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November 15, 2019

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

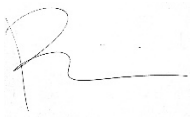
RE: Comments on the Proposed Rule Governing the Special Immigrant Juvenile Classification DHS Docket No. USCIS 2009-0004

To Whom It May Concern:

I am writing to resubmit the Immigrant Legal Resource Center's (ILRC) 2011 comments on U.S. Citizenship and Immigration Services (USCIS)'s proposed rule governing the Special Immigrant Juvenile classification. *See* Special Immigrant Juvenile Petitions, 82 Fed. Reg. 55250 (Oct. 16, 2019). The ILRC submitted comments on the proposed rule during the original 2011 comment period, both organizationally and as part of the Immigrant Children Lawyers Network. I attach those here for ease of reference. In addition, the ILRC is also separately submitting supplemental comments with Public Counsel, addressing some additional concerns with the proposed regulations that have arisen in the intervening eight years since they were originally published.

If you have any questions, please feel free to contact me at rprandini@ilrc.org. Thank you for your consideration.

Sincerely,



Rachel Prandini
Staff Attorney
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From: Angie Junck [mailto:ajunck@ilrc.org]
Sent: Monday, November 07, 2011 2:36 PM
To: USCISFRComment@dhs.gov
Cc: Angie Junck
Subject: DHS Docket No. USCIS-2009-0004

Re: DHS Docket No. USCIS-2009-0004/

Comments on Proposed Rule: Special Immigrant Juvenile Status

To Whom It May Concern:

The Immigrant Legal Resource Center (ILRC) is a national technical resource center on immigration law founded in 1979 and based in San Francisco, California. The ILRC is the one of the primary national agencies in the United States dealing with immigration legal issues affecting children and youth and provides technical assistance to individuals and agencies on these issues, including Special Immigrant Juvenile Status (SIJS). The ILRC produces some of the only materials in the country on immigration legal issues affecting children and youth, including our publication *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, Immigrant Legal Resource Center, Third Edition (www.ilrc.org). On a daily basis, we provide technical assistance to attorneys including immigration and juvenile defense counsel, judges, social workers, and other child service providers across the country on immigrant youth issues. ILRC attorneys have given more than 100 presentations all over the country on immigration options for immigrant children and youth. Based upon our work, we have a national perspective on the experiences of immigrant youth, advocates, and decisionmakers regarding SIJS.

We write to provide comments to Citizenship and Immigration Services' September 6, 2011 proposed regulations for SIJS petitions. We appreciate that the regulations do reflect much of the updated SIJS language in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. We do, however, have concerns regarding certain aspects of the proposed regulatory language and the commentary attached to the proposed regulations. While we did sign onto the Immigration Children Lawyers' Network letter and agree with all of the suggestions therein, we write separately to raise additional issues and to emphasize particular concern over certain provisions.

I. Issues with Eligibility Provisions for Special Immigrant Juvenile Status

ILRC would like to highlight three prominent areas in the proposed regulation relating to eligibility for SIJS that we believe require further attention prior to the regulation being finalized.

a. The Regulation Should Make Clear that Delinquency Courts Fall within the Scope of SIJS

We are concerned that there is no explicit mention in the proposed regulation regarding the ability of youth under the jurisdiction of a delinquency court to apply for and be eligible for SIJS. While proposed 8 C.F.R. § 204.11(b)(2) specifically recognizes that "[c]ommitment to or placement under the custody of an individual can include adoption and guardianship," the regulation fails to mention in this section that similarly a child in delinquency proceedings might be eligible for SIJS. The failure to include this in the regulation may be (and we believe will be) construed as delinquency courts not having the authority to enter SIJS predicate orders, when under the plain language of the TVPRA of 2008 children in such proceedings may fall within the definition of a Special Immigrant Juvenile. Through our extensive work with juvenile defenders and some juvenile court judges we have seen that many of the children in delinquency proceedings enter the system due to activity that has been triggered by abuse, neglect, abandonment, or similar victimization. Many of these cases, however, are not transferred to the child welfare/dependency system due to jurisdictional issues and/or because juvenile probation departments have their own mechanisms to deal with these issues.

The final regulation, therefore, should reflect that a child in delinquency proceedings may be eligible for SIJS. The plain language of the TVPRA of 2008 allows for youth in delinquency proceedings to be eligible for SIJS because they are under the jurisdiction of a juvenile court, courts that *under state law make decisions about the custody or care of juveniles*. The TVPRA further provides that "[T]he court must have legally committed the child to or placed the child under the custody of, an agency or department of a state…." INA § 101(a)27(J)(i). When State juvenile courts place children under the

custody of probation departments as a result of delinquency, for immigration purposes they are within the boundaries set forth by this requirement. Additionally, statutory language enacted by the TVPRA provides that the child cannot be reunified with one or both parents "due to abuse, neglect, or abandonment, *or a similar basis under state law*." Delinquency courts make similar findings under state law in the court of the juvenile justice process.

