

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION - FAMILY PART  
COUNTY OF XXXXX

In the Matter of

XXX

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) Docket Number None Assigned  
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**BRIEF IN SUPPORT OF  
MOTION TO PETITION FOR CUSTODY  
OF  
XXX**

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On the brief:  
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## **PRELIMINARY STATEMENT**

XXX is a 12-year old male citizen of Haiti who was abandoned by his mother as an infant and by his father at age three. His mother gave custody to his father at birth, who then died in 1992. XXX then lived with various relatives until he arrived in the United States on or about March 4, 2001. If not for the care and support of his Aunt and Uncle in the United States, XXX would have ended up under the supervision of the Division of Youth and Family Services in New Jersey and in the foster care system.

The Aunt and Uncle are petitioning this court to grant them guardianship of XXX so they may provide proper care for him. However, in addition to the normal guardianship petition XXX needs an order from this court finding he was: 1) abandoned by his parents; 2) adjudicating him dependent on the juvenile court and eligible for long term foster care; 3) determining it is not in his best interest to be returned to Haiti; and 4) reaffirming he is in the care and custody of the his Aunt and Uncle. An order containing that specific language is required so that XXX may legally remain in the United States. Below please find the facts and law pertaining to this unique case.

## **STATEMENT OF FACTS**

XXX was born on February 11, 1989 in Haiti. His parents were not married. As an infant he was given up by his mother to his father who had no other children. His father died in 1992. XXX then lived with his paternal grandmother until she died on or about November 1, 1999. He then went to live with his paternal uncle in Haiti. The uncle kept him for two years, until he could no longer afford XXX's care and support. Then his paternal aunt agreed to take over his care, bringing him to the United States on or about March 1, 2001.

The Aunt and Uncle are in the process of applying to the Bureau of Citizenship and Immigration Services (BCIS) for Special Immigrant Juvenile status in the United States for

XXX. In order for that to happen, the BCIS requires a Family Court Judge issue an order containing the specific language contained in the BCIS regulations. Therefore, the Aunt and Uncle come before this Court to request that order.

### **LEGAL ARGUMENT**

Special Immigrant Juvenile (“SIJ”) status is an immigration classification within the Immigration and Naturalization Act (“INA”) permitting certain children, under the age of 21, who have been declared dependent on a juvenile court, or have been placed with a child welfare agency, to obtain status as aliens lawfully admitted for permanent residence. 8 USC sec. 1101(a)(27)(J); INA sec. 101(a)(27)(J). This status was created to allow children without legal immigration status, and who are without parental support, to remain in the United States legally and obtain the full protection of the state. Id.

A child in the United States is eligible for SIJ status if he is dependent on the juvenile court or placed in the custody of a child welfare agency; and that dependency order is on account of abuse, neglect, or abandonment; and the juvenile is eligible for long term-foster care; and it is not in the best interest of the child to be returned to the country of citizenship. 8 USC sec. 1101(a)(27)(J); INA sec. 101(a)(27)(J). The child need not be placed in foster care; a relative may be named as a guardian. Matter of Menivar - A 70 117 167 (Administrative Appeals Unit, Dec. 27, 1994); 72 Interpreter Releases 391 (March 20, 1995).

The Code of Federal Regulations at 8 CFR sec. 204.11(a) defines “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. This section empowers the juvenile courts of New Jersey to make findings necessary for the granting of SIJ status. In fact, without such a determination by the state juvenile court, an immigrant cannot qualify for such status.

The child must submit to the immigration court an order from the family court determining the above facts and explicitly setting them out in the order. 8 CFR sec. 204.11(d). If the correct findings are made, the BCIS District Director will then be able to consent to the child proceeding in immigration court with the Petition for Adjustment to Legal Permanent Resident (i.e. obtain a green card).

Findings by the state court alone will not entitle the child to any immigration benefit in the United States. Rather, the requested findings are preliminary determinations that are prerequisites to the filing of an application for relief with the BCIS. The BCIS has sole discretionary authority to grant or deny the application. However, without the requested findings, the child faces deportation to a country where he has no family and is in grave danger.

**A. XXX is Dependent on the Family Court to Determine Guardianship and Support.**

For the purposes of immigration law, XXX is considered to be dependent upon the Family Court of the State of New Jersey by virtue of the court's acceptance of jurisdiction to determine the issue of guardianship and support.<sup>1</sup> In the context of immigration law, a finding that XXX is dependent upon the court does not require him to be financially dependent on the State or that he be placed in the custody of the State. Nor does the State's placement of the child in a guardianship situation remove him from "dependent on juvenile court" status.

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<sup>1</sup> (IF NEEDED ADD) While the statutory age of majority has been reduced from 21 to 18 in New Jersey, the law recognizes exceptions for dependent and neglected children between the ages of 18 and 21. NJSA 9:17B-2. Further, New Jersey courts uniformly have rejected a *per se* rule that emancipation happens at 18. *see Monmouth County Division of Social Services on Behalf of the Division of Youth and Family Services v. C.R.*, 316 NJ. Super 600 (Chancery Division Family Part, 1998) (father ordered to pay support to DYFS for services to disabled son, even those services rendered after the child turned 18). "...Emancipation is a fact-sensitive event, dependent on the intricacies and various operative facts of each matter." *Id.* At 616.

