FAMILY COURT OF THE CITY OF NEW YORK COUNTY OF KINGS

-------------------------------------------- X

Proceedings for the Appointment of a Guardian of the

Person or Permanent Guardian of,

 Docket No:

 Family File No:

 **NOTICE OF MOTION**

Shodijon Shodiev

A person Under the Age of 21

-------------------------------------------- X

A Proceeding under Article 6 of the Family Court Act

PLEASE TAKE NOTICE, that upon the annexed Memorandum of Law in Support of Petition for Guardianship and Motion for Special Findings, June 6, 2024; and all exhibits hereto attached; and all proceedings heretofore, a motion will be made in Family Court of the State of New York, County of Kings located at 330 Jay Street, Brooklyn, NY 11201 filed on June 6, 2024, for a guardianship hearing, a hearing on the matter of Special Findings, and for an order for making factual findings that:

1. Finding that Shodijon Shodiev is under the age of twenty-one;
2. Finding that Shodijon Shodiev is unmarried;
3. Finding that Shodijon Shodiev been placed under the guardianship of an individual appointed by a juvenile court;
4. Finding that reunification with Shodijon Shodiev’s parents is not viable due to abandonment, neglect, and abuse and also given that both parents are deceased;
5. Finding that it is not in Shodijon Shodiev’s best interest to be returned to Uzbekistan.
6. Granting such other and further relief as this Court deems just and proper.

Dated: Brooklyn, New York

June 6, 2024

Respectfully submitted,

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**INTRODUCTION**

This Memorandum of Law is submitted on behalf of Shodijon Shodiev (hereinafter “Shodijon”) in support of Shodijon’s’ petition for guardianship to have Shokirjon Kamilov (‘hereinafter “Mr. Kamilov”) appointed as his guardian, and particularly, in support of his Notice of Motion seeking an order making certain factual findings.

Shodijon cannot be reunified with both of his parents due to abuse, neglect, abandonment, or other similar basis under state law. Shodijon, therefore, asks the Family Court to grant the underlying guardianship petition, and additionally asks the Family Court, by way of the Notice of Motion simultaneously filed with this Memorandum, to make five specific factual findings. (discussed *infra).*

**ARGUMENT**

**I. FAMILY COURT HAS JURISDICTION OVER THE PETITION FOR GUARDIANSHIP OF SHODIJON.**

The Family Court has jurisdiction in matters related to guardianship of the person of a minor or infant and permanent guardianship of a child. N.Y. Fam. Ct. Act § 661 (McKinney 2010).

1. **The Family Court Must Determine the Best Interests of Sodijon in Deciding the Guardianship Petition.**

In New York, a “best interest” test is used to determine whether the guardianship should be awarded to a petitioner. *Friederwitzer v. Friederwitzer,* 55 N.Y.2d 89 (1982). “The ‘best interest of the child’ in the ‘totality of circumstances’ is the touchstone for determining who shall have the guardianship and custody of an orphaned child.” *Id.* This requirement applies with equal force in guardianship cases where a Special Findings motion is made. “When considering guardianship appointments, the infant's best interest is paramount.” *In re Trudy-Ann W,* 73 A.D.3d 793, 794 (2d Dept. 2010). In determining a guardianship petition, the Family Court must take into consideration all relevant factors that bear upon the Subject Child’s best interests, which include physical and psychological health, welfare, and happiness. Notably, whether or not the Subject Child will eventually seek immigration relief and how soon the Subject Child will reach the age of majority, are not facts in determining a Subject Child's best interests. *Id.* (Trudy Ann W’s application for a Special Findings Order was granted by the Appellate Division mere days before her 21st birthday.)

In this case, granting guardianship to Shokirjon is in the best’s interests of Shodijon. The appointment of Shokirjon as the guardian will ensure that Shodijon remains in a stable, safe, and supportive relationship with a responsible adult. Shokirjon, as guardian, will be able to assist Shodijon in making legal, medical, and educational decisions on Shodijon’s’ behalf and will ensure that he will receive care, advice, encouragement, and guidance through adulthood.

