

(b)(6)

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



U.S. Citizenship
and Immigration
Services

[Redacted]

Date: **MAY 07 2015**

[Redacted]

IN RE: Self-Petitioner: [Redacted]

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:

[Redacted]

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Charlotte, North Carolina Field Office Director (the “director”) denied the special immigrant visa petition. The matter is now before the AAO upon certification of the director’s subsequent, adverse decision. The decision of the director will be affirmed and the petition will be denied.

The petitioner is a [redacted] year-old citizen of Honduras who seeks classification as a special immigrant juvenile (SIJ) pursuant to sections 101(a)(27)(J) and 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1101(a)(27)(J), 1153(b)(4).

The director determined that the petitioner was not eligible for SIJ classification because the juvenile court’s temporary custody order does not make a permanent finding of nonviability of reunification with the petitioner’s parents, and he denied the petition accordingly. On certification of the director’s adverse decision, the petitioner submits a brief.

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. 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 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 Homeland Security, through a U.S. Citizenship and Immigration Services (USCIS) Field Office Director, to consent to the grant of special immigrant juvenile status. This consent determination “is an acknowledgement that the request for SIJ classification is bona fide,” meaning that neither the custody order nor the best interest determination were “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.” 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*, at 2 (May 27, 2004)(quoting H.R. Rep. No. 105-405 at 130 (1997)).

Pertinent Facts

The record reflects that the petitioner was born in Honduras on [REDACTED] and he entered the United States without inspection from the Mexican border on or about March 14, 2013. He was apprehended by U.S. Border Patrol at the time of his entry in [REDACTED] Texas and issued a Notice to Appear in removal proceedings. The petitioner was taken into custody of the Office of Refugee Resettlement (ORR). On April 12, 2013, the petitioner was released from ORR custody to his mother, [REDACTED]. On April 22, 2014, the General Court of Justice District Court Division, [REDACTED] (hereinafter “juvenile court”) granted an ex parte emergency custody order to the petitioner’s sister, [REDACTED]. *Order Granting Ex Parte Emergency Custody*, Dist. Ct. Div., [REDACTED] (April 22, 2014).

The petitioner filed this Form I-360, Petition for Special Immigrant, on April 24, 2014. The director subsequently issued a Notice of Intent to Deny (NOID) because, among other things, the petitioner failed to provide a permanent custody order. The petitioner responded to the NOID with a brief in which he stated that the temporary custody order converted into a permanent custody order. The director found the petitioner’s assertions to be insufficient to overcome the intended basis of denial. On August 6, 2014, the director denied the petition and certified his decision to the AAO for review. On certification of the director’s adverse decision, the petitioner submits a brief.

We review these proceedings *de novo*. A full review of the record fails to establish the petitioner’s eligibility. The petitioner’s assertions on appeal do not overcome the director’s grounds for denial. The director’s decision will be affirmed for the following reasons.

Analysis

Nonviability-of-Reunification Determination

The director determined that the petitioner failed to demonstrate that he is or was the subject of a qualifying juvenile court dependency or custody order because the ex parte emergency custody order only made a temporary finding that reunification with the petitioner’s parents was not viable. *Notice of Certification*, dated August 6, 2014. On certification, the petitioner asserts that “nowhere in the language of INA section 101(a)(27)(J) is the word ‘permanent’ found as a

requirement for custody determinations.” The petitioner contends that “the delineation between temporary/permanent is both irrelevant and unnecessary” and not required by the Immigration and Nationality Act. The petitioner, however, misconstrues the director’s determination, which is that “the ex parte court order only makes an expressly temporary finding that *reunification is not viable*.” *Notice of Certification*, dated August 6, 2014 (emphasis added). 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.” Section 101(a)(27)(J)(i) of the Act. Here, the juvenile court awarded the petitioner’s sister the “temporary care, custody, and control” of the petitioner subject to a hearing on May 2, 2014. *See Order Granting Ex Parte Emergency Custody*, Dist. Ct. Div., [REDACTED] (April 22, 2014). The juvenile court’s finding of nonviability-of-reunification with the petitioner’s parents was issued on a temporary basis, subject to a redetermination hearing less than two weeks later. 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 permanent custody to the petitioner’s sister. *See* Section 235(d)(5) of the Trafficking Victims Protection and Reauthorization Act (TVPRA 2008), Pub. L. 110-457 (providing that a court-appointed custodian who acting as a temporary guardian is not considered a legal custodian for purposes of SIJ eligibility).

