



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

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

In Re: 17100382

Date: OCT. 20, 2022

Appeal of National Benefits Center Decision

Form I-360, Petition for Special Immigrant Juvenile

The Petitioner seeks classification as a special immigrant juvenile (SIJ) under sections 101(a)(27)(J) and 204(a)(1)(G) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1101(a)(27)(J) and 1154(a)(1)(G). The Director of the National Benefits Center (Director) denied the Petitioner's Form I-360, Petition for Special Immigrant Juvenile (SIJ petition), and the matter is now before us on appeal. The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, the appeal will be dismissed.

I. LAW

To establish eligibility for SIJ classification, petitioners must show that they are unmarried, under 21 years old, and have been subject to a state juvenile court order determining that they cannot reunify with one or both parents due to abuse, neglect, abandonment, or a similar basis under state law. Section 101(a)(27)(J)(i) of the Act; 8 C.F.R. § 204.11(b). Petitioners must have been declared dependent upon the juvenile court, or the juvenile court must have placed them in the custody of a state agency or an individual or entity appointed by the state or the juvenile court. Section 101(a)(27)(J)(i) of the Act; 8 C.F.R. § 204.11(c)(1). The record must also contain a judicial or administrative determination that it is not in the petitioners' best interest to return to their or their parents' country of nationality or last habitual residence. *Id.* at section 101(a)(27)(J)(ii); 8 C.F.R. § 204.11(c)(2).

U.S. Citizenship and Immigration Services (USCIS) has sole authority to implement the SIJ provisions of the Act and regulation. Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 471(a), 451(b), 462(c), 116 Stat. 2135 (2002). SIJ classification may only be granted upon the consent of the Secretary of the Department of Homeland Security (DHS), through USCIS, when the petitioner meets all other eligibility criteria and establishes that the request for SIJ classification is *bona fide*, which requires the petitioner to establish that a primary reason the required juvenile court determinations were sought was to obtain relief from parental abuse, neglect, abandonment, or a similar basis under State law. Section 101(a)(27)(J)(i)–(iii) of the Act; 8 C.F.R. § 204.11(b)(5). USCIS may also withhold consent if evidence materially conflicts with the eligibility requirements such that the record reflects that the request for SIJ classification was not *bona fide*. 8 C.F.R. § 204.11(b)(5). Petitioners bear the burden

of proof to demonstrate their eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

A. Relevant Facts and Procedural History

In [] 2016, when the Petitioner was 20 years old, the [] Family Court in New York issued an order appointing A-S-¹ as the Petitioner's guardian in proceedings brought under section 661 of the New York Family Court Act and section 1707 of the New York Surrogate's Court Procedure Act. The order stated that "the appointment shall last until the [Petitioner]'s 21st birthday" In a separate order issued the same day and titled *ORDER-SPECIAL JUVENILE STATUS* (SIJ order), the Family Court determined, among other findings necessary for SIJ eligibility under section 101(a)(27)(J) of the Act, that the Petitioner "is dependent upon the Family Court, or has been committed to or placed in the custody of a state agency or department, or an individual or entity appointed by the State or Family Court." Additionally, the Family Court found that the Petitioner's reunification with his father was not viable due to neglect and abandonment because his father "has subjected his son to domestic violence" and subsequently abandoned him "by expelling him from the family home since he was 17 years old." Further, the Family Court determined that it would not be in the Petitioner's best interest to be returned to India, his country of nationality, "because in India he has no home." In an [] 2017 *nunc pro tunc* SIJ order, the Family Court cited the state law that formed the basis for its dependency, parental reunification, and best interest determinations and provided additional facts supporting those findings.

Based on the Family Court's orders, the Petitioner filed his SIJ petition in December 2016. The Director denied the petition because the evidence did not establish "that the state court had jurisdiction under state law to make a legal conclusion about returning [the Petitioner] to [his] parent(s)' custody" because he had already reached the age of majority in New York when the Family Court orders were issued.

B. S.D.N.Y. Judgment and Applicability to the Petitioner

In a [] 2020 amended SIJ order, the Family Court indicated in relevant part that the court retains jurisdiction over the Petitioner's custody and care as a minor under New York law. Further, the Family Court specified the state law and facts that formed the basis for its parental reunification and best interest determinations. Additionally, subsequent to the filing of the appeal, the District Court for the Southern District of New York issued a judgment in *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019). In *R.F.M. v. Nielsen*, the district court determined that USCIS erroneously denied plaintiffs' SIJ petitions based on USCIS' determination that New York Family Courts lack jurisdiction over the custody of individuals who were over 18 years of age. 365 F. Supp. 3d at 377-80. The district court also held that USCIS erroneously required that the New York Family Court have authority to order the return of a juvenile to the custody of the parent(s) who abused, neglected, abandoned or subjected the juvenile to similar maltreatment in order to determine that the juvenile's reunification

¹ We use initials to protect identities.

with the parent(s) was not viable pursuant to section 101(a)(27)(J)(i) of the Act. 365 F. Supp. 3d at 378-80.