Even prior to statutory changes to the SIJS statute enacted by the TVPRA, the former Immigration & Naturalization Service took the position that youth in delinquency proceedings may be eligible for SIJS. First, an INS interpretive memo issued on August 7, 1998 specifically contemplated that the requisite SIJS findings can be made in delinquency, rather than dependency, proceedings. *See* Memorandum from Thomas Cook, Acting Assistant Commission, Adjudications Division, United States Department of Justice, *INS on Interim Field Guidance Relating to Public Law 105-119 (Sec. 113) amending Section 101(a)(27(J) of the INA- Special Immigrant Juveniles* (Aug. 7, 1998). The former INS stated that evidence of the "type of proceeding before the juvenile court" must be provided to the District Director, including "for example, juvenile delinquency proceeding." *See id.* at 3 (emphasis added). The regulation, therefore, should make it clear as it does for guardianships and adoptions, that commitment or placement with a State agency or department such as a Juvenile Probation Department is included for purposes of classification as a Special Immigrant Juvenile.

b. The Regulation Should Eliminate Any Requirement of Continuing Jurisdiction in Light of the TVPRA

Inconsistencies are created between the proposed continuing jurisdiction requirement (Proposed 8 C.F.R. § 204.11(b)(iv)), INA § 101(a)(27(J), and the TVPRA of 2008. The TVPRA provides that so long as an applicant is under 21 years of age on the date on which an SIJS petition is properly filed, USCIS cannot deny SIJS to a person based on age. The plain language, therefore, intends to protect a child from aging out of eligibility regardless of whether there is continuing jurisdiction over that child. In other words, if under the TVPRA USCIS cannot deny SIJS to any person on account of "age," as long as he/she was under the age of 21 when the SIJS petition was filed, USCIS cannot then refuse to approve an SIJS petition or revoke an approved SIJS petition simply because the child's juvenile court case has been closed. In addition, the TVPRA of 2008 defines a special immigrant juvenile as someone "who *has been* declared dependent…" INA §

101(a)(27(J)(1)(emphasis added.) The use of the past tense indicates that the State must have taken some action in the past, but not that dependency or custody must be ongoing until the SIJS application is adjudicated. In fact, nowhere in the statute is there any indication that continuing jurisdiction is a requirement for SIJS. For these reasons, the proposed regulation should be aligned with the language in the TVPRA that as long as child is under 21 years of age when petition is filed the initial dependency finding is sufficient regardless of continuing jurisdiction and/or how that jurisdiction was terminated.

c. SIJS Applicants Should Not Be Required to Obtain New Predicate Orders When They Relocate Out of State

The commentary to the proposed regulation states that when an SIJ petitioner moves to another state the initial juvenile court dependency order will no longer be in effect because jurisdiction no longer exists and therefore, the petitioner must obtain a new dependency order. An SIJ applicant, however, should not be required to obtain a new dependency order when he/she relocates out of state because this practice is inconsistent with recognized state legal practices and provides an impractical burden on the State court systems. State courts throughout the country recognize another juvenile court's continuing jurisdiction over children who have relocated, voluntarily or otherwise, to another state. This requirement could also be burdensome, especially when the move was out of the control of the child. For example, this is a common occurrence when the Office of Refugee Resettlement or DHS moves a child to an out of state detention facility. The child's attorney should not have to restart the petition process.

State judicial systems do not have the resources to duplicate or create a new determination regarding a juvenile where one has already been made. The requirement disregards the burden it would impose on state judicial systems at a time when they are facing enormous resource restraints to fulfill their existing duties under state law, let alone address ancillary issues such as immigration.

III. Issues Relating to State Court Involvement

ILRC has identified the following three issues pertaining to the involvement and findings of the State court that should be modified.

First, the regulation and the commentary to the regulation provide for the impermissible review and re-adjudication of State court findings by USCIS. In particular, proposed 8 C.F.R. § 204.11(c)(1)(i) requires adjudicators to determine "whether the alien has established, based on the evidence of record, that the State court order was sought primarily to obtain relief from abuse, neglect, abandonment, or a similar basis under State law and not primarily for the purpose of obtaining lawful immigration status." The commentary at 76 Fed. Reg. 54981 lists evidence that would be expected to support a SIJ application in order for an applicant to meet his or her burden of proof and the commentary at 76 Fed. Reg. 54982 authorizes USCIS to "obtain initial or additional supporting evidence, documents, or materials directly from a court, government agency, or other administrative body in either paper or electronic format."

Textually, the TVPRA as amended in 2008, eliminated the express consent provision that allowed for further determination on the State findings by Attorney General. Instead, it was replaced with a provision stating that applicants are eligible for SIJS when the Secretary of Homeland Security consents to the grant of such status. The proposed regulation should clearly reflect this intention and not allow for the re-examination of the evidence of abuse, neglect, or abandonment as provided in proposed 8 C.F.R. § 204.11(c)(1)(i). This amendment will honor State courts expertise in making these findings, which is why the State court order requirement was instituted. The commentary also lists evidence that is required to be produced in support of an SIJS application, but ignores that production of these documents would violate state confidentiality provisions. For example, under California Welfare & Institutions Code §§ 827 and 828, the vast majority of documents in the juvenile court file is confidential unless petitioned for in a court of law. Also, the authorization allowing USCIS to obtain additional documentation is troubling because it suggests that USCIS has the authority to request confidential court records, when it is not even statutorily required. The federal regulation should provide clearer instructions to USCIS officers in adjudicating SIJS applications and should presume an applicant has submitted a bona fide application where supported by a requisite State court order.

A second issue is that proposed 8 C.F.R. § 204.11(c)(1)(ii) misstates the purpose of the State court order and will discourage judges from making SIJ determinations for

eligible children. The proposed regulation provides "that the State court order was sought primarily to obtain relief from abuse, neglect, abandonment, or a similar basis under State law and *not primarily for the purpose* of obtaining lawful immigration status." (Emphasis added.) The proposed regulation disregards the purpose of all SIJS orders, which is to make SIJS findings for a future petition. Although the courts generally make these findings at some point in their proceedings, they would not do so in an SIJS predicate order unless they are specifically asked to do so for SIJS purposes. For these reasons, the statement in the commentary should be eliminated.

