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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

C6



DATE: **JUN 15 2011**

Office: LOUISVILLE, KY

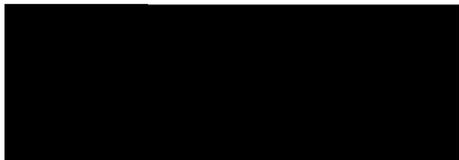
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IN RE:



PETITION: Petition for Special Immigrant Juvenile Pursuant to Section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(J) of the Act, 8 U.S.C. § 1101(a)(27)(J)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Louisville, Kentucky, denied the special immigrant visa petition and dismissed a subsequent motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be sustained.

The petitioner is a 16-year-old native and citizen of Guatemala who seeks classification as a special immigrant juvenile (SIJ) pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4).

The director determined that the petitioner was not eligible for SIJ classification because the juvenile court did not find that parental reunification was not viable due to abuse, neglect, or abandonment. The petition was denied accordingly. On appeal, the petitioner contends through counsel that he is eligible for SIJ classification because the juvenile court found that parental reunification was not viable due to a similar basis found under state law. The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was considered in rendering a decision on the appeal.

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. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (2008), enacted on December 23, 2008, amended the eligibility requirements for SIJ classification at section 101(a)(27)(J) of the Act, and accompanying adjustment of status eligibility requirements at section 245(h) of the Act, 8 U.S.C. § 1255(h). *See* section 235(d) of the TVPRA; *see also* Memo. from Donald Neufeld, Acting Assoc. Dir., U.S. Citizenship and Immig. Servs. (USCIS), et al., to Field Leadership, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions* (Mar. 24, 2009) (hereinafter *TVPRA – SIJ Provisions Memo*). The SIJ provisions of the TVPRA are applicable to this appeal. *See* section 235(h) of the TVPRA.

Section 101(a)(27)(J) of the Act, as amended by section 235(d) of the TVPRA, describes a “special immigrant” 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;

¹ The petitioner filed a motion to reconsider the denial of the petition, which was improperly forwarded to the AAO as an appeal. *See* 8 C.F.R. § 103.5(a)(1)(ii). Pursuant to the director’s request, the petitioner then filed a Form I-290B Notice of Appeal. For purposes of administrative efficiency, the AAO will treat the director’s actions as a denial of the motion to reconsider, and will adjudicate this appeal.

- (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[.]

The TVPRA amended the SIJ definition by expanding the group of aliens eligible for SIJ classification to include aliens who have been placed under the custody of “an individual or entity appointed by a State or juvenile court.” TVPRA section 235(d)(1)(A). The TVPRA also removed the need for a juvenile court to deem a juvenile eligible for long-term foster care due to abuse, neglect or abandonment, and replaced it with a requirement that the juvenile court find that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law. *See id.*²

Additionally, the TVPRA modified the two forms of consent—formerly “express” consent and “specific” consent—required for SIJ petitions. First, instead of “expressly consent[ing] to the dependency order serving as a precondition to the grant of special immigrant juvenile status,” the new definition requires the Secretary of Homeland Security, through the USCIS Field Office Director, to “consent[] to the grant of special immigrant juvenile status.” TVPRA section 235(d)(1)(B). This consent determination “is an acknowledgement that the request for SIJ classification is bona fide,” *TVPRA – SIJ Provisions Memo* at 3, meaning that neither the dependency order nor the best interest determination was “sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect,” H.R. Rep. No. 105-405 at 130 (1997); *see also* Memo. from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship and Immig. Servs., to Reg. Dirs. & Dist. Dirs., *Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions* (May 27, 2004) at 2 (hereinafter *SIJ Memo #3*). “An approval of an SIJ petition itself shall be evidence of the Secretary’s consent.” *TVPRA – SIJ Provisions Memo* at 3. Second, the TVPRA transferred the “specific consent” function, which applies to certain

² U.S. Citizenship and Immigration Services (USCIS) has long defined “eligible for long-term foster care” to mean “that a determination has been made by the juvenile court that family reunification is no longer a viable option.” *See* 8 C.F.R. § 204.11(a) (1993).

juveniles in federal custody, from the Secretary of Homeland Security, as previously delegated to U.S. Immigration and Customs Enforcement, to the Secretary of Health and Human Services. TVPRA section 235(d)(1)(B).

The record reflects that the petitioner was born in Guatemala on [REDACTED], to [REDACTED] and [REDACTED]. See *Birth Certificate for [REDACTED]*. The petitioner arrived in the United States without being admitted or paroled on July 13, 2008, and he was served with a Notice to Appear for removal proceedings on July 14, 2008. The petitioner is scheduled to appear for a master calendar hearing before an immigration judge on November 7, 2011.

On November 17, 2009, the court of Justice for the Commonwealth of Kentucky (hereinafter juvenile court), placed the petitioner in the temporary custody of his brother. See *Order, Temporary Removal Hearing*, dated Nov. 17, 2009. The court found:

1. The child, [REDACTED], was born on [REDACTED] in Tzununul, Guatemala and is a citizen and national of Guatemala.
2. The child is declared a dependent child pursuant to KRS 600.020(19). He will remain a dependent of and under the jurisdiction of this court until his immigration status is decided or until he turns 18 [or 21], whichever comes first.
3. The child's parents reside in Guatemala and are unable to adequately care for the child and, therefore, parental reunification is not a viable possibility.
4. It is not in the best interest of the child to be returned to Guatemala. It is in the child's best interest to remain in the United States.

