

Furthermore, the pleadings, whether oral or written, would be of no probative value to the Service's inquiry. Pleadings in Immigration court involve the Respondent either admitting or denying service of the Notice to Appear; Admitting or denying the factual allegations made therein; Conceding or denying the charges made therein; and designating a country of removal. The issues of whether J----'s parents neglected and abandoned her or whether J---- had any contact with her parents at her time of entry into the US would not be addressed in the pleadings.

Upon information and belief, there were no pleadings submitted to the Court in this matter. However, even if written pleadings were submitted to the Court they would not be relevant to the adjudication of J----'s adjustment of status application.

There was a second court involved in this case, the Family Court of the State of New York, ██████ County. Applicant's counsel did not represent her or any other party to the Family Court Proceedings. Since it was unclear which court the Service was referring to in the RFE, undersigned counsel contacted the attorney who represented J---- in the Family Court Proceedings to ask if they were aware of any "date stamped pleadings" in that matter.

J----'s Family Court attorney provided our office with a date stamped copy of the Petition for Guardianship. The Petition for Guardianship does not explicitly contain pleadings but it does make factual allegations. Even if one were to consider the allegations in the petition to be pleadings they would not be relevant to the adjudication of J----'s application for adjustment of status.

Lastly, it is impossible to know what "the order" that the Service references is. There was a Guardianship Order, a Special Findings Order, and an Order of Termination made in this case. It is unclear which order the Service believes to contain a discrepancy. It is further unclear which order could possibly contain information that would be containing a discrepancy with the statements made by J---- at her time of entry or how that would have any relevance to the adjudication of the instant application.

II. There Service's Inquiry is Legally Irrelevant.

The Service requests additional evidence because they believe there is a discrepancy with the order and with the statements made by J---- at her time of entry into the US.

Specifically the Service notes that “the order states that J----’s parents neglected and abandoned her as an infant and despite brief periods of reunification, have not resumed their parental responsibility: however J---- stated her parents paid for [REDACTED] to bring her to [REDACTED] to reunite with them and she contacted her father at the time of her entry.” (See RFE).

The Service states the purpose for requesting additional evidence in this matter is in for them inquire as to whether or not J----’s parents neglected and abandoned her. This is the sole reason provided as justification for the request for evidence.

When adjudicating a Special Immigrant Juvenile Status (SIJS) petition, the Service examines the juvenile Court Order *only* to determine if it contains the requisite findings of dependency/custody; nonviability of reunification due to abandonment; and that return is no in the child’s best interest, as stated in INA §101(A)(27)(J)(i)-(ii). The Service does not act in a fact-finding capacity in regards to these issues. *Matter of A-H-C*, 14684 (AAO 2015). The Statute explicitly defers such findings to the expertise and judgment of the State Court. INA §101(A)(27)(J)(i)-(ii); 8 U.S.C. §1101(a)(27)(J)(i). Accordingly, the Service should not question the State Court’s order. *Id.* See also USCIS Memorandum No. 3 – Field Guidance on Special Immigrant Juvenile Status Petitions, 4-5 (May 25, 2004).

The USCIS Ombudsman Office has explicitly stated, “USCIS is not vested with authority to make dependency determinations. It is not empowered to engage in post-decision legal or factual review of such decisions and it lacks the expertise possessed by state tribunal specializing in family law.” USCIS Ombudsman Recommendation, Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices” April 14, 2001, p. 7.

The New York State Family Court of Queens County maintains exclusive jurisdiction over the guardianship of J---- until she reaches the age of 21 pursuant to 8 U.S.C. §1101(a)(27)(J). The State of New York Family Court of [REDACTED] County entered an order on [REDACTED], 2016, stating the same. The Service has no jurisdiction in that regard. The Service is a Federal Agency under the Administrative Procedures Act (APA). The Service is a specialized Federal Agency created for the purpose of adjudicating immigration benefits, which is why INA §§101(A)(27)(J) and 245, grant the Service exclusive jurisdiction

to adjudicate J----'s Petition for Special Immigrant Juvenile Status and Adjustment of Status.

Similarly, the New York State Family Court has exclusive jurisdiction over the guardianship of J---- and all other family matters relating to her, as it is a State Court created for the purpose of adjudicating family law matters. State Family Court and Juvenile Courts are specialized court of exclusive subject-matter jurisdiction. These Courts were created specifically for the purpose of adjudicating domestic relation matters.