Finally, proposed 8 C.F.R. § 204.11(g) should clarify that formal termination of parental rights is not a requisite for SIJ status. INA § 101(a)(27)(J)(i) provides that reunification is not "*viable* due to abuse, neglect, or abandomment, or a similar basis under state law." (Emphasis added.) This does not mean impossible or that the rights should be terminated, just that it is in the child's best interest. This can mislead or discourage judges from signing an SIJ Order for fear that they are making a determination they are not prepared (and not required) to make. The final regulation should reflect the intentions set forth in the INA.

IV. Petition Procedural Issues including Review and Adjustment

USCIS should employ the evidentiary standard of whether a State court has jurisdiction over the child in reviewing the "similar basis under State law" standard. The commentary at 76 Fed. Reg. 54982 provides, "[i]f the evidence includes a finding that reunification is not viable due to a similar basis under State law, the petitioner must establish that such a basis is similar to a finding of abuse, neglect, or abandonment." This standard is too specific. It undermines State laws and the expertise of the judges in each state to make determinations as to their specific laws surrounding viability of reunification.

The proposed regulations also state under 8 C.F.R. § 245.1(e)(3) that the inadmissibility provisions under sections 212(a)(2)(A), (2)(B), (2)(C), et seq. may not be waived. This is an incorrect statement of law and thus, should be rewritten to make clear that the grounds of inadmissibility designated may, in fact, be waived in certain circumstances. While these provisions cannot be waived under the generous waiver standard for SIJS applicants under INA § 245(h)(2)(B), they may be waived under other provisions of the INA. For example, a child who is qualified for SIJ status could be granted a

waiver under INA § 212(h) based upon being the parent of a U.S. citizen. The statute does not bar such waivers, and granting such waivers in appropriate cases is entirely consistent with Congress's intent to expand, not contract, a child's ability to overcome inadmissibility grounds to achieve adjustment of status.

V. Suggested Deletions

Proposed 8 C.F.R. § 205.1(a)(3)(iv)(B) is not consistent with statutory language brought about by the TVPRA of 2008 and should be deleted. The regulation, as proposed, automatically revokes an approved I-360 once a child is reunified with one or both parents that the court had previously found was not a viable option. Such a revocation would punish a child for having the possibility of family reunification, rather than supporting what might be—in a few rare circumstances—in a child's best interest. This would work against another department of the U.S. Federal Government efforts to promote "permanency" as a core goal of its child welfare efforts.

We hope that you seriously consider adopting these changes and/or deletions in the final regulations in order to be consistent with the TVPRA and state laws and procedures, and to ensure that abused, neglected, and abandoned children are able to seek the relief they are entitled to under the Special Immigrant Juvenile Status provisions. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Angie Junck

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November 7, 2011

Chief Sunday Aigbe
Regulatory Products Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW, Suite 5012
Washington, DC 20529-2020

RE: DHS Docket No. USCIS-2009-0004

Dear Chief Aigbe:

The Immigrant Children Lawyers Network ("ICLN") is comprised of over 170 attorneys, advocates, and accredited representatives working on behalf of immigrant children nationwide. Formed in April 2006, the ICLN seeks to ensure the highest levels of representation for immigrant children, coordinate advocacy efforts, and share information from across the country. As advocates who work on behalf of immigrant children throughout the United States, we are concerned about those children who are among the world's most vulnerable—immigrant children who cannot be reunified with their parents on account of abuse, neglect, abandonment, or a similar basis under State law.

The undersigned members of the ICLN and other interested parties are writing in response to the regulations proposed by U.S. Citizenship and Immigration Services ("USCIS") on September 6, 2011, regarding Special Immigrant Juvenile Petitions. While we applaud the proposed regulations' provisions reflecting the statutory language updated by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, we have significant concerns about much of the proposed regulatory language, as well as the commentary accompanying the proposed regulations. We urge you to amend the proposed regulations in the following manner.

TITLE AND DEFINITIONS

The title for proposed 8 C.F.R. § 204.11 should be revised.

We suggest amending the proposed title to more fully reflect which individuals may be covered by Special Immigrant Juvenile Status, as the term "aliens declared dependent on a juvenile court," on its own, may be misleading. The definition of a "special immigrant juvenile" in § 101(a)(27)(J) of the Immigration and Nationality Act ("INA") defines an alien eligible for SIJ classification as an alien "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*." 8

U.S.C. § 1101(a)(27)(J)(i) (emphasis added). As such, the title of the corresponding regulation should reflect that definition as well.

Some proposed alternate titles include:

> "Special immigrant classification for certain aliens who cannot reunify with one or both parents due to abuse, neglect, abandonment, or a similar basis found under State law (Special Immigrant Juvenile)."

> "Special immigrant classification for certain aliens declared dependent on a juvenile court or placed under the custody of a court-appointed agency, individual, or entity (Special Immigrant Juvenile)."

The definitions of "State" and "juvenile court" in proposed 8 C.F.R. § 204.11(a) should include geographic areas under the administrative control of the United States.

Additionally, we are concerned that the definition of "State" located at proposed 8 C.F.R. § 204.11(a) does not encompass U.S. commonwealths, territories, or districts, such as Puerto Rico, the U.S. Virgin Islands, or the District of Columbia. We propose that the language be revised to:

> "State includes an Indian tribe, tribal organization, or tribal consortium, operating a program under a plan approved under 42 U.S.C. § 671, or any State, district, commonwealth, or territory under the administrative control of the Government of the United States."

Similarly, the definition of "juvenile court" in proposed 8 C.F.R. § 204.11(a) should also be expanded. We propose that the language be revised to:

> "Juvenile court means any court located in the United States (or in any State, district, commonwealth, or territory under the administrative control of the United States) having jurisdiction to make judicial determinations about the custody and care of juveniles."