Id. In an attached order, the court stated that it was not in the best interest of the petitioner to return to Guatemala "due to child being in danger due to gang activity." *Id.*

At the Adjudication Hearing held on December 15, 2009, the juvenile court declared the petitioner to be a "dependent" child, noted that reasonable efforts were made to prevent the petitioner's removal from the home, and ordered that the petitioner continue to remain out of the home and placed with his brother. See *Order, Adjudication Hearing*, dated Dec. 15, 2009. The juvenile court found that the petitioner had been living in the United States with "knowledge [and] agreement of parents," noted that the petitioner's Guardian Ad Litem spoke with the petitioner's mother by telephone, and found that based on the testimony, the petitioner "would be dependent if returned to former custodians." *Id.*

The petitioner filed his Petition for Special Immigrant (Form I-360) with USCIS on November 27, 2009, when he was 15 years old. After the petitioner's interview on January 5, 2010, the director requested additional evidence regarding the juvenile court's findings. See *Notice of Intent to Deny*, dated June 30, 2010. The petitioner submitted responsive evidence. The director denied the petition on August 4, 2010 and dismissed the petitioner's motion to reconsider. The petitioner timely appealed.

Here, the juvenile court found that the petitioner's reunification with his parents was not viable based on its determination that the petitioner was a dependent child. See *Order, Adjudication*

Hearing, dated Dec. 15, 2009. The director determined that the petitioner was not eligible for SIJ classification because the juvenile court did not find that parental reunification was not viable due to abuse, neglect, or abandonment. On appeal, the petitioner contends that he is eligible for SIJ classification because the juvenile court's finding of dependency constituted a similar basis under Kentucky law. This contention has merit.

Kentucky law defines a dependent child as:

any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child[.]

Ky. Rev. Stat. Ann. § 600.020(19). Under Kentucky law, an abused or neglected child is defined, in relevant part, as:

a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:

- (a) Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
- (b) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
- (c) Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
- (d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
- (e) Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
- (f) Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
- (g) Abandons or exploits the child;
- (h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. . . .

Ky. Rev. Stat. Ann. § 600.020(1). Once a judicial determination has been made that a child is dependent, abused, or neglected, the same dispositional alternatives are applicable. *See* Ky. Rev. Stat. Ann. § 620.140. Specifically,

(1) In determining the disposition of all cases brought on behalf of dependent, neglected, or abused children, the juvenile session of the District Court, in the best interest of the child, shall have, but shall not be limited to, the following dispositional alternatives:

(a) Informal adjustment of the case;

(b) Protective orders, such as the following:

1. Requiring the parent or any other person to abstain from any conduct abusing, neglecting, or making the child dependent;
2. Placing the child in his own home under supervision of the cabinet or its designee with services as determined to be appropriate by the cabinet; and
3. Orders authorized by KRS 403.740 and 403.750;

(c) Removal of the child to the custody of an adult relative, other person, or child-caring facility or child-placing agency, taking into consideration the wishes of the parent or other person exercising custodial control or supervision. Before any child is committed to the cabinet or placed out of his home under the supervision of the cabinet, the court shall determine that reasonable efforts have been made by the court or the cabinet to prevent or eliminate the need for removal and that continuation in the home would be contrary to the welfare of the child; or

(d) Commitment of the child to the custody of the cabinet for placement for an indeterminate period of time not to exceed his attainment of the age eighteen (18). To allow participation in state or federal educational programs or to permit the cabinet to assist the child in establishing independent living arrangements, any person who is or has been committed to the cabinet as dependent, neglected, or abused may request that the court extend or reinstate his commitment up to the age of twenty-one (21). The request shall be made prior to the person's attaining eighteen (18) years and six (6) months of age. Upon receipt of the request and with the concurrence of the cabinet, the court may authorize commitment up to the age of twenty-one (21).

Id.

In Kentucky, children adjudged “dependent, neglected or abused” are equally entitled to juvenile court intervention and protection. *See* Ky. Rev. Stat. Ann. §§ 600.020(1), (19), 600.140. The dispositional alternatives for dependent children are identical to those applicable to abused or neglected children, supporting a determination that intervention based on a dependency finding is substantially similar to intervention based on abuse or neglect. *See* Ky. Rev. Stat. Ann. § 600.140.

In this case, the juvenile court: (1) determined that the petitioner was a dependent child; (2) found that parental reunification was not viable because his parents were unable to care for him adequately; and (3) placed him in the custody of his adult brother. Accordingly, the petitioner has shown that the juvenile court placed him in the custody of an adult relative, and determined that family reunification was not viable due to his dependency, a basis similar to abuse, neglect, or abandonment under Kentucky law as required by section 101(a)(27)(J)(i) of the Act. Additionally, the juvenile court determined that it would not be in the petitioner’s best interest to be returned to Guatemala, *see Order, Temporary Removal Hearing*, dated Nov. 17, 2009, which satisfies the best interest requirement set forth in section 101(a)(27)(J)(ii) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the petitioner to establish eligibility for the benefit sought. Here, the petitioner has shown by a preponderance of the evidence that he is eligible for the benefit. Accordingly, the appeal will be sustained, the director’s decision will be withdrawn, and the petition will be approved.

ORDER: The appeal is sustained. The decision of the director is withdrawn, and the petition is approved.