The petitioner asserts that under North Carolina’s dependency law, there is no single factor that determines whether an order is temporary or permanent, nor are there specific limits on the length of time of a temporary order. The petitioner contends that even if the ex parte order was temporary, the North Carolina Court of Appeals has held under *LaValley v. LaValley*, 564 S.E.2d 913 (N.C. App. Ct. 2002) that an unappealed temporary custody order converts into a permanent order at “some point in time.” An order is temporary in North Carolina “if either (1) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (2) the order does not determine all issues.” *Lamond v. Mahoney*, 583 S.E.2d 656, 659 (N.C. App. Ct. 2003)(citing *Brewer v. Brewer*, 533 S.E.2d 541, 546 (N.C. App. Ct. 2000)). In *LaValley* the Court of Appeals stated that “[a] temporary order is not designed to remain in effect for extensive periods of time or indefinitely . . . and must necessarily convert into a final order if a hearing is not set within a reasonable time.” 564 S.E.2d 913, 915 n.5. The Court emphasized that “[w]e are careful to use the words ‘set for hearing’ rather than ‘heard’ because we are aware of the crowded court calendars in many of the counties of this State.” *Id.* In this case, the juvenile court set a hearing date on the same day it issued the temporary custody order and the time interval between the two hearings was less than two weeks.

The petitioner requests that we nevertheless consider the May 5, 2014 hearing date to be “unreasonable” pursuant to *LaValley* because the juvenile court no longer had jurisdiction over the petitioner after he turned eighteen years old on [REDACTED]. However, the petitioner also asserts that USCIS has no authority for “arbitrarily delineating” the custody order as “temporary” or “permanent” under either federal or state law. He contends that USCIS’s authority does not extend to dependency, commitment, or custody determinations within the jurisdiction of state juvenile courts. The petitioner’s latter assertions regarding the limitation of USCIS authority in reviewing a juvenile court’s custody or dependency order are correct. When adjudicating a petition for special immigrant juvenile status, USCIS examines 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, as stated in section 101(a)(27)(J)(i)-(ii) of the Act. 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).¹

Here, the juvenile court issued a custody order for the “temporary care, custody, and control” of the petitioner for a defined period time. *See Order Granting Ex Parte Emergency Custody*, Dist. Ct. Div., [REDACTED] (April 22, 2014). Temporary custody orders in North Carolina may leave certain issues outstanding “pending the resolution of a claim for permanent custody.” *Regan v. Smith*, 509 S.E.2d 452, 454 (N.C. App. Ct. 1998). The petitioner’s request that pursuant to the holding in *LaValley* we treat the temporary custody order as permanent would require us to make a state court determination, which as acknowledged by the petitioner, is outside our authority in these immigration proceedings. We are limited to the court’s findings, which made only a temporary determination regarding the nonviability-of-reunification with the petitioner’s parents. No evidence has been submitted to show that the juvenile court subsequently issued a permanent custody order to the petitioner’s sister.

Finally, the petitioner asserts that USCIS is prohibited by the *Perez-Olano* Settlement Agreement from denying his petition on the basis that the juvenile court’s jurisdiction expired when he turned eighteen years old. The petitioner states that he remains eligible for SIJ classification so long as he was subject to a valid dependency order that subsequently terminated only based on age. The settlement agreement prevents USCIS from denying or revoking the approval of certain SIJ petitions based on age or dependency status if the petitioner was less than 21 years of age and the subject of a valid juvenile court dependency order at the time the petition was filed. *See Perez-Olano v. Holder*, No. CV 05-3604, 7-8 (C.D. Cal. 2005) (Settlement Agreement). The director, however, did not deny the SIJ petition because the petitioner “aged out” of the juvenile court’s jurisdiction after he turned eighteen years of age. *See* N.C. Gen. Stat. Ann. § 48A-2 (West 2015)(defining a minor as “any person who has not reach the age of 18 years.”). The director instead denied the petition because the juvenile court order does not contain the requisite nonviability-of-reunification determination and therefore is deficient under section 101(a)(27)(J)(i) of the Act.

In sum, the juvenile court’s temporary determination does not establish that “family reunification is no longer a viable option” because the court did not ultimately grant permanent custody to the petitioner’s sister. The petitioner is therefore the subject of a temporary custody order that does not contain the requisite nonviability-of-reunification determination under section 101(a)(27)(J)(i) of the Act.

¹ *See 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).

Conclusion

The petitioner failed to establish that he was the subject of a qualifying juvenile court custody order. Consequently, the petitioner does not meet subsections 101(a)(27)(J)(i) of the Act and the petition will remain denied.

In these 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 Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will remain denied.

ORDER: The August 6, 2014 decision of the Charlotte Field Office Director is affirmed. The petition will remain denied.