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:

We are writing to submit the Immigrant Legal Resource Center (ILRC) and Public Counsel's supplemental 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 and Public Counsel each submitted comments on the proposed rule during the original 2011 comment period, both organizationally and as part of the Immigrant Children Lawyers Network. Per the Federal Register announcement, we understand that "DHS will consider comments received during the entire public comment period in its development of a final rule." *Id*. Accordingly, we write to renew our 2011 comments and briefly supplement them due, in part, to concerns and changes in practice that have arisen in the intervening eight years.[1]

The ILRC is a national resource center on immigration law and policy founded in 1979 and based in San Francisco, California, with offices in the Central Valley of California, Texas, and Washington D.C. 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 few 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 (5th ed. 2018). On a daily basis, we provide technical assistance to immigration and juvenile defense counsel, judges, social workers, and other child service providers across the country on immigrant youth issues. ILRC attorneys have given hundreds of presentations nationally on immigration options for

[1] Under separate cover, the ILRC also resubmits our 2011 comments and those of the Immigrant Children Lawyers Network, for ease of reference.

immigrant children and youth. Based upon our work, we have a national perspective on the experiences of immigrant youth, advocates, and decision makers regarding SIJS.

Public Counsel has extensive experience handling SIJS cases. Over the years, we—and our corps of volunteer attorneys, social workers and law students—have represented hundreds of Special Immigrant Juveniles. We assist children in California's dependency, delinquency, probate and adoption systems—before State courts, USCIS, and the Executive Office for Immigration Review. Public Counsel is widely recognized as a leader on SIJS cases. We provide trainings and technical assistance on SIJS at national conferences and webinars as well as in individual States at the invitation of their child welfare and State juvenile court systems. We also have litigated SIJS issues on class and individual bases before the U.S. District Court for the Northern District of California, the U.S. Court of Appeals for the Ninth Circuit, and the California Supreme Court. Our comments in this letter derive from our own experiences with SIJS as well as from what we have seen of SIJS in the field.

I. Proposed 8 C.F.R. § 204.11(c)(1)(i) [Consent]: Remove the Impermissible Discretionary Element from the SIJS Consent Function

INA § 101(a)(27)(J)(iii), as amended by the Trafficking Victims Protection Reauthorization Act of 2008, provides that in order for a child to be granted SIJS, the Secretary of Homeland Security "consents to the grant of special immigrant juvenile status." Nowhere in the statute did Congress include language permitting the agency to exercise discretion in making this determination. Nevertheless, the proposed rule introduces a discretionary element to the consent requirement. *Compare* INA § 101(a)(27)(J)(iii) ("in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status…"), *with* proposed 8 C.F.R. § 204.11(c)(1)(i) ("In determining whether to provide consent to classification as a special immigrant juvenile *as a matter of discretion*, USCIS will consider…")(emphasis added). Congress knows how to grant discretionary authority, and it decidedly did not do so here. *Cf.* INA § 212(h)(2) ("the Attorney General, *in his discretion*, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has *consented* to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status"); *see also Matter of Polidoro*, 12 I&N Dec. 353, 354 (BIA 1967) ("The issue in visa petition proceedings is not one of discretion but of eligibility."). Notably, in its current Policy Manual, USCIS rightly does *not* incorporate a discretionary element into the consent function. *See* 6 USCIS Policy Manual J.2(D)(5), J.3(A)(3). Nor does USCIS's Administrative Appeals Office reference it in its adjudications. *See, e.g.*, In re [Redacted], 2007 Immig. Rptr. LEXIS 24059, at *13-14 (AAO June 5, 2007) (citing *Polidoro* for the eligibility-not-discretion rule when considering an SIJS-based I-360 adjudication hinging on consent). Plainly, discretion cannot and should not be part of the final rule.