Federal Courts have limited jurisdiction under Article III §2 of the US Constitution. 28 U.S.C. §§1251, 1253, 1331, and 1332. Matters of domestic relations such as child custody or guardianship are purely concepts of State law.

The Federal Government designates matters of domestic relations to the State Courts under the Tenth Amendment of the US Constitution. Further, by enacting the Violence Against Women Act of 1994, 108 Stat. 1916, 42 U.S.C. §13931, Congress expressly confirmed the same stating that 28 U.S.C. §1367 shall not be construed, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of child custody. 42 U.S.C. §13981(e)(4).

When the Service requests evidence underlying State Court orders, it is, in effect, engaging in an inappropriate review of the State Court's decision. Family Court determinations are not a matter of federal law. The Service is not vested with authority to make such determinations. It is not empowered to engage in post-decision legal or factual review of such decisions and it lacks the expertise possessed by state tribunals specializing in family law.

The AAO has found that the Director does not have the authority to look behind the State Court's order to conclude that a SIJS application is not bona fide. *Matter of A-H-C-*, 14684 (AAO 2015). In the instant case the State Court of New York issued an order, which contains the requisite determinations. Therefore, the record demonstrates the *bona fides* of the SIJS classification pursuant to INA §101(a)(27)(J) by a preponderance of the evidence. *Matter of Oliende*, 26 I&N Dec. 127 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010); INA §291; 8 U.S.C. §1361.

Lastly, whether J---- stated that she had contact with her parents or not when she was stopped and questioned by immigration is not relevant line of inquiry for the purposes of this case. Any statement J---- made to immigration officers while be detained as an unaccompanied minor would be inadmissible evidence. Moreover, as an unaccompanied minor child J---- did not have the competency to form the *mens rea* required for a finding of misrepresentation or fraud.

The Service's line of inquiry is completely irrelevant to any legal determination that must be made at this time. The requested evidence is irrelevant to J----'s eligibility for SIJS, her eligibility to adjust status to a permanent resident, and to her legal status in the United States. The Service has no legal need for the evidence being requested and no legal need to reconcile J----'s statements at the border with the Family Court Order.

III. The Primary Purpose Framework Should Not be Applied to SIJS Cases.

The motivation for requesting additional evidence appears to be so the Service may apply what has been referred to as the "primary purpose" framework; to determine if the underlying State Court action was initiated for the primary purpose of obtaining an immigration benefit. The RFE does not explicitly discuss the primary purpose framework but it the RFE indicates that the Service intends to apply this framework.

It is inappropriate for the Service to scrutinize SIJS cases under the "primary purpose" framework, which is not based in the statute or regulations, and which ignores the reality that in many cases, protection from removal is essential to obtaining relief from parental abuse, neglect, or abandonment. As noted above, the "primary purpose" language is not contained in the statute or current regulations. Moreover, this framework is at odds with the reality for many immigrant youth escaping parental abuse, neglect, or abandonment. The Service has itself recognized that immigration relief may be tied in with relief from parental abuse, neglect, or abandonment. In fact, recent USCIS training materials note that, "a mixed motive [of obtaining immigration relief and seeking relief from abuse, neglect, or abandonment] is acceptable and common."¹⁷

¹ USCIS, "Detailed Q & A, Looking Behind Juvenile Court Order," AILA Doc. No. 15043014 (posted on 05/04/15).

² USCIS Policy Manual, Volume 6: Immigrants, Part H – Special Immigrant Juveniles, p. 8.

IV. The Request is Inappropriate Under Relevant Statute & Federal Regulations.

It is inappropriate under the plain language of the Federal SIJS statute for the Service to request documents in the State Court file. The structure and plain language of 8 U.S.C. § 1101(a)(27)(J) make clear that determinations of dependency, legal commitment, custody, and the non-viability of reunification with one or both parents due to abuse, neglect, abandonment, or a similar basis found under State law are within the purview of the State Court, and not the Service. In addition, the structure and plain language of the SIJS statute make clear that determinations of the child's best interest are to be made in administrative or judicial proceedings, and not by the Service. *Id.*

It is prescribed by statute that in order for a child to be eligible for SIJS the child must be dependent on a juvenile court or placed under the custody of an individual appointed by a *State Court* pursuant to *State Law*. 8 C.F.R § 204.11(a); 76 Fed. Reg. 172. "Determining the viability of reunification with one or both of a child's parents due to abuse, neglect, abandonment, or a similar basis under State law is a question that lies within the expertise of the juvenile court, applying relevant State law." 76 Fed. Reg. 172 at 54982.