ELIGIBILITY

SIJ applicants may and should remain eligible for SIJ classification and adjustment of status notwithstanding that their dependency, commitment, or custody lapses prior to adjudication, except where such orders are vacated as improvidently granted.

Echoing the requirements of INA § 101(a)(27)(J), proposed 8 C.F.R. § 204.11(b)(iv) provides that a child is eligible for SIJ classification if he or she "[h]as been declared dependent on a juvenile court or has been legally committed to or placed under the custody of a State agency or department or an individual or entity appointed by a State or juvenile court." However, proposed 8 C.F.R. § 204.11(b)(iv) goes further than the

applicable INA section and continues, "Such dependency, commitment, or custody must be in effect at the time of filing and continue through the time of adjudication, unless the age of the petitioner prevents such continuation."

In contrast to this proposed regulation, INA § 101(a)(27)(J) defines a special immigrant juvenile as an immigrant "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." 8 U.S.C. § 1101(a)(27)(J)(1) (emphasis added). The statute uses the past tense – "has been declared," "has committed to," "has placed" – indicating that a State must have taken such action at some point in the past, but not that the dependency or custody has to be ongoing at the time of SIJ application or adjudication. In fact, the statute nowhere posits any requirement that a SIJ applicant be under a continuing order of dependency, commitment, or custody at the time of application or adjudication.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA 2008") provides that SIJ applicants "may not be denied special immigrant status . . . based on age if the alien was a child on the date on which the alien applied for such status." TVPRA 2008, Pub. L. No. 110-457, § 235(d)(6), 122 Stat. 5044. Thus, USCIS may not deny a SIJ petition because the child's dependency, commitment, or custody order lapsed due to age. In the recent *Perez* settlement agreement, USCIS specifically agreed that applicants would remain eligible for SIJ classification notwithstanding that their dependency, commitment, or custody orders lapse based on age prior to the time of application.[1] Neither should USCIS disqualify applicants from SIJ classification or adjustment solely because their dependency, commitment, or custody orders lapse prior to their filing Forms I-360 or the adjudication of their applications based on reasons other than age, except in cases where a State court vacates its order as improvidently granted.

The only age-related requirement that the TVPRA 2008 permits USCIS to impose is that a SIJ applicant be under 21 at the time of application. INA § 101(a)(27)(J) simply directs USCIS to confer SIJ benefits upon an applicant who "has been declared dependent on a juvenile court . . ." Neither statute requires a SIJ applicant to be the subject of a dependency, commitment, or custody order valid at the time of application or adjudication. Thus, proposed 8 C.F.R. § 204.11(b)(iv) must be revised accordingly.

[1] *Perez-Olano*, et al., *v. Holder*, et al., No. CV 05-3604 (C.D. Cal.), ¶ 23 (Stating in the disjunctive that "[d]efendant USCIS shall not deny a class member's application for SIJ classification or SIJ-based adjustment of status on account of age or dependency status, if, at the time the class member files or filed a complete application for SIJ classification, he or she was under 21 years of age *or* was the subject of a valid dependency order that was subsequently terminated based on age" (emphasis added).).

A SIJ applicant should not be required to start State juvenile court proceedings anew merely because he or she relocates to another state.

The commentary at 76 Fed. Reg. 54980 states that SIJ applicants must "obtain a new dependency order" when relocating to another state, as "the initial juvenile court dependency order will no longer be in effect because the juvenile will no longer be under the juvenile court's jurisdiction." However, the commentary provides no legal support for this requirement. In actuality, many states honor the custody orders of other states. In fact, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), adopted by 49 states, the District of Columbia, Guam, and the U.S. Virgin Islands, provides that State courts that have made child custody determinations will continue to have "exclusive, continuing jurisdiction" over that determination in many circumstances. UCCJEA § 202 (1997). In addition, as stated above, it is inconsistent with the INA, the TVPRA 2008, and the *Perez* settlement to require continued dependency at the time of SIJ application or adjudication, so there would be no reason to require a new dependency order in any case. Accordingly, this troubling requirement should be eliminated from the commentary at 76 Fed. Reg. 54980.

The final regulations should recognize that a State court's ordering placement with a non-abusive parent or in a foster home or group home is an order of commitment or custody within the meaning of INA § 101(a)(27)(J)(i).

Proposed 8 C.F.R. § 204.11(b)(2) properly recognizes that "[c]ommitment to or placement under the custody of an individual can include adoption and guardianship." However, the final regulation should similarly recognize that an applicant's being placed with a non-abusive parent or in a foster home or group home constitutes "commitment to or placement under the custody of an individual or entity appointed by a State or juvenile court" within the meaning of INA § 101(a)(27)(J)(i), and likewise makes him or her eligible for SIJ classification. In our experience, commitments to non-abusive parents or foster homes or group homes are far more common than adoptions and guardianships, and the final regulation should make clear that such placements are valid predicates for SIJ eligibility.

CONSENT

Proposed 8 C.F.R. § 204.11(c)(1)(i) should not impermissibly allow and encourage USCIS review of State court findings.

By requiring adjudicators to determine "whether the alien has established, based on the evidence of record, that the State court order was sought primarily to obtain relief from abuse, neglect, abandonment, or a similar basis under State law and not primarily for the purpose of obtaining lawful immigration status," proposed 8 C.F.R. § 204.11(c)(1)(i) invites officers to impermissibly review and re-adjudicate State court findings.