Equally alarmingly, pursuant to the proposed rule USCIS is not limited to its articulated inapposite standard in deciding whether to consent in its alleged exercise of discretion.[2] Instead,

[2] The standard that USCIS is tasked with considering in exercising consent pursuant to the proposed regulations—"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

proposed 8 C.F.R. § 204.11(c)(1)(i) states that USCIS will consider the primary purpose standard "among other permissible discretionary factors," but does not place any limiting language on what those factors may include. We are concerned that USCIS may use this alleged authority to pull in consideration of any range of discretionary factors for individual children that are not related to the SIJS eligibility requirements, such as immigration history, prior arrests, or mental health concerns. These types of discretionary considerations are already addressed at the adjustment of status stage, *see* INA § 245(h), and are wholly inappropriate and beyond statutory authority to consider in conjunction with the SIJS petition. We are also concerned that USCIS may use this broad alleged discretionary authority to categorically deny broad swathes of SIJS petitions in an attempt to insulate itself from meaningful judicial review. Accordingly, if USCIS includes any discretionary element in the consent requirement in the final regulations—which it should not—then it must make clear that such considerations are limited to the state or juvenile court proceeding itself and do not go beyond that context.

Lastly, even if the final regulations rightfully do not include a discretionary element in the consent requirement, the regulations must also make clear that the articulated standard for consent cannot be used as a catch-all to pull in issues unrelated to the *bona fides* of the state court SIJS findings. This expansive and contorted interpretation of consent, in which the agency attempts to address a broad range of alleged discretionary behaviors under the guise of information that should have been considered by the state or juvenile court, has already been struck down by a federal court. *See, e.g., Zabaleta Flores v. Nielsen*, 367 F.Supp.3d 208 (S.D.N.Y. 2019) ("The government seeks to justify the denial of consent not on the grounds of gang membership itself but rather on the basis that the failure to consider gang membership undercut the Family Court's decision that it would not be in the plaintiff's best interest to be returned to Guatemala."). The final regulations should clarify that such a strained interpretation of consent by the agency goes "beyond the scope of its consent function." *Id.* at 217.

II. Commentary and Proposed 8 C.F.R. § 204.11(g) [Timeframe]: Remove All References to and Treatment of Biometrics as Initial Evidence

The proposed rule rightly does *not* list biometrics as a piece of required initial evidence for an SIJS-based I-360. *See* Proposed 8 C.F.R. § 204.11(d)(1)-(4). However, the commentary does so. *See* 76 Fed. Reg. 54,982 ("The proposed rule would require the following initial evidence . . . Biometrics as provided in the instructions on the form[.]") This reference to biometrics in the commentary thus should be removed to avoid confusion. It should also be removed because the I-360 instructions do not in fact require biometrics for these petitions, and instead treat them as something that USCIS *may* require *after* it concludes the petition is complete. *See* I-360 Instructions at 10-11 (April 4, 2018 ed.) [I-360 Instructions] ("USCIS may require that you appear for an interview or provide fingerprints, photograph, and/or signature . . . . After USCIS receives your petition and ensures it is complete, we will inform you in writing, if you need to

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similar basis under State law and not primarily for the purpose of obtaining lawful immigration status"—is based on legislative history from a prior version of the statute. *See* 76 Fed. Reg. 54981 (citing legislative history from 1997). This impermissible addition to the statutory requirement, as explained in our 2011 comments, ignores the elimination of the express consent requirement from the statute in 2008.

attend a biometric services appointment."). Relatedly, USCIS should remove the reference to a petitioner's request for biometrics rescheduling as an act that "restart[s] the 180-day adjudication timeframe." *See* Proposed 8 C.F.R. § 204.11(h). This is true both because the 180-day deadline is not subject to tolling or restarting (as outlined in Public Counsel's 2011 commentary on the proposed rule) and because the optional nature of biometrics here takes it outside the scope of 8 C.F.R. § 103.2(b)(10)(i)'s applicability to initial evidence (providing that "any time period imposed on USCIS processing will start over" when "a petitioner . . . who *requires* fingerprinting requests that the fingerprinting appointment . . . be rescheduled" (emphasis added)).

