<sup>6</sup> The Petitioner cites to *USCIS Memo #3, supra*.

petitioner's best interests, as required by sections 101(a)(27)(J)(i) and (ii) of the Act. USCIS is not the fact finder in regards to these issues of child welfare under state law. Rather, the statute explicitly defers such findings to the expertise and judgment of the juvenile court. Section 101(a)(27)(J)(i)-(ii) of the Act (referencing the determinations of a juvenile court or other administrative or judicial body). USCIS goes "beyond the court order" and requires the factual basis for the court's findings only so it may fulfill its required consent function. When determining whether the underlying order is deficient and does not make the requisite findings, we cannot go beyond the court order to see if there are sufficient facts for us to determine that the Petitioner was abandoned by her parents. Thus, although the Director requested that the Petitioner supplement the record, as stated above, that was in reference to whether or not the Petitioner's SIJ petition warranted our consent, not whether the requisite findings were made in the order.

Ultimately, the juvenile court's grant of guardianship to J-P-M- through a temporary order is insufficient to demonstrate that reunification with one or both of the Petitioner's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law. Accordingly, 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.

#### B. USCIS Consent is Not Warranted

After examining the juvenile court order to determine if the order contains the requisite findings of dependency or custody; nonviability of family reunification due to parental abuse, neglect or abandonment; and the best-interest determination, USCIS then reviews the relevant evidence to ensure that the record contains a reasonable factual basis for the court's determinations,<sup>7</sup> which demonstrate that the court order was sought primarily to obtain relief from abuse, neglect or abandonment. Where the record lacks evidence providing a reasonable factual basis for the juvenile court order, USCIS may request additional evidence from the petitioner to establish a reasonable basis for the agency's consent to SIJ classification.<sup>8</sup>

The temporary court order here does not provide any support of explanation for its determination that the Petitioner is eligible for long term foster care due to abuse, abandonment, and neglect by her parents. Similarly, the juvenile court did not provide any support or explanation for its determination that it is not in the best interest of the Petitioner to be returned to Honduras. Other than stating generally that the Petitioner was abused, abandoned, and neglected by her parents and that it is not in her best interest to be returned to Honduras, there is no evidence in the record regarding what information was taken into account by the juvenile court in making its non-viability of reunification and best interest determinations. The temporary custody order does not contain specific facts supporting the court's findings, and the record of proceedings does not contain, for example, any separate findings of fact accompanying the orders, or an affidavit from the juvenile court or the Petitioner's guardian summarizing the evidence that was presented to support the

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<sup>7</sup> A "factual basis" means the facts upon which the juvenile court relied in making its rulings or findings.

<sup>8</sup> *USCIS Memo #3 at 5.*

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juvenile court's orders. See *USCIS Memo #3 at 5* (describing the types of evidence that USCIS may request and consider when making a consent determination).

On appeal, the Petitioner resubmits a custody order granting her custody over her younger sister, N-C-A-. The custody order contains facts relevant to the determination of custody for N-C-A-. The Petitioner also resubmits an affidavit describing how her parents treated her. However, there is no evidence that the custody order for N-C-A- or the Petitioner's affidavit were ever submitted to or considered by the court in the custody proceedings, and therefore they do not show what facts the court relied upon when making its findings in the Petitioner's case. As we noted earlier in this decision, USCIS cannot fulfill its consent function under section 101(a)(27)(J)(iii) of the Act absent the facts upon which the juvenile court relied in making its rulings or findings. Accordingly, the record of proceedings does not establish the factual basis for the juvenile court's ruling that the Petitioner was abused, abandoned, and neglected by her parents or that return to Honduras would not be in her best interest.<sup>9</sup>

Based on the preceding discussion, the consent of USCIS to a grant of SIJ classification in this case, as required by section 101(a)(27)(J)(iii) of the Act, is not warranted. Accordingly, the SIJ petition is not approvable and the Petitioner remains ineligible for SIJ classification.

#### 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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<sup>9</sup> A finding that a particular custodial placement is the best alternative available to a petitioner in the United States does not necessarily establish that a placement in a petitioner's country of nationality would not be in the petitioner's best interest. See *Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status*, 58 Fed. Reg. 42843, 42848 (Aug. 13, 1993).