1. **It is in the Best Interest of Shodijon to be able to Apply for Special Immigration Juvenile Status.**

Short of being a citizen, Lawful Permanent Residence is the most stable and enduring form of immigration status available to any immigrant, in that it allows an immigrant to remain lawfully in the United States indefinitely (subject to some restrictions) as well as to work legally, enlist in the Armed Forces, apply for federally subsidized financial aid for college, and eventually, apply for full United States Citizenship via naturalization. By comparison, if an undocumented minor does not secure Special Immigration Juvenile Status (hereinafter “SUS”) (and then Lawful Permanent Residence), and instead remains undocumented, the chances of having a meaningful and productive life, in terms of education, employment, civic involvement, and responsible adulthood are greatly reduced. Accordingly, it is clearly in Shodijon’s best interest to be able to apply for Special Immigrant Juvenile Status.

1. **FEDERAL LAW SPECIFICALLY DELEGATES RESPONSIBILITY TO THE FAMILY COURT TO MAKE FACTUAL FINDINGS IN RELATION TO SPECIAL IMMIGRATION JUVENILE STATUS.**

Since 1990, the United States Government has offered SIJs as a form of protected immigration status to immigrant minors who have been abused, neglected, abandoned, or who have experienced similar circumstances. This memorandum and the accompanying Notice of Motion have been filed in Family Court because Congress has specifically delegated responsibility for making factual findings related to SIJS to a “juvenile court” at the state level. New York Family Court is a “juvenile court” within the meaning of the federal statute and is the entity entrusted with making these findings over minors within state jurisdiction. 8 C.F.R. §

204. 11(a) (2008) (defining a juvenile court as any “court located in the United States having jurisdiction under state law to make judicial determinations about custody and care of juveniles.”)

* 1. **Federal Law Delegates Responsibility to Family Court to Make Factual Findings Within Family Court’s Expertise and Traditional Purview.**

For the Subject Child to be eligible to apply to USCIS for SUS, a juvenile or State court must first make findings of fact. Under both state and federal law, the juvenile or State Court does not make any immigration decisions, but rather, makes factual findings concerning the Subject Child. The juvenile or State court - and not USCIS- makes these findings because these are the courts with expertise in juvenile matters.

Clearly, these findings are within the purview of the Family Court, inasmuch as the Family Court Act states that the “court is given a *wide range of powers for dealing with the complexities of family life* so that its action may fit the particular needs of those before it.” The judges of the court are thus given wide discretion and grave responsibilities.” (emphasis added) N.Y. Fam. Ct. Act§ 141 (McKinney 2008); see also *In re Richard* S., 32 N.Y.2d 592, 596 (1973) (recognizing the Family Court’s power to use discretion to make determinations appropriate in the particular case before it).

1. **Federal Law DOES NOT Delegate Responsibility to Family Court to Make Any Immigration Determinations.**

The effect of a Family Court’s entering a Special Findings order is that the Subject Child, if otherwise qualified, may then apply for SUS; if and only if USCIS grants Special Immigrant Juvenile Status to the applicant, may the applicant seek more permanent status. These factual findings are a prerequisite to filing an application to USCIS as part of an application for SIJS, but not a guarantee. Without a Special Findings order from the Family Court, the Subject Child cannot apply to USCIS for SUS and Legal Permanent Resident. However, the United States Citizenship and Immigration Services will conduct its own investigation before adjudicating the applications at an Adjustment of Status interview and ultimately retains the discretionary authority to approve or deny a Subject Child’s applications for SUS and LPR.

Thus, in accordance with the federal statute, the Family Court is asked only to make factual findings clearly within its traditional purview - **whether reunification with one or both parents is a viable option where or with whom it is in a minor’s best interest to reside** - and is NOT asked to make any determination as to the child's immigration status.

The federal statute sets forth a specific definition of Special Immigrant Juvenile. See INA

§ 101(a)(27)(J). In line with this definition, the five Special Findings Shodijon now seeks are as follows: (1) Shodijon is under twenty-one years of age; (2) Shodijon is unmarried; (3) Shodijon is dependent upon the juvenile court or is placed under the custody of an individual appointed by the juvenile court; (4) reunification with one of both of Shodijon’s parents are not viable due to abuse, neglect, or abandonment or a similar basis under state law; and (5) it is not in Shodijon’s best interests to return to his country of origin or last habitual residence.

1. **NEW YORK STATE APPELLATE COURTS HAVE RECOGNIZED FAMILY COURT’S RESPONSIBILITY TO CONDUCT HEARINGS WHEN MOTIONS FOR SPECIAL FINDINGS ARE FILED.**

Both the First and Second Departments have overturned Family Court decisions that refused to appoint guardians and enter Special Findings orders for Subject Children in a variety of circumstances. See *In re Trudy-Ann W.,* 73 A.D.3d 793, (2d Dept. 20 I 0); *In re Jisun L.* 75 A.D.3d 510 (2d Dept. 2010). *In re Alamgir A.,* 81 A.D.3d 937 (2s Dept. 2011); *In re Sing WC.* 83 A.D.3d 84 (2d Dept. 2010).