Both the former Immigration and Naturalization Service ("INS") and USCIS have repeatedly emphasized over the years that State courts, not federal immigration agencies, are the bodies with expertise in issues of child welfare, and as such, their findings related to these issues need not and should not be second-guessed or readjudicated by USCIS adjudicators.[2] Over time, Congress has also signaled its intent that the State court findings not be readjudicated by USCIS. In 2008, the SIJ statute was amended to remove the requirement that the Attorney General "expressly consent to the dependency order," which Congress had previously explained "require[ed] the Attorney General to determine that neither the dependency order nor the administration or judicial determination of the alien's best interest was 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" (H.R. 105 H. Rpt. 405, at 130 (1997))—in other words, that the underlying basis for SIJ status (abuse, abandonment, neglect, or other similar basis) was bona fide. When Congress amended the statute in 2008 and removed the express consent requirement, it instead provided that applicants are eligible for SIJ status when the "Secretary of Homeland Security consents to the grant of" such status. 8 U.S.C. § 1101(a)(27)(J)(iii). By changing the statutory language, Congress signaled that DHS consent does not require reexamining the evidence of abandonment, abuse, neglect, and best interests—as these issues are already determined by the State court—but rather that DHS has the opportunity to review the SIJ petition to confirm that the petitioner meets all of the eligibility requirements. Accordingly, a legal presumption that a SIJ petition is bona fide if the petitioner meets the eligibility requirements as evidenced by the State court order and proof of age is appropriate.

Proposed 8 C.F.R § 204.11(c)(1)(i) should not require applicants to submit additional evidence that may violate State confidentiality laws.

The commentary at 76 Fed. Reg. 54981 lists evidence that would be expected to support a SIJ petition in order for an applicant to meet his or her burden of proof to show that the State court order was sought for relief from abuse, abandonment, or neglect, rather than primarily for obtaining lawful immigration status. The evidence list includes "a dependency or guardianship order, findings accompanying the order, actual records from the proceedings, or other evidence that summarizes the evidence presented to the court," and "evaluations or treatment plans from the court, State agency, department, or individual with whom the juvenile has been placed." Under most State law, however, such evidence is confidential. *See*, *e.g.*, Calif. W&I §§ 827,

[2] *See Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exception to Marriage Fraud Arrangements; Adjustment of Status*, 58 Fed. Reg. 42842, 42847 (Aug. 12, 1993) (stating that "it would be both impractical and inappropriate for the [INS] to routinely readjudicate judicial . . . administrative determinations as to the juvenile's best interest"); William R. Yates, Associate Director for Operations, U.S. Citizenship and Immigration Services, *Memorandum #3—Field Guidance on Special Immigrant Juvenile Status Petitions*, at 4-5 (May 27, 2004) (instructing that adjudicators "generally should not second-guess the [State] court's ruling or question whether the court's order was properly issued"); Donald Neufeld, Acting Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, at 4 (March 24, 2009) (advising that adjudicators "should avoid questioning a child about the details of the abuse, abandonment or neglect suffered, as those matters were handled by the [State] court, applying [S]tate law").

828; D.C. Code §§ 16-2331, 16-2332; NJSA §§ 1:38-3,2A: 4A-60; NMSA §§ 32A-2-32, 32A-3B-22, 32A-4-33; Tex. Fam. Code §§ 58.005, 58.106, 261.201, 262.308, 264.613.

In many cases, adjudicators would be asking applicants and attorneys to violate State law in providing documents and orders from the record. USCIS would also be imposing significant burdens on counsel who, in many cases, would have to seek permission from the State court to disclose such documents. The USCIS Ombudsman has already identified such a problem, which the proposed regulations would exacerbate.[3] Such disclosure requests will ultimately delay the adjudication of SIJ petitions and create an additional administrative burden on USCIS and possibly EOIR.

Additionally, this section of the commentary at 76 Fed. Reg. 54981 states that "USCIS may consider any evidence of the role of a parent or other custodian in arranging for a petitioner to travel to the United States or to petition for SIJ classification." This commentary appears to assume fraud on the part of SIJ petitioners, and legal advocates strongly urge USCIS to provide more clear guidance regarding this statement. As currently worded, it is too vague and suggests that one parent or a non-legal custodian's attempt to allow a child to travel to the United States, or to pursue relief before USCIS, is *per se* suspect. Given that a State court may consider only one parent when assessing reunification options for a child, it could very well be the case that a non-offending parent encourages the child to flee the abusive parent. Further, a custodian, including a non-legal custodian, simply allowing the child to pursue SIJ status is not indicative of fraud. For example, the non-legal custodian may encourage the child and make attempts to assist the child to pursue SIJ classification in order to protect the child from abusive family members. This is clearly not fraudulent activity, but the commentary is cursory and does not reflect the nuances of SIJ cases.

<u>Proposed 8 C.F.R § 204.11(c)(1)(i) should not conflate the pursuit of State court findings with the pursuit of a SIJ special findings order itself.</u>

As currently drafted, proposed 8 C.F.R. § 204.11(c)(1)(i) imposes a burden on the applicant to show "that the State court *order* was sought primarily to obtain relief from abuse, neglect, abandonment, or a similar basis under State law and not primarily for the purpose of obtaining lawful immigration status." (Emphasis added.) The commentary at 76 Fed. Reg. 54981 similarly discusses how "the order" must not be sought primarily to obtain an immigration benefit. However, in a vast majority of jurisdictions, and particularly in cases where a child is a ward of the State child welfare agency, dependency or custody is determined before the court makes the requisite SIJ findings, which are contained in a separate, special order issued to facilitate obtaining immigration relief. As a result, the State court order is created solely for the purpose of submission with the SIJ petition, and thus to obtain lawful immigration status. It is not a naturally created petition, as it merely consolidates required findings by the State court for a SIJ petitioner. It is made solely for the convenience of the SIJ petitioner, to summarize the most legally relevant findings for the SIJ petition and allow the petitioner to comply with USCIS

[3] *USCIS Ombudsman Recommendation: Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices* (Apr. 15, 2011) ("This evidence has often been placed 'under seal' and obtaining it from the courts requires a significant amount of time and effort.").

requirements, and to protect the privacy interests involved in the State court proceedings. However, the current wording of the proposed regulation conflates the pursuit of State court findings, solely for the purpose of pursuing lawful immigration status, with the pursuit of the order itself.