The district court granted the plaintiffs' motion for summary judgment and for class certification. The court's judgment certified a class including SIJ petitioners, like the Petitioner in this case, whose SIJ orders were "issued by the New York family court between the petitioners' 18th and 21st birthdays" and whose SIJ petitions were denied on the ground that the Family Court "lacks the jurisdiction and authority to enter SFOs [Special Findings Orders] for juvenile immigrants between their 18th and 21st birthdays." *R.F.M. v. Nielsen*, Amended Order, No. 18 Civ. 5068 (S.D.N.Y. May 31, 2019). Here, the record establishes that the Petitioner is a member of the *R.F.M. v. Nielsen* class. However, he remains ineligible for SIJ classification on another ground.

C. USCIS' Consent is Not Warranted

During our adjudication of the Petitioner's appeal, we issued a notice of intent to dismiss (NOID), informing the Petitioner of derogatory information in his case and giving him an opportunity to respond. The Family Court indicated in its initial SIJ order that the Petitioner's reunification with his father was not viable due to neglect and abandonment because his father kicked him out of the home in India in January 2011. In a 2017 personal affidavit submitted in response to a request for evidence from the Director, the Petitioner asserted that his father beat him and his mother at the family home in India in January 2014, resulting in the Petitioner's injury and hospitalization. The Petitioner also stated that after the January 2014 incident, he went to live with his uncle because his "father did not want [him] to return home." Further, the underlying petition for guardianship, which was filed before the Family Court in [REDACTED] 2015, alleged that a guardian should be appointed for the Petitioner because his parents did not live in the United States and that if he returned to India, he would "be returning to the same parents who did not care for him or provide for him."

We notified the Petitioner in our NOID that, contrary to the information he provided the Family Court, government records indicate that the Petitioner's father entered the United States in March 2008 on a B-2 nonimmigrant visa and remained in this country until his departure in May 2017. The records that show the Petitioner's father was present in the United States from March 2008 to May 2017 conflict with his claim before the Family Court that his father kicked him out of the home in India in 2011 and beat him in India in 2014. Furthermore, these records are inconsistent with the claim in the 2015 guardianship petition to the Family Court that neither of the Petitioner's parents were present in the United States.

In response to our NOID, the Petitioner's counsel submits a brief in which she states that we are "wrong" and that "his father was not in the United States in 2008 or any other time." Counsel does not provide any supporting evidence for her claim or specifically rebut our determination, based on government records, that the Petitioner's father lived in the United States from March 2008 to May 2017. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

Counsel also alleges that we violated 8 C.F.R. § 103.2(b)(16)(i), which requires us to advise the Petitioner of derogatory information and provide him an opportunity to rebut that information prior to issuing an adverse decision based on it. She contends that we “fail[ed] to give Petitioner the opportunity to answer to the allegation regarding the father before making its decision,” thereby violating his due process rights, and requests that the matter be remanded to the Director “in order to allow the Petitioner to submit rebuttal evidence.” Counsel appears to have confused our NOID, which was issued for the explicit purpose of notifying the Petitioner of derogatory information and providing him an opportunity to respond, for a decision dismissing the Petitioner’s appeal. In our NOID, we acknowledged that the Petitioner had not yet had an opportunity to respond to the derogatory information. In the final paragraph, we cited 8 C.F.R. § 103.2(b)(16)(i) and explained that we intended to dismiss the appeal based on the derogatory information, but that the Petitioner “may submit evidence to rebut” it prior to our decision in his case.

As discussed, SIJ classification may only be granted upon the consent of the Secretary of Homeland Security, through USCIS, where the petitioner meets all other eligibility criteria. Section 101(a)(27)(J)(i)-(iii) of the Act. For USCIS to consent, the request for SIJ classification must be bona fide, which requires the petitioner to establish that a primary reason for seeking the juvenile court determinations was to obtain relief from parental abuse, neglect, abandonment, or a similar basis under State law. 8 C.F.R. § 204.11(b)(5). USCIS may withhold consent if evidence materially conflicts with the eligibility requirements such that the record reflects that the request for SIJ classification was not bona fide. *Id.* The record contains unresolved discrepancies regarding the presence of the Petitioner’s father in the United States during the time the Petitioner claimed he was neglected and abandoned in India. Additionally, the record contains evidence that materially conflicts with the Petitioner’s claims in the petition for guardianship that his parents were not in the United States and that if he were to return to India, he would have to return to the parents who did not care for him. The Petitioner has not provided any argument or evidence to rebut this information, as our NOID gave him the opportunity him to do, aside from the assertion of counsel that our records are incorrect. Accordingly, the Petitioner has not shown by a preponderance of the evidence that his request for SIJ classification is bona fide, as the regulation requires.

ORDER: The appeal is dismissed.