



Submitted via www.regulations.gov

November 14, 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: DHS Docket No. USCIS-2009-0004; CIS No. 2474-09; RIN 1615-AB81

Dear Ms. Deshommes:

The Catholic Legal Immigration Network, Inc. (CLINIC) submits these comments in response to the Department of Homeland Security's reopening of the public comment period for the proposed rule entitled "Special Immigrant Juvenile Petitions," 76 Fed. Reg. 54978, initially published on September 6, 2011. During the 2011 comment period, CLINIC submitted a joint comment as part of the Immigrant Children Lawyers Network along with numerous other individuals and organizations. (ID USCIS-2009-0004-0051) [hereinafter "2011 ICLN Comment"]. CLINIC incorporates by reference the 2011 ICLN Comment and now adds additional comments through this submission.

CLINIC provides these comments as a stakeholder with special expertise on Special Immigrant Juvenile Status. CLINIC embraces the core Gospel value of welcoming the stranger. CLINIC's work derives from Catholic social teaching to promote the dignity and protect the rights of immigrants in partnership with its network. CLINIC supports the largest nationwide network of nonprofit immigration programs, with approximately 375 community-based Catholic and non-Catholic immigration legal programs. CLINIC's affiliated immigration programs serve over 400,000 immigrants each year. CLINIC's network of affiliated programs is diverse in program size, types of immigration cases represented, and types of nonprofit organizations. Through its affiliates, as well as through projects such as the Dilley Pro Bono Project (formerly known as the CARA Pro Bono Project), the BIA Pro Bono Project, and a project serving formerly separated families, CLINIC advocates for the just and humane treatment of immigrants through direct representation, pro bono referrals, and engagement with policy makers. CLINIC supports legal representatives for children through technical assistance, practice advisories, webinars, and in-person trainings related to the representation of noncitizen children including in Special Immigrant Juvenile Status petitions.

CLINIC appreciates the opportunity to provide comments on this regulation.

I. General Comment

CLINIC is concerned that the final SIJS regulation the agency plans to issue will cause harm and endanger children contrary to congressional intent. USCIS's tone and stated purpose in announcing the reopening of the comment period are concerning. The agency's website states that in recent years SIJS "has increasingly been sought by juvenile and young adult immigrants solely for the purposes of obtaining lawful immigration status and not due to abuse, neglect or abandonment by their parents."¹ According to the USCIS webpage, the agency "seeks to realign the SIJ classification with congressional intent, implement statutorily mandated changes and address shortcomings in the regulations that threaten the integrity of the SIJ program." The webpage also includes a quote from USCIS Acting Director Ken Cuccinelli that "Congress needs to address loopholes in the SIJ program to better protect children."

This administration classifies as "loopholes" or "abuses" essential parts of the SIJ program that ensure the safety of immigrant children as Congress mandated. An October 2017 White House document titled "Immigration Principles & Policies" outlined proposals to "ensure the expeditious return of" unaccompanied children.² Among other proposals, that document advocated amending the definition of special immigrant juvenile to narrow its scope significantly (disallowing one-parent cases and requiring trafficking victimization), claiming that the "current legal definition is abused, and provides another avenue for illicit entry." An internal DHS memo obtained by Senator Merkley's office titled "Policy Options to Respond to Border Surge of Illegal Immigration" lists 16 proposed policy initiatives, including family separation, termination of the *Flores* settlement agreement, and the expansion of expedited removal.³ Several items on the list propose restricting the SIJS program. Number 6, titled "Eliminate Abuses in the SIJ Program" includes a suggestion that DHS withhold consent in any case where the child is living with a parent or legal guardian and proposes that this could be accomplished by "issuing a NPRM, 30 days for comment, 30 days for review." Item 14 proposes that USCIS revise its interpretation of SIJS to exclude children with one available parent, proposing that USCIS could accomplish this through notice and comment rulemaking "in light of a previously issue [sic] 2011 notice of proposed rulemaking."

Given the above rhetoric and stated intentions, CLINIC is concerned that USCIS's purpose in finalizing this regulation is to narrow the SIJS program in a way that defies congressional intent—to protect vulnerable children who have suffered parental abuse, neglect, or

¹ USCIS Clarifies Special Immigrant Juvenile Classification to Better Ensure Victims of Abuse, Neglect and Abandonment Receive Protection (Oct. 15, 2019), <https://www.uscis.gov/news/uscis-clarifies-special-immigrant-juvenile-classification-better-ensure-victims-abuse-neglect-and-abandonment-receive-protection>.