While pursuing immigration relief may be a goal and component of the State court's efforts to protect the child, this is not necessarily inappropriate and does not somehow invalidate the State court's jurisdiction or efforts on behalf of the child. But as currently written, proposed 8 C.F.R. § 204.11(c)(1)(i) limits State court judges from doing what Congress asked of them—making findings to support the permanency and well-being of immigrant children in whose interests it is to remain in the United States. The regulations must instruct adjudicators that DHS consent should be given when the SIJ *petition* is bona fide, *i.e.*, that it is supported by a competent State court order making the requisite findings and legal determinations.

Proposed 8 C.F.R. § 204.11(c)(2) should be amended to make clear that a State court's entering a SIJ predicate order does not "determine or alter custody status or placement" within the meaning of INA § 101(a)(27)(J)(iii)(I) and accordingly does not trigger the specific consent requirement.

As amended by the TVPRA 2008, INA § 101(a)(27)(J)(iii)(I) requires that the Department of Health and Human Services ("HHS") provide specific consent where the State court will "determine the custody status or placement" of a child in HHS custody. 8 U.S.C. § 1101(a)(27)(J)(iii)(I). Proposed 8 C.F.R. § 204.11(c)(2) fails to clarify this "specific consent" requirement. The final regulation should make clear that a State court's exercising jurisdiction over a youth in HHS custody and issuing a SIJ predicate order does not, without more, determine custody status or placement so as to trigger the specific consent requirement.

HHS and USCIS have repeatedly agreed with this interpretation of the specific consent requirement.[4] In contrast to HHS and USCIS's stated understanding of the specific consent requirement, proposed 8 C.F.R. § 204.11(c)(2) impermissibly expands this requirement to situations where a State court will "determine or alter" custody status. Similarly, the related commentary at 76 Fed. Reg. 54982 instructs that HHS consent is needed if the State court is "modifying," "determin[ing] or alter[ing]" custody status or placement. To ensure consistency, the final regulations and commentary should only use the term "determine," as limited by the INA and TVPRA 2008.

Petition Procedures

USCIS should recognize that SIJ petitioners may have difficulty presenting documentation of their age.

The commentary at 76 Fed. Reg. 54982 lists examples of documents that can be submitted as evidence of a SIJ petitioner's age. We suggest that USCIS also acknowledge that alternative

[4] *See Perez* settlement, ¶¶ 7, 17; U.S. Department of Health and Human Services, Office of Refugee Resettlement, *Program Instruction re: Specific Consent Requests* (December 24, 2009).

forms of evidence establishing a petitioner's age, such as State court orders with findings of fact regarding an applicant's age, or affidavits from child welfare workers, guardians *ad litem*, and others with knowledge of the child's history and dependency status, should also suffice. This is justified for a variety of reasons.

First, families who mistreat their own children in physical and emotional ways oftentimes also act in harmful ways with regard to official documentation or registration; similar to the mistreatment they may have suffered at the hands of their family members, these SIJ petitioners had no control over whether their births were properly recorded by the adults in their lives. Second, many child victims come from countries where events such as births and deaths are not routinely recorded in an organized manner. For example, SIJ petitioners may be orphans coming from Haiti or other countries where records may simply not exist or are practically impossible to obtain. Third, many SIJS-eligible children have been swiftly rescued from a dangerous situation, found without a parent or guardian who can provide such documentation, or taken away from abusive caretakers who many times are unwilling to produce such documents. Many of these children have not been in contact with anyone in their home country for many years and have no way of traveling there to search for records.

Where a petitioner provides evidence that reunification is not viable due to "a similar basis under State law," the evidentiary standard employed by USCIS should be whether the state court has jurisdiction over the child under that similar basis.

The commentary at 76 Fed. Reg. 54982 states that "[i]f the evidence [submitted] includes a finding that reunification is not viable due to a similar basis under State law, the petitioner must establish that such a basis is similar to a finding of abuse, neglect, or abandonment." It is unclear and vague how a petitioner would establish that a "similar basis under State law" is similar to a finding of abuse, abandonment, or neglect, let alone to the satisfaction of an individual USCIS adjudicator. Instead, the evidentiary standard should be that the State court has statutory authority to take jurisdiction over the vulnerable child under that "similar basis under State law," or that there is a statement within the State court order affirming that the underlying basis is similar to abuse, abandonment, or neglect under State law.

USCIS must not be permitted to "obtain initial or additional supporting evidence, documents, or materials directly from a court, government agency, or other administrative body in either paper or electronic format."

This authorization, stated in the commentary at 76 Fed. Reg. 54982, is *not* statutorily required, and is inappropriate. USCIS adjudicators do not have the expertise to interpret or re-adjudicate a State court's procedures, records, and legal findings. This broad statement appears to open the door for certain USCIS adjudicators to second-guess the State court's findings. This statement also creates the impression that the USCIS adjudicators have the federal authority to request court records that may be confidential and protected under strict State privacy laws, as discussed above.