The Second Department has reinforced the Family Court’s responsibility to hold a

hearing on a motion for a Special Findings order; *In re Emma M.* 74 A.D.3d 968 (2d Dept. 2010). Notably, the Second Department has emphasized that a hearing must be held before a determination regarding best interests can be made. *In re Ashely W., 2011 Slip Op 5082* (2d Dept. 2011 ). Thus a motion for Special Findings cannot be denied without a hearing. Clearly, it is within Family Court’s purview and responsibility to conduct hearings and decide motions for Special Findings, as well as to grant petitions when it will be in the best interests of the Subject Children to do so, even when the Subject Children are on the verge of legal adulthood.

1. **FEDERAL LAW GOVERNING SIJS INCLUDES CHILDREN WITH ONE PARENT, IN GUARDIANSHIP PROCEEDINGS.**

The Special Immigration Juvenile Status (“SIJS”) federal law, enables certain children to regularize status was amended through the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (hereinafter “TVPRA”). The TVPRA amendments enacted by the U.S. Congress and signed into law by President George W. Bush became effective on March 23, 2009. The TVPRA amendments broadened and clarified Section 101(a)(27)(J) of the Immigration and Nationality Act (hereinafter the “INA”) that defined Special Immigrant Juveniles (hereinafter referred to as the “Statute”). See [NA§ 101(a)(27)(J).

It is clear that his expanded definition now includes children who cannot be reunified with one parent or both and for whom the other parent seeks an appointment of guardianship. A juvenile court finding to this effect is authorized by both a plain reading of the relevant sections of the Statute, and the fact that the U.S. Department of Homeland Security, interprets the Statute to include single-parent guardianship-based cases based on a finding that reunification with one parent is not viable. Here, Shodijon is unable to reunite with both parents. His both parents are not in the country and abandoned him.

1. **TESTIMONY AND DOCUMENTARY EVIDENCE MAY BE PRESENTED TO THE FAMILY COURT TO PROVIDE ALL FIVE FACTS FOR A SPECIAL FINDINGS ORDER. AZAMAT HAS ESTABLISHED THE FACTS NECESSARY FOR THIS COURT TO ISSUE A SPECIAL FINDINGS ORDER.**

As previously discussed, an undocumented minor is eligible to apply to USCIS for SIJS if the Family Court finds that: (1) the Subject Child is under 21 years of age; (2) the Subject Child is unmarried; (3) the Subject Child is dependents upon the juvenile court or is placed under the custody of an individual appointed by a juvenile court; (4) reunification with one or both parents is not viable due to abuse, neglect or abandonment or a similar basis under state law; and (5) it is not in the Subject Child’s best interests to return to his or her home country of origin or last habitual resident. All of these facts may be proven by documentation and testimony at a hearing conducted to determine the underlying petition.

1. Age of the Subject Child: Shodijon is less than Twenty-One Years of Age.

Proof that the Subject Child is less than twenty-one years of age may be established through the Subject Child’s testimony and presentation of the Subject’s Child birth certificate or passport.

Azamat was born on October 1, 2007, and is currently seventeen years old. Thus he is under twenty-one years old.

1. Marital Status of the Subject Child: Shodijon is not Married.

Proof that the Subject Child is not married is established through testimony. Shodijon is not married, nor has he ever been married.

1. **Placement in the Custody of an Individual Appointed by the Court: Shodijon's Placement under the Custody of an Individual Appointed by a Juvenile Court will satisfy this Requirement.**

The Appellate Division, First Department held that “Family Court's appointment of a guardian constitutes the necessary declaration of dependency on a juvenile court ...” (emphasis added) *In re Antowa McD.,* 50 A.D.3d 507, 507 (l51 Dept. 2008).

A child is dependent on the Family Court when, in lieu of one or both of the child’s parents, the court has taken responsibility for determining the care and guardianship of a child. The child requires the Family Court’s assistance and intervention for the clarification of a legal relationship with an adult. Moreover, the language included in the Statute and regulations (as well as in the New York State Unified Court System’s own form, General Form 42), clearly demonstrates that a Special Findings order is warranted when a Subject Child is dependent upon the court, or in the alternative, has been placed in the custody of an individual appointed by the state or Family Court.