² White House Immigration Principles & Policies, AILA Doc. No. 17100965 (posted Oct. 9, 2017), available at <https://www.aila.org/infonet/wh-immigration-principles-and-policies>.

³ See Anne Flaherty & Quinn Owen, *Leaked Memo Shows Trump Administration Weighed Separated Families at Border, Sen. Merkley Wants Nielsen Investigated for Perjury*, Jan. 18, 2019, ABC NEWS, <https://abcnews.go.com/Politics/leaked-memo-shows-trump-administration-weighed-separating-families/story?id=60459972>. The administrative has already pursued a number of the listed items, though some have been enjoined by federal courts. See, e.g., *Ms. L. v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (enjoining government's family separation policy); *Make the Road New York v. McAleenan*, No. 19-CV-2369, 2019 WL 4738070 (D.D.C. Sept. 27, 2019), *appeal filed*, No. 19-5298 (D.C. Cir. Oct. 31, 2019) (enjoining expansion of expedited removal).

abandonment and to expand the class of children eligible for SIJS protection through 2008 amendments. CLINIC believes that U.S. policies on immigration should reflect the country's core moral values and historical practice of welcoming immigrants. Immigration policies should ensure justice, offer protection, and treat immigrants humanely. We hope that the agency will act in furtherance of these principles and the congressional purpose behind the SIJS statute and its 2008 amendments.

II. Specific Comments, Organized by Proposed Regulatory Provision

A. Regulation Name – Proposed 8 CFR § 204.11

The proposed regulation's name, "Special immigrant classification for certain aliens declared dependent on a juvenile court (Special Immigrant Juvenile)" does not capture a large category of children who are eligible of SIJS through custody or commitment rather than through a dependency declaration. The 2011 ICLN Comment proposed several updated name options. Another, simple name option would be "Special Immigrant Juvenile Status."

B. Definition of "Juvenile Court" – Proposed 8 CFR § 204.11(a)

The 2011 ICLN Comment proposed clarifying amendments to the definition of "juvenile court." In addition to those proposals, revision is required to align the definition with the current statute. As the U.S. District Court for the Southern District of New York concluded in March of 2019, "The agency's requirement -- that to be a juvenile court the state court must have jurisdiction to make custody determinations -- is inconsistent with the SIJ statute's plain language, which requires that a juvenile be declared dependent on a juvenile court or placed in a qualifying custody arrangement." *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 377 (S.D.N.Y. 2019) (emphasis in original). The agency appears to recognize that the current regulatory definition is inadequate, as an October 2019 adopted Administrative Appeals Office decision states that a "juvenile court" is "a court located in the United States having jurisdiction under state law to make judicial determinations about the dependency *and/or* custody and care of juveniles." *Matter of A-O-C-*, Adopted Decision 2019-03, at 4 n.2 (AAO Oct. 11, 2019) (emphasis added).

C. Dependency, Commitment, or Custody – Proposed 8 CFR § 204.11(b)(1)(iv)

As explained in the 2011 ICLN Comment, the proposed regulation's requirement that the dependency, custody, or commitment remain in effect at the time of filing, and through adjudication unless the child ages out, is not grounded in the statute and should be removed. This requirement is also inconsistent with current policy⁴ and with the *Perez Olano* Settlement Stipulation.⁵ As noted by previous commenters, in many cases, particularly in the juvenile court

⁴ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2.D.4, www.uscis.gov/policy-manual/volume-6-part-j-chapter-2 (no continuing jurisdiction requirement where petitioner "was the subject of a valid order that was terminated based on age *before* or after filing the SIJ petition" (emphasis added)).