More generally, requiring biometrics of children seeking SIJS is not a practice in which USCIS should engage. USCIS has already acknowledged as much, crafting its Policy Manual to leave biometrics processing wholly outside of the SIJS-based I-360 petitioning and adjudications process. *See* 6 USCIS Policy Manual J.3-J.4; *cf. id* J.4(C)(1) (addressing optional I-360 interview). This setting aside of biometrics is appropriate for a variety of reasons, both logistically and substantively. Children who have been abused, abandoned, or neglected often have difficulty in the early stages of their case securing the required government-issued identification to allow for biometrics processing. And given children's lack of control over scheduling and transportation, tying their I-360 adjudication to biometrics appointment completion will likely create unnecessary delay at best and an unwarranted I-360 denial at worst. Moreover, at this stage USCIS need not "verify [a child's] identity, obtain additional information, and conduct background and security checks, including a check of criminal history records maintained by the Federal Bureau of Investigation (FBI)." I-360 Instructions at 10. Children seeking SIJS have already gone through a juvenile court process that has examined their identity, "additional information" needed for their case can be more appropriately obtained via a request for evidence, and their arrest and adjudication history—whether in juvenile or adult court—is not relevant to USCIS's SIJS-based I-360 adjudication, which, as discussed above, is a matter of eligibility, not discretion. *See Polidoro*, 12 I&N Dec. at 354 ("The issue in visa petition proceedings is not one of discretion but of eligibility.").

III. Commentary [Revocation]: Clarify That Revocation on Notice Cannot Be Based Upon USCIS Regulations, Policy, or Practice Not in Effect on the I-360's Approval Date

We commented previously on the proposed rule's modifications to 8 C.F.R. § 205.1(a)(3)(iv), which we largely endorsed. We write now to urge USCIS to make clear that adjudicators cannot issue Notices of Intent to Revoke or revocations for SIJS-based I-360s that are grounded in USCIS regulations, policy, or practice not in effect on the I-360's approval date. To allow otherwise would be to make SIJS an always-moving target, and it would deprive many children of the protection Congress intended for them. An example may illustrate:

> A sixteen-year-old child from Honduras obtains a guardianship and SIJS findings in mid-July 2016, and promptly files her I-360 that month. USCIS approves her I-360 on October 1, 2016—prior to the issuance of the USCIS Policy Manual and, of course, the final rule that will result from the current regulatory process USCIS is undertaking. The child's priority date eventually becomes current in 2020, long after her 18th birthday has terminated her guardianship. At the adjustment of status stage, were USCIS to impose

> one of its newer requirements on this child—for example, that her SIJS findings must contain specific citations to state law—and attempt to revoke her approved I-360, she would be unable to remedy the situation as state court jurisdiction over her has already terminated based on age, making amendment of the SIJS findings impossible.

This is plainly improper, and we believe USCIS should make clear it is not an appropriate use of the revocation on notice provisions. *See* INA § 205 (requiring "good and sufficient cause" for revocation); 8 C.F.R. § 205.2 (allowing revocation "on any ground other than those specified in § 205.1 when the *necessity* for the revocation" comes to USCIS's attention (emphasis added)). This is of particular importance given the long wait times many children endure before an SIJS-based EB4 visa is available to them, and the possibility of USCIS policy changes during that time.

Of course, we also expect that USCIS will not otherwise apply any new regulations, policy, or practice to the detriment of a child who filed her I-360 before that rule's effective date, given the reliance and impermissible retroactivity issues at play. *See, e.g.*, First Amended Class Action Complaint for Declaratory and Injunctive Relief at 28-29, *J.L. v. Cissna*, 2019 U.S. Dist. LEXIS 42976 (N.D. Cal. Mar. 15, 2019) (No. 18-cv-04914-NC) (complaint involving challenge to new SIJS policy based, in part, on plaintiffs' reliance interests); *see also* Class Action Complaint for Declaratory and Injunctive Relief at 27-30, *J.O.P. v. DHS*, No. 8:19-cv-01944-GJH (D. Md. July 1, 2019) (complaint involving challenge to new children's asylum policy based, in part, on plaintiffs' reliance interests and policy's impermissible retroactivity).

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The ILRC and Public Counsel believe that if USCIS heeds our comments when finalizing its regulations, it will improve the implementation of the Special Immigrant Juvenile classification for the agency, advocates, and children alike. If you have any questions, please feel free to contact us at rprandini@ilrc.org and kjackson@publiccounsel.org. Thank you for your consideration.

Sincerely,

Rachel Prandini
Staff Attorney, ILRC

Kristen Jackson
Senior Staff Attorney, Public Counsel