

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



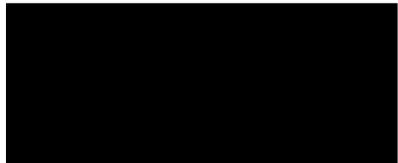
C6

Date: **MAY 14 2012** Office: OMAHA, NE FILE:

IN RE: Petitioner:

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 Omaha, Nebraska Field Office Director denied the special immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner is a 19-year-old citizen of Mexico 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), and as defined at section 101(a)(27)(J) of the Act, 8 U.S.C. § 1101(a)(27)(J).

The Field Office Director (the director) denied the petition based on her belief that the petitioner's request for SIJ status was not bona fide. On appeal, counsel asserts that the director improperly went behind the juvenile court order, disregarded U.S. Citizenship and Immigration Services (USCIS) policy guidance, and improperly relied on irrelevant facts.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Review of the entire record, as supplemented on appeal, fails to support the director's decision. However, because the petition is not approvable based on the present record, the matter will be remanded to the director for further action and issuance of a new decision.

Applicable 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. On December 23, 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), was enacted. *See* Pub. L. No. 110-457, 122 Stat. 5044 (2008). Section 235(d) of the TVPRA 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). *Id.*; *see also* Memo. from Donald Neufeld, Acting Assoc. Dir., U.S. Citizenship and Immig. Servs., 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 case. *See* Section 235(h) of the TVPRA (stating that the TVPRA shall “apply to all aliens in the United States in pending proceedings before the Department of Homeland Security” on December 23, 2008).

Section 101(a)(27)(J) of the Act now 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 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 [.]

The regulations define a "juvenile court" as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a).

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* TVPRA section 235(d)(1)(A).¹

Additionally, the TVPRA modified the "express" consent formerly required for SIJ petitions. 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 USCIS, 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 or abandonment[.]" H.R. Rep. No. 105-405 at

¹ 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).

130 (1997). Approval of an SIJ petition is evidence of the Secretary's consent. *TVPPRA – SIJ Provisions Memo* at 3.

Pertinent Facts and Procedural History

The applicant was born in Mexico on December 21, 1992. On the Form I-360, he stated that he entered the United States without inspection on January 1, 2010 when he was 17 years old. On September 7, 2011, the petitioner was apprehended by U.S. Immigration and Customs Enforcement (USICE) and subsequently placed into removal proceedings before the Omaha Immigration Court. On November 14, 2011, when the petitioner was 18 years old, the Probate Division of the Douglas County Nebraska Court (juvenile court) granted temporary guardianship of the petitioner to [REDACTED] his sister-in-law. The court order states that: the petitioner's father is deceased; "his mother remains in Mexico and is not ready, willing, or able to care for [the petitioner] and as such, he has been abandoned, neglected, or abused by his biological mother, and therefore family reunification is not viable"; it is not in the petitioner's best interest to be returned to Mexico and that it is in his best interest to remain in the United States in the custody and control of his sister-in-law.

On November 21, 2011, when the petitioner was 18 years old, he filed the instant Form I-360 requesting SIJ classification. With the Form I-360, counsel submitted a letter from the petitioner's English as a Second Language (ESL) teacher, copies of the petitioner's birth certificate, the juvenile court order of temporary guardianship, and the death certificate of the petitioner's father who passed away on October 28, 1999 when the petitioner was six years old.

The director denied the petition based on her belief that the petitioner sought the guardianship order primarily to obtain lawful permanent resident status and relief from removal, not to obtain relief from parental abuse, abandonment or neglect. The director noted that the petitioner had been in the United States for over a year without a court-appointed guardian and that he did not seek the juvenile court order until after he was apprehended by USICE and placed in removal proceedings. The director also stated that the petitioner was working and was not enrolled in school at the time of his apprehension and that he was only under the guardianship of his sister-in-law for approximately one month before the order was dismissed because the petitioner had turned 19, the age of majority in Nebraska.

On appeal, counsel asserts that the court order contains all the requisite findings to establish the petitioner's eligibility for SIJ classification and that the director relied on irrelevant facts to determine that the petitioner's request was not bona fide. Counsel also submits immunization and school records showing that the petitioner was enrolled in high school from February to August 2011, reenrolled in January 2012 and that his sister-in-law was identified as his "educational guardian."

Analysis

The director's determination that the petition was not bona fide is misguided, both factually and legally. The director cited the fact that the petitioner was in removal proceedings and nearly 19 years old when he sought the juvenile court order, yet neither of these facts preclude the petitioner's eligibility for SIJ classification. The statute requires only that the order be obtained while the petitioner is under the jurisdiction of the juvenile court and that the Form I-360 be filed before the petitioner reaches the age of 21. Section 101(a)(27)(J)(i) of the Act, 8 U.S.C. §§ 1101(a)(27)(J)(i), 1232(d)(6). The director also stated that the petitioner's guardianship order had been dismissed on January 4, 2012 because the petitioner had reached the age of 19; however, the record contains no copy of this order or any other evidence of the dismissal. Even if the dismissal order was documented in the record, it would not render the petitioner ineligible if the only reason for dismissal was the petitioner's age. *See* 8 U.S.C. § 1232(d)(6) (codifying the age-out protection of TVPRA). *See also* Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54978, 54979, 54985 (Sept. 6, 2011) (to be codified at 8 C.F.R. § 204.11(b)(1)(iv) to provide age-out protection for juvenile court orders valid at the time the SIJ petition is filed, but subsequently discontinued due to the petitioner's age). The director further stated that the petitioner was working and not attending school when he was apprehended by USICE, but the director failed to articulate any relevance of this fact to the petitioner's eligibility for SIJ classification.