⁵ *Perez-Olano v. Holder*, 05-3604, Doc. No. 186, Stipulation Settling Motion for Class-Wide Enforcement of Settlement (Mar. 4, 2015), at 2, www.uscis.gov/sites/default/files/USCIS/Laws/Legal%20Settlement%20Notices/PerezOlano_Order_Approving_Sti

context, courts close a matter once a final resolution is reached. That final resolution may include transfer of custody to the non-offending parent or to a third party. It would be contrary to the statute to deny SIJS to children who have achieved a permanency option in juvenile court merely because the juvenile court process reached its conclusion and secured a safe and permanent placement for the child. The CIS Ombudsman has recognized that a continuing jurisdiction requirement is not found in the statute and that “Congress had, but did not exercise, the ability to restrict and limit eligibility to a person who ‘is dependent’ upon a court within a specified time frame, including ‘at the timing of filing.’”⁶

Also, as explained in the 2011 ICLN Comment, the requirement stated in the commentary to the regulation that a petitioner who relocates to a new jurisdiction must obtain a new order, 76 Fed. Reg. 54980, is based on an erroneous understanding of state law and is inconsistent with the SIJS statute, which contains no such requirement. Indeed, since the proposed regulation was issued in 2011, USCIS has adopted a different policy, under which the agency acknowledges that “[a] juvenile court order does not necessarily terminate because of a petitioner’s move to another court’s jurisdiction”; rather, “[i]n general, a court maintains jurisdiction when . . . the legal custodian relocates to a new jurisdiction.”⁷ Requiring a child to initiate an unnecessary court action in the new state merely to comply with an immigration regulation would appear to put the child in a catch-22 situation given the proposed regulation’s consent requirement (see comment below), under which the agency will deny SIJS if the child sought a state court order primarily to obtain an immigration benefit.

The regulation’s time parameters are also ambiguous, as they require the dependency, commitment, or custody to remain in effect “through the time of adjudication” without explaining what part of the SIJS process “adjudication” refers to.

D. Parental Reunification Determination— Proposed 8 CFR § 204.11(b)(v) & 76 Fed. Reg. 54981

The commentary to the proposed regulation espouses a vague standard to define the term “similar basis” that requires the petitioner to establish that the state law basis is similar in its “nature and elements” to abuse, abandonment, or neglect. 76 Fed. Reg. 54981. The commentary lists types of evidence that a petitioner may submit to make this showing, including state laws, evidence of the underlying conduct, and opinions or letters from child welfare workers. This standard is confusing and undefined and in practice leads to inconsistent adjudications and denials of petitions of SIJS-eligible children.⁸ Instead requiring the petitioner to prove a vague

[pulation.pdf](#) (protecting SIJS petitioners who were “subject of a valid dependency order that was terminated based on age prior to filing”).

⁶ Citizenship and Immigration Services Ombudsman, Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications, at 8 (Dec. 11, 2015), www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015_2.pdf [hereinafter “2015 CIS Ombudsman Recommendation”].

⁷ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2.D.4, www.uscis.gov/policy-manual/volume-6-part-j-chapter-2.

⁸ Compare K-S- (AAO July 10, 2019), https://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2019/JUL102019_02C6101.pdf (approving SIJS

standard with burdensome evidentiary requirements, the agency should defer to the state court's interpretation of state law. In other words, when the state court makes a finding that the non-visibility of reunification ground is a "similar basis" under state law, no further evidence or argument should be required of the SIJS petitioner. State courts are the entities with expertise about their own state law and best situated to make a "similar basis" determination.

The regulations should also formally abandon USCIS's previous *ultra vires* requirement that in order to make a qualifying parental reunification determination, the juvenile court must have jurisdiction to place the juvenile in the custody of the unfit parent(s). This requirement has been found unlawful by multiple federal courts. See *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 383 (S.D.N.Y. 2019); *Moreno-Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208 (W.D. Wash. 2019); *J.L. v. Cissna*, 341 F. Supp. 3d 1048 (N.D. Cal. 2018). In October 2019, USCIS in an adopted AAO decision acknowledged these legal rulings and stated that USCIS "does not require" this showing. *Matter of D-Y-S-C-*, Adopted Decision 2019-02, at 6 n.4 (AAO Oct. 11, 2019).

E. Adoption and Guardianship – Proposed 8 CFR § 204.11(b)(2)

The proposed regulation notes that juveniles who have been adopted or placed under guardianship can meet the dependency/custody requirement for SIJS. While this is accurate, the regulation does not address or acknowledge the many other ways that a juvenile can meet the dependency/custody requirement, such as through being placed under the custody of the non-offending parent or a third party, or through a dependency adjudication or placement or commitment in another setting. The regulation should clarify that adoption and guardianship are merely two examples and not an exhaustive list.