The first option is a finding of “dependency.” The second option is that a juvenile court may find that a child has been committed to or placed in the custody of a state agency or department. The third option is that the juvenile court may find that a child has been committed to or placed in the custody of an individual or entity appointed by the state or Family Court. Thus, with three optional findings that a juvenile court may make, it is clear that the Family Court need not find that a child is “dependent” upon the Family Court; the Family Court may alternatively find that a child has been committed to or placed in the custody of an agency; or that the child has been committed to or placed in the custody of an individual.

Thus, if this Court grants the instant guardianship petition, then Carlos has been placed under the custody of an individual appointed by the juvenile court.

1. **Reunification with One or Both parents: Reunification with both of Shodijon’s Parents Are Not Viable because of Abuse, Neglect, Abandonment, or SIMILAR Basis under New York Law: Shodijon cannot be reunited with their parents because they live in a different country.**

The required finding is that a juvenile’s reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under State Law. Proof that reunification with one or both of the Subject Child’s parents is not viable due to abuse, neglect, or abandonment, or a similar basis found under State Law is established through testimony and sometimes documentary evidence. The definitions of abuse, neglect ad abandonment are not set forth in the federal statute; accordingly, the Family Court may look to the Family Court Act and related case law for guidance.

A child is considered neglected under Family Court Act 1012(f)(ii) if the child is under the age of eighteen years and has been “abandoned”, according to the criteria set forth in Section 384-6 of the Social Services Law N.Y. Fam. Ct. Acct§ 384-b(S)(a) (McKinney Supp. 2008).

This court must find that reunification with one or both of Shoidjon’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State Law. Immigration benefits may be available to a child even if he is living with one parent since 8 U.S.C. §l101(a)(27)(J) only requires the inability to reunite with one parent. *in re Marisol NH.,* 979 N.Y.S.2d 643 (3rd Dept. 2014).

According to *Matter of Luis R.,* when a child’s parent is deceased, “reunification is not possible,” which satisfied the statutory reunification requirement ... Docket No. G-8926-12 at 2 (2d Dept. 2014). Here, Shodijon’s parents are not in the United States and are unable to take care of him. Here, Shodijon is a child who is left without parental care and de facto is neglected and abandoned.

1. **Child’s Best Interests: It is not in Shodijon’s Best Interests to be removed from the United States and Returned to Uzbekistan.**

The United States Congress delegated responsibility to the Family Court to determine whether or not it is in the best interest of an SIJS applicant to return to his home country. 8 C.F.R

§204.11c(6)(2008). To make that determination, the Court should consider all relevant factors that bear upon the minor’s physical and psychological welfare, health, happiness, and hopes for the future.

In determining a child’s best interests, the Family Court often considers several factors, such as the child’s emotional, psychological, educational, medical, and social needs; the wishes of the child; the child’s long-term development; the quality of the home environment; and the quality of parenting. See *In re Astonn H.,* 167 Misc. 2d 840, 847 (Fam. Ct. Kings co. 1995).

It is contrary to Shodijon’s best interests to be returned to Uzbekistan because 1) he will face extremely dangerous conditions, and 2) he has no one to properly care for him in his home country. Mr. Shokirjon has provided financial, emotional, and physical support for him, and should be appointed as his guardian. Mr. Shokirjon is in the best position to continue to care for Shodijon. When Shodijon came, Mr. Shokirjon immediately supported him to enroll in classes, encouraged him to get proper education, and provides the best support for him. If Shodijon is returned to his home country as a young male with no parental support and guidance, he will be the best victim of violence and abuse.

**CONCLUSION**

This Court has jurisdiction to decide the petition for custody concerning this Subject Child and to make factual findings in regard to the motion for Special Findings. The standard for such determinations is the best interest of the Subject Child, Shodijon. As set forth herein, as well as the accompanying affidavits, the Subject Child respectfully requests that this Court:

1. Grant Shodijon’s petition for guardianship so that Mr. Shokirjon is appointed as his guardian;
2. Make the following findings of fact with regard to a Special Immigrant Juvenile Status order:

1. Shodijon is a child under twenty-one years of age;
2. Shodijon is unmarried;
3. Shodijon is dependent on the Family Court, or an individual appointed by the state of the Family Court;
4. Reunification with one or both of Shodijon’s parents is not violable due to abandonment and death or a similar basis under New York Law as his mother abandoned him;
5. It is not in Shodijon’s best interest to be removed from the United States and returned to his home country.
6. Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted this June 6th of 2024.

Respectfully submitted,

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