Further, it is inappropriate under the Federal Regulations that implement the SIJS statute for the Service to request documents in the State Court file. Pursuant to 8 CFR § 204.11(c), which outlines the eligibility requirements for SIJS, determinations about a child's dependency, eligibility for long-term foster care, and best interests are to be made by a State Court in accordance with State Law governing such determinations.

V. The Requested Evidence May be Subject to State Confidentiality Laws.

It is inappropriate for the Service to request the State Court file when it is aware that State confidentiality laws may, and often do, prevent disclosure of juvenile State Court files, especially when such files contain sensitive information regarding child abuse, abandonment and neglect. The Service has recognized this concern and addressed it in official written policy². In New York State, Family Courts are generally closed to the public. Juvenile cases are automatically sealed upon conclusion in certain circumstances. N.Y. Fam. Ct § 375.1; *Matter of Steven R.*, 121 Misc.2d 245 (N.Y. Fam. Ct. 1983).

² USCIS Policy Manual, Volume 6: Immigrants, Part H – Special Immigrant Juveniles, p. 8.

VI. The Request for Evidence was Issued Improperly.

TVPPRA regulations contemplate that where a State Court order finds reunification not viable due to “a similar basis under State law,” additional evidence may be necessary to prove that the basis for the court order is similar to abuse, neglect, or abandonment. 76 Fed. Reg. 172 at 54981. However, neither the regulations nor the Service’s written policies allow for an adjudicator to request more evidence to prove that the child was abused, neglected, or abandonment when the SIJS petition is based on a State Court order that specifically uses the terms abuse, neglect, or abandonment.

In the instant case the Order provided with J----’s Petition specifically includes the terms *neglect* and *abandonment*. It would therefore be improper for the Service to request additional evidence in regards to the instant Petition. The 2011 Ombudsman Office Recommendation³ to the Director of USCIS specifically requests the Service, “cease requesting the evidence underlying juvenile court determination.” The recommendation further explains that the Service may make an inquiry as to whether the State Court’s order was based on neglect or abandonment but the Service is expressly prohibited from engaging in review of the facts and circumstances underlying the determination of the State Court.

The Service appears to be requesting additional evidence in order to provide “consent” pursuant to 8 USC §1101(a)(27)(J)(iii), based on the authority delegated to the Service by the Secretary of Homeland Security. The statute does not provide a standard governing when the Service should consent. The Service has had various conflicting policies over the years regarding when and how consent should be granted in SIJS cases. Pursuant to the Yates Memorandum⁴, “the adjudicator should generally should not second-guess the court rulings or question whether the court’s order was properly issued. Orders that include or are supplemented by specific findings of fact...will usually be sufficient to establish eligibility for consent. Such finding need not be overly detailed.”

In the instant case the Petitioner has provided an order from the State Court, which includes specific findings of fact sufficient to establish eligibility for the Service to consent to the SIJS Petition. Specifically the Court Order states that child’s reunification with one

³ USCIS Ombudsman Recommendation, “Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices” April 14, 2001, pp. 2, 6.

⁴ USCIS Memorandum, William R. Yates, “Regarding Field Guidance on Special Immigrant Juvenile Status Petitions, Memorandum #3,” HQADN 70/23 (May 27, 2004), pp. 4-5.

or both parents would not be viable, “based on the parents’ neglect and abandonment of the child.” The Court further notes, “Parents abandoned the minor as an infant and despite brief period of reunification have not resumed their parental responsibility.” (See Special Finding Order).

The Court’s order is explicit and provides a factual basis for the determination of neglect and abandonment. The Order is sufficient to establish eligibility for the Service to consent to the instant Petition. Therefore, a request for additional evidence is improper.

CONCLUSION

The Petitioner has provided all evidence necessary to demonstrate *prima facie* eligibility for SIJS. The Petitioner has provided an order from a State Family Court declaring her dependent upon a guardian appointed by the State under State law and an order from the State Family Court making a special finding that reunification with Petitioner’s parents is not possible due to abandonment under New York State Law.

Please contact the undersigned if there are any additional concerns regarding this matter. There appears to be no reason for the instant Petition to be denied. We respectfully request the Petition be approved as soon as possible.

Thank you for your time and consideration in this case.

Respectfully Submitted,


Joseph B. Caraccio

Attorneys for the Petitioner
Pollack, Pollack, Isaac & DeCicco LLP
225 Broadway, Suite 307
New York, NY 10007
(212) 233-8100
jbc@ppid.com

Dated: New York, NY
JUNE , 2016