The regulation should clarify that if juvenile court jurisdiction ends upon adoption or placement in a guardianship, custody, or other arrangement, the juvenile does not lose eligibility (see Comment II.C above). Such clarification would be consistent with current policy, under which the petitioner need not remain under court jurisdiction if jurisdiction ended solely because the petitioner was adopted or placed in a permanent guardianship.⁹

F. General Consent – Proposed 8 CFR § 204.11(c)(1)

The proposed regulation's interpretation of the consent function is problematic. The proposed regulation states that to determine whether to consent, "USCIS will consider, among other permissible discretionary factors, 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, and that the evidence otherwise demonstrates that there is a bona fide

where order stated that parental death was a similar ground to abandonment under New York law) *with M-S-* (Nov. 6, 2018), www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2018/NOV062018_01C6101.pdf (denying SIJS where order stated that parent's death was similar basis under New York law).

⁹ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2.D.4, www.uscis.gov/policy-manual/volume-6-part-j-chapter-2.

basis for granting special immigrant juvenile status.” Proposed 8 CFR § 204.11(c)(1)(i). The 2011 ICLN Comment describes various problems with this language. We offer additional comments here regarding five specific issues:

1. The “primary” purpose standard is a relic of since-repealed language in the statute that gave less deference to the state court’s determinations. The commentary asserts that this standard is “consistent with congressional intent in creating the consent function,” 76 Fed. Reg. 54981, but cites to legislative history surrounding a now-repealed, less deferential consent requirement. That previous provision required the attorney general to “expressly consent[] to the dependency order serving as a precondition to the grant of special immigrant juvenile status.” Former 8 U.S.C. § 1101(a)(27)(J)(iii) (1998). In contrast, the current consent provision, established by Congress in 2008 through the Trafficking Victims Protection Reauthorization Act, P.L. 110-457, 122 Stat. 5044, merely requires the DHS Secretary to “consent[] to the grant of special immigrant juvenile status.” INA § 101(a)(27)(J)(iii). This amendment reflects deference to the institutional expertise and competence of the state court in deciding child welfare matters.¹⁰ In contrast, the language of the proposed regulation impermissibly invites USCIS officers to second-guess the state court’s determinations and re-adjudicate matters properly decided by state court child welfare judges. Recently adopted AAO decisions also adhere to this problematic standard, and direct USCIS, in exercising the consent function, to separately consider the “the nature and purpose of the juvenile court proceedings.”¹¹ This is a departure from established past practice of USCIS, as enshrined in the Policy Manual, wherein “USCIS generally consents to the grant of SIJ classification when the order includes or is supplemented by a reasonable factual basis for all of the required findings,”¹² instead of conducting a separate “nature and purpose” inquiry. USCIS should consent where the petition contains the required information, the state court order makes the required findings, and the child meets the age and marital status requirements.
2. Not only does the “primary” purpose standard fail to reflect the current statute, but it also invites impermissible arbitrariness and disparate treatment of similarly situated petitioners. Allowing individual USCIS officers to conduct a subjective inquiry into a petitioner’s “primary” purpose in seeking state court protection fosters unfairness and arbitrariness and does not further transparency and predictability values. USCIS should abandon this vague and subjective standard. Allowing USCIS officers to exercise discretion over the “primary” purpose assessment will likely lead to denials of SIJS petitions simply because any immigration purpose was present. Since SIJS petitioners are by definition immigrant children, all SIJS petitioners are at risk of facing this arbitrary and unintended outcome. As the CIS Ombudsman has stated: “The primary purpose

¹⁰ See 2015 CIS Ombudsman Recommendation, *supra* note 6, at 5 (“By eliminating the ‘express’ nature of the consent requirement, TVPRA recognized State court authority and ‘presumptive competence’ over determinations of dependency, abuse, neglect, abandonment, reunification, and the best interests of children.”).

¹¹ *Matter of D-Y-S-C-*, Adopted Decision 2019-02, at 7 (AAO Oct. 11, 2019); *Matter of A-O-C-*, Adopted Decision 2019-03, at 8 (AAO Oct. 11, 2019); *Matter of E-A-L-O-*, Adopted Decision 2019-04, at 7 (AAO Oct. 11, 2019).