A vulnerable child should not be required to compromise his or her highly personal and sensitive information outside of the State court proceeding. A child should reasonably expect that the information he or she discloses to the State court will be used to make best interest determinations, and that such a forum is a safe place to discuss sensitive issues without fear that third parties will become privy to that information and use it to remove the child from the United States. A child who has been abused, abandoned, or neglected may be afraid of seeking protection from the court or disclosing critical information due to fear that USCIS may access it to use it for purposes other than determining the child's best interest. In addition, there are other individuals' privacy concerns that must be respected—State court records often contain information not only about the SIJ applicant, but also information about siblings and other persons who are not the SIJ applicant and who also have a right to privacy.

Interviews

USCIS should generally waive in-person interviews for an I-360 SIJ petition.

Proposed 8 C.F.R. § 204.11(e) states that "although an interview is not a prerequisite to the adjudication of a Special Immigrant Juvenile petition, USCIS may require an interview as a matter of discretion." We are concerned, however, that without more, the "may require" language will turn into a "will require" at local USCIS offices.

While certain submitted SIJ petitions may warrant an in-person interview (e.g., no proof of age or other eligibility requirement submitted), it is inefficient to routinely schedule in-person interviews to adjudicate I-360 SIJ petitions. Though the commentary at 76 Fed. Reg. 54982 discusses the need to have an in-person interview to obtain missing information, it is unclear why a Request for Evidence could not be submitted to the child's legal representative. This is routine practice in all other immigration matters with USCIS. Additionally, the commentary at 76 Fed. Reg. 54982 discusses the need to have an in-person interview to obtain information regarding a possible criminal record. However, it is unclear to legal advocates why such an inquiry would need to be made to adjudicate the I-360 only. While such an inquiry would be relevant at the adjustment of status stage, it should not be an issue at an interview solely conducted in regards to the adjudication of an I-360 petition.

Furthermore, for those SIJ petitioners in removal proceedings, it can be quite time-consuming to allow for the local USCIS district office to schedule an interview. The child's Immigration Court hearings are often continued multiple times while the child awaits the scheduling of an interview and adjudication of his or her I-360. Waiting for USCIS to adjudicate a straightforward SIJ petition after an in-person interview is a waste of the Immigration Court's resources.

For those in ORR custody as unaccompanied alien children, the lack of established procedure to waive in-person interviews also delays the child's ability to enter the Unaccompanied Refugee Minors program. As some SIJ petitioners in ORR custody are quite close to their 18th birthday, time is of the essence and is another reason why USCIS should generally waive in-person

interviews for straightforward SIJ petitions. We suggest that the regulations indicate that the I-360 interview be the exception, rather than the rule.

USCIS should clarify that SIJ petitioners are always permitted to have their attorneys present during any interview with USCIS.

In the commentary at 76 Fed. Reg. 54982, USCIS states that it "still maintains discretion to interview a child separately when necessary." It is not clear from this commentary whether this interviewing of the child "separately" includes having his or her attorney or legal representative present. A child should be entitled to have his or her legal representative with him or her during any interview with USCIS, and this should be clarified in this commentary.

No Parental Rights

Proposed 8 C.F.R. § 204.11(g) should clarify that *all* parental rights need not be terminated in the underlying State court proceeding in order for a child to be eligible for SIJ status.

The title of proposed 8 C.F.R. § 204.11(g), "No Parental Rights," is misleading. INA § 101(a)(27)(J)(iii)(II) provides that "no natural parent or prior adoptive parent" of a special immigrant juvenile "shall . . . be accorded any right, privilege, or status under" the INA. 8 U.S.C. § 1101(a)(27)(J)(iii)(II). However, this does not mean that the parent or parents' parental rights must be terminated, contrary to what the title of this proposed regulation suggests. The INA does not require State courts to terminate parental rights as a prerequisite to SIJ classification. Accordingly, we suggest that the title of proposed 8 C.F.R. § 204.11(g) be changed to "No Parental Immigration Benefits," to more clearly reflect the statutory language.

Timeframe

The 180-day clock should not be restarted upon a request for "initial" evidence.

Initial filing of a SIJ petition is complete if it includes: (1) a completed Form I-360, (2) proof of age of the juvenile, and (3) a State court order showing the requisite findings. For purposes of approving an I-360, no further initial documents are required; and thus, upon receipt of the above noted documents, along with the application fee or a waiver of the filing fee (if concurrently filing an I-485), a USCIS officer has sufficient evidence to either approve or reject the application. In the case where the application is accepted, the date of receipt of the complete application package marks the start of the 180-day clock for purposes of adjudicating the I-360. Thereby, any legitimate request for documents sent subsequent to the initial receipt of the I-360 application ought to be considered a request for further evidence, rather than a request for initial evidence. 8 CFR § 103.2(a)(7)(i). Once an I-360 is received by USCIS, it ought to be considered to have included all required initial evidence and thus, no further request of documents warrants a restart of the 180-day clock. Instead, simply a pause and restart of the time upon receipt of the requested documents would be proper.

The 180-day clock should only be suspended when a request for further evidence is required for adjudicating Form I-360, and not a concurrently filed Form I-485.

Proposed 8 C.F.R. § 204.11(h) and its related commentary at 76 Fed. Reg. 54983 should make clear that the 180-day clock is applicable to the adjudication of an I-360 petition only, and not an I-485 application for adjustment of status filed concurrently with the I-360. In light of that, the 180-day clock should only be paused when a request for further documents is required for adjudicating the I-360 and not for the I-485. For example, a request of arrest details relates to admissibility issues under the I-485, not the merits of the I-360, and such a request should not stop the clock.