“The court’s placement of the beneficiary in a guardianship situation does not preclude a finding that the beneficiary is dependent on the juvenile court.” In the Matter of Menivar, at 4. “The acceptance of jurisdiction over the custody of a child by the juvenile court, when the child’s parents have effectively relinquished control of the child, makes the child dependent upon the juvenile court, whether the child is placed by the court in foster care or, as here, in a guardianship situation.” Id.

The Administrative Appeals Unit, whose decisions are binding on the BCIS, determined that even placing a child in a guardianship situation where the child’s father retained some parental rights “does not preclude a finding that the beneficiary is dependent upon the juvenile court.” Id.

The Petitioners here, his aunt and uncle, are not seeking the assistance of the State in providing for XXX, and such assistance is not required for a finding of dependency. However, by accepting jurisdiction to determine the issue of XXX’s guardianship and support, the court exercises control and therefore, in effect finds XXX dependent upon the juvenile court.

Therefore, once this court accepts jurisdiction it has found XXX is dependent on the juvenile court for the purpose of establishing eligibility for SIJ status.

**B. The Dependency on the Juvenile Court is on Account of Abandonment by his Parents.**

In the context of a termination of parental rights proceeding, the court in In re Guardianship of K.L.F., explained if a parent “evidences a settled purpose to forego all parental duties and relinquish all parental claims to the child” the parent has abandoned the child. 129 N.J. 32, 39 (1992). The fact that the parents may be morally blameless is not conclusive on the issue of permanent custody; N.J.S.A. 30:4C-15(c) speaks to the “best interest of the child,” not

parental culpability. In the Matter of the Guardianship of R., G. and F., Minors, 155 N.J. Super. 186, 195-196.

In the present case, XXX's mother gave up custody at birth to his father. His father died in 1992. XXX then lived with various family relatives both in Haiti and the United States. His mother is believed to be alive and in Haiti, but her whereabouts are unknown.

The only relative willing to provide the care he needs is his aunt and uncle in the United States. As such, his dependency on the court is on account of abandonment by his parents.

**C. XXX is Eligible for Long Term Foster Care.**

XXX is eligible for long-term foster care because reunification with his family is not an option. A child need not be placed in long-term foster care, but must only be eligible for it, as defined by the Federal Regulations at 8 CFR 204.11(a).

For the purposes of establishing and maintaining eligibility for classification as a Special Immigrant Juvenile, a child who has been adopted or placed in a guardianship situation after having been found to be dependent upon the juvenile court in the United States will continue to be considered to be eligible for long-term foster care. Id.

Therefore, once this court places XXX in the custody of his aunt and uncle, he is and will remain eligible for long term foster care.

**D. It is Not in XXX's Best Interest to be Returned to Haiti.**

In issuing final regulations relating to SIJ status, the BCIS has stated that the “[immigration] service does not intend to make determinations in the course of deportation proceedings regarding the ‘best interest of the child’ for the purpose of establishing eligibility for Special Immigrant Juvenile classification.” Federal Register, Vol. 58, no. 54,42847 (August 12, 1993). “The final rule states that the decision concerning the best interest of the child may only

be made by the Juvenile Court, or in administrative proceedings authorized or recognized by the juvenile court.” Id.

XXX has no family left willing to care for him in Haiti. He has no natural brothers or sisters; his mother has had no contact with him since birth and her whereabouts, if she is still alive, are not known; and other more distant family members have refused to help him.

The Aunt and Uncle have generously agreed to take care of XXX and accept him into their family. The Aunt and Uncle have two sons and one daughter living at home, XXX would be the youngest child in their family. The Aunt and Uncle are providing a safe, secure and loving home in the United States. It is clearly in his best interest to remain in the United States rather than be returned to Haiti.

### **CONCLUSION**

For the purpose of establishing eligibility to file for Special Immigrant Juvenile status, XXX is dependent upon this court on account of the abandonment by his mother and then death of his father. He is eligible for long-term foster care because without the support of his aunt and uncle’s family he would be homeless. Finally, as shown by the attached documents, it is clearly not in his best interest to be returned to Haiti.

An order by the court explicitly finding the above facts is the only way XXX will be able to apply for permanent legal immigration status (i.e. obtain a green card) and remain in the loving and safe home of his aunt and uncle.

This court has the authority to make such a finding by federal statute. This court is in fact actually required to issue these findings before an immigrant may qualify for this benefit under the INA. Without such an order, XXX will face deportation to Haiti where there is no one who

will support him. If he were returned to Haiti he would be left to his own initiative to survive in the poorest country in the Caribbean.



It is therefore respectfully requested that this court issue the attached order making the requisite findings enabling XXX to apply for Special Immigrant Juvenile status and remain with his Aunt and Uncle, the only family he has.

DATED: October 10, 2001

Respectfully

Submitted,

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