The director's determination also relied on a misinterpretation of the law. When adjudicating a petition for special immigrant juvenile status, USCIS examines the juvenile court order only 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, as stated in section 101(a)(27)(J)(i)-(ii) of the Act. USCIS then reviews the relevant evidence to ensure that the record contains a reasonable factual basis for the court's determinations, which demonstrate that the court order was sought primarily to obtain relief from abuse, neglect or abandonment. USCIS is not the fact finder in regards to 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, 8 U.S.C. § 1101(a)(27)(J)(i)-(ii) (referencing the determinations of a juvenile court or other administrative or judicial body).²

Accordingly, the agency's consent determination must be based on material evidence in the record, not a subjective belief that the juvenile court order was sought primarily to obtain an immigration benefit. 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. *See* USCIS Memorandum No. 3 – Field Guidance on Special Immigrant Juvenile Status Petitions, 5 (May 25, 2004). Adjudicators may request the records of the juvenile court proceedings or, where such records are confidential

² *See also* USCIS 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 court's rulings).

and unavailable, an affidavit from the court, or the state entity or the individual who retains custody over the child, summarizing the evidence that was presented to support the court's order. *Id.* Evidence may also include affidavits, letters, evaluations or treatment plans from individuals who know or have worked with the petitioner such as, but not limited to, social workers, health care professionals, guardians, family members and friends. *See* 76 Fed. Reg. at 54981 (describing the types of evidence that USCIS may request and consider when making a consent determination). In this case, the director made a subjective determination that the request was not bonafide. The director cited no deficiency in the juvenile court order and did not request additional evidence from the petitioner. Consequently, the director's decision shall be withdrawn.

The petition is not approvable, however, because the juvenile court order is deficient and the present record does not contain sufficient evidence to establish a reasonable factual basis for the juvenile court order and USCIS consent to the petitioner's request for SIJ classification. The juvenile court order states that the petitioner's father is deceased and that "his mother has abandoned, abused, or neglected him." The order does not specify which of these three circumstances existed in the petitioner's case. The only relevant facts stated in the order are that the petitioner's mother "remains in Mexico and is not ready, willing, or able to care for the minor child" and that the petitioner "left Mexico unaccompanied on his own and traveled to the United States to seek the help of his brother." Apart from the court order, the record contains the death certificate of the petitioner's father and his school records showing that his sister-in-law was listed as his educational guardian. The record contains no evidence from the juvenile court proceedings such as, for example, the original application for guardianship, the transcript of any hearing held on the application or any other evidence the court considered regarding the petitioner's mother's abandonment, abuse or neglect. The record also lacks any statements from individuals who know or have worked with the petitioner that are relevant to the court's findings. Although the petitioner submitted a letter from his ESL teacher, she only discusses his academic performance and does not indicate that she has any knowledge of the circumstances leading to his arrival in the United States and his need for a guardian. In sum, the present record lacks sufficient evidence to support the juvenile court's finding of abuse, neglect or abandonment and to warrant the agency's consent to the petitioner's request for SIJ classification.

The director's decision shall be withdrawn as it is based on an erroneous interpretation of the pertinent facts and applicable law and USCIS policy. Because the petition is not approvable based on the present record, the matter will be remanded to the director to request additional evidence from the petitioner addressing the following deficiencies. The juvenile court order in this case states that the petitioner's mother "is not ready, willing, or able to care" for the petitioner and concludes that he has consequently been "abandoned, neglected or abused by his biological mother" without specifying which of those conditions occurred. The order contains no specific findings of fact to support the determination that the petitioner was "abandoned, neglected or abused" by his mother and the record contains no further documentation from the juvenile court proceedings or other evidence regarding the petitioner's mother's situation in Mexico and her treatment of the petitioner that necessitated the appointment of a guardian. In addition, if the temporary guardianship order has been extended or terminated, the record should be supplemented

with the subsequent order and any evidence pertinent to those judicial proceedings and the agency's consent determination.

Conclusion

In this case, as in all visa petition proceedings, the petitioner bears the burden of proof to establish his eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Although the petitioner has not met his burden of proof, the decision of the director will be withdrawn and the matter will be remanded to the director for further action in accordance with the preceding discussion. The director shall then issue a new decision, which shall be certified to the AAO if adverse to the petitioner.

ORDER: The February 3, 2012 decision of the Omaha Field Office is withdrawn. The petition is remanded to that office for further action and issuance of a new decision. If the new decision is adverse to the petitioner, it shall be certified to the Administrative Appeals Office for review.