When a request for further evidence is made, the 180-day clock is paused from the time the request is sent out to the time of receipt of the requested documents. Practically speaking, that is appropriate if during that time, USCIS cannot adjudicate the I-360 without the requested documents. However, in some instances, the requests are of such a nature that a clock pause should not be initiated on the date the request is made. A distinction must be made between an immediate request for evidence and a request to bring certain documents to a scheduled interview. Because an interview notice is not actually a request for further evidence, the 180-day clock should not be paused until the date of the interview and then only paused on that date in the case where the applicant fails to provide the officer with the required documents at the interview, if adjudication is therefore not possible.

Automatic Revocation

Certain proposed deletions from current 8 C.F.R § 205.1(a)(3)(iv) are proper and necessary in light of changes made by the TVPRA 2008, but proposed 8 C.F.R. § 205.1(a)(3)(iv)(B) requires clarification.

We appreciate that current 8 C.F.R. § 205.1(a)(3)(iv)(A) and (C) are proposed to be deleted from the new regulations, removing from the list of automatic revocation grounds a child's reaching the age of 21 and a child's no longer being a court dependent.

We appreciate that proposed 8 C.F.R. § 205.1(a)(3)(iv)(B) has removed the "eligible for long-term foster care" language of the current regulation and replaced it with the concept of reunification with one or both parents. We agree that this provision should only be triggered if the reunification is achieved by virtue of a State court order. Were that not the case, an abusive parent could trigger this provision by abducting his or her child and achieving reunification *despite* a State court order to the contrary.

We suggest, however, that proposed 8 C.F.R. § 205.1(a)(3)(iv)(B) be clarified. As currently written, the proposed regulation might be read to suggest that revocation occurs any time there is reunification with a parent. It should instead make clear that reunification with one "non-offending" parent does not result in automatic revocation.

Adjustment of Status

The changes incorporated into the list of inapplicable grounds of inadmissibility found in proposed 8 C.F.R. § 245.1(e)(3) are appropriate and necessary reflections of changes established in the TVPRA 2008.

We appreciate that proposed 8 C.F.R. § 245.1(e)(3) has been updated to reflect the additional grounds of inadmissibility that the TVPRA 2008 made inapplicable to children qualified for SIJ status, as well as the reference to the grounds of inadmissibility rather than exclusion.

The regulations should make clear that the grounds of inadmissibility designated as unwaivable in proposed 8 C.F.R. § 245.1(e)(3) may, in fact, be waived in certain circumstances.

Proposed 8 C.F.R. § 245.1(e)(3) states:

> The inadmissibility provisions of sections 212(a)(2)(A), (2)(B), (2)(C) (except for a single offense of simple possession of 30 grams or less of marijuana), (3)(A), (3)(B), (3)(C), or (3)(E) of the Act *may not be waived.*

(emphasis added). This is not a revision to the current regulations but rather a provision created in the 1990s and carried forward through these proposed regulations.

We believe this is an incorrect statement of the law. Properly construed, the statute provides that these provisions cannot be waived *under the generous waiver standard* outlined in 8 U.S.C. § 1255(h)(2)(B). This does not mean, however, that these inadmissibility provisions are completely unwaivable. For example, a child who is qualified for SIJ status could be granted a waiver under INA § 212(h), 8 U.S.C. § 1182, based upon being the parent of a U.S. citizen. The statute does not bar such waivers, and granting such waivers in appropriate cases is entirely consistent with Congress's intent to expand, not contract, a child's ability to overcome inadmissibility grounds to achieve adjustment of status.

Congress recognized that children who have been abused, abandoned, or neglected are vulnerable and should be protected and nurtured into adulthood. As advocates who work with many of these children, we ask that you incorporate our suggestions into the final SIJS regulations so that those children who are eligible for SIJS relief will be able to receive the protection they so desperately need.

Thank for your commitment and efforts on behalf of immigrants.

Sincerely,

American Friends Service Committee
Americans for Immigrant Justice (formerly Florida Immigrant Advocacy Center)
Ayuda
Catholic Legal Immigration Network, Inc. (CLINIC)
Center for Gender and Refugee Studies
Center for Human Rights and Constitutional Law
Children's Law Center of Minnesota
Alice Clapman of University of Baltimore School of Law
Diocesan Migrant and Refugee Services, Inc.
The Door
Esperanza Immigrant Rights Project, Catholic Charities of Los Angeles, Inc.
Florida Coastal School of Law Immigrant Rights Clinic
Thomas E. Fulghum, Attorney at Law
Gulfcoast Legal Services
Susan Hazeldean of Cornell Law School
HIAS Pennsylvania
Human Rights Initiative of North Texas, Inc.
Immigrant Child Advocacy Project at the University of Chicago
Immigrant Legal Advocacy Project
Immigrant Legal Resource Center
Immigration Counseling Service
Immigration Law Unit, Legal Aid Society (New York)
Kathleen E. Irish, Attorney at Law
Kids in Need of Defense (KIND)
Hiroko Kusuda of Loyola University New Orleans College of Law
Lawyers for Children, Inc.
Legal Services for Children
Theodor S. Liebmann of Hofstra Child Advocacy Clinic
Lutheran Social Services of New England
Elizabeth McCormick of University of Tulsa College of Law
Michigan State University College of Law Immigration Law Clinic
Migration and Refugee Services/United States Conference of Catholic Bishops
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C. Mario Russell of Catholic Charities NY, St. John's School of Law, and New York Law School
Sin Fronteras – Los Angeles, CA
Sin Fronteras – Washington, DC
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University of Miami School of Law Children & Youth Law Clinic
U.S. Committee for Refugees and Immigrants
Women's Refugee Commission
Liliana C. Yanez, Esq. of CUNY School of Law

(Please note that where an individual's name is listed, the individual's affiliation is listed for identification purposes only.)