¹² USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2.D.5, www.uscis.gov/policy-manual/volume-6-part-j-chapter-2.

inquiry relies on a false dichotomy that suggests it is possible that a State court action may only focus on *either* protections against future *or* securing immigration benefits, when almost always, the court protections inevitably provide both in tandem. Securing stability in the form of status in the United States is irrevocably a key aspect of protecting a child from future harm. As a consequence of the ‘bona fide’ review, ‘express consent’ continues unaltered and USCIS adjudicators have in practice nullified the clause amended by Congress in the TVPRA.”¹³ Similarly, USCIS should abandon consideration of unspecified “other permissible discretionary factors,” proposed 8 CFR §204.11(c)(1)(i), in the consent inquiry as not appropriate or consistent with the statute.

3. The commentary’s examples of additional evidence raise confidentiality concerns. The commentary states that in proving the “primary” purpose for seeking the state court order, the petitioner must submit evidence that may include juvenile court dependency or guardianship orders, findings accompanying the order, and actual records from the proceedings. 76 Fed. Reg. 54981. This type of evidence may be confidential under state law, contains sensitive information about children and other individuals that raise serious privacy concerns, and imposes significant burdens on petitioners to access juvenile court records.¹⁴ The CIS Ombudsman has pointed out the inappropriateness of USCIS requesting underlying juvenile court documents as “in effect, engaging in an inappropriate review of the state tribunal’s decision.”¹⁵ The Ombudsman noted,
Juvenile court dependency determinations are not a matter of federal law. USCIS is not vested with authority to make dependency determinations. It is not empowered to engage in post-decision legal or factual review of such decisions and it lacks the expertise possessed by state tribunals specializing in family law.¹⁶
4. Even assuming the proposed standard were permissible, its focus on the purpose behind the order is unworkable. The proposed regulation focuses on the primary purpose in seeking the state court “order.” Often a child seeks and submits a special order containing Special Immigrant Juvenile Status findings to protect privacy interests and provide USCIS with concise and pertinent information. Under this proposed standard, such children would be found ineligible because the order was obtained for the purpose of seeking SIJS. To the extent a “primary purpose” inquiry is permissible at all (which we

¹³ 2015 CIS Ombudsman Recommendation, *supra* note 6, at 8.

¹⁴ See Citizenship and Immigration Services Ombudsman, Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices, at 7 (Apr. 15, 2011), www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf [hereinafter “2011 CIS Ombudsman Recommendation”] (recommending that USCIS “[c]ease requesting the evidence underlying juvenile court determinations” and noting that such requests “burden applicants with onerous documentary requirements”); see also 2015 CIS Ombudsman Recommendation, *supra* note 6, at 6 (stating that seeking evidence underlying orders “is inconsistent with the statutory scheme and USCIS’ own training materials”); *id.* at 7 (noting that such requests are “overly burdensome and intrusive” and may be difficult to respond to “owing to the protected nature of the court documentation”).

¹⁵ See 2011 CIS Ombudsman Recommendation, *supra* note 14, at 7.

¹⁶ *Id.*

maintain it is not), the purpose should be focused on the underlying state court action or proceeding itself, rather than the SIJS findings order. This is consistent with current policy, where “USCIS recognizes that there may be some immigration motive for seeking the juvenile court order. For example, the court may make findings in separate hearings and the petitioner may request an order that compiles the findings of several orders into one order to establish eligibility for SIJ classification.”¹⁷ The USCIS Policy Manual recognizes that a “special order issued to help clarify the findings that were made so that USCIS can determine the petitioner’s eligibility for SIJ classification does not mean that the order is not bona fide.”¹⁸ The proposed rule could deter children from seeking the protection of the court out of concern that USCIS will later examine the purpose behind the state court process and could determine, contrary to the state court judge’s findings, that the child is ineligible for SIJS protection. This would frustrate the purpose behind state court child welfare proceedings—to provide safety, permanency, and well-being for children in need.

5. USCIS should not deny consent because a parent or custodian arranged a child’s travel to the United States or assisted them in filing the SIJS petition. The commentary to the proposed regulation states that in determining consent “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.” 76 Fed. Reg. 54982. To support its position, USCIS cites a 2003 case that arose *before* Congress amended the SIJS statute to allow for one-parent SIJS and before Congress narrowed the consent function. It is perfectly appropriate, and consistent with the purpose of the SIJS statute, for a protective adult in a vulnerable child’s life to take steps to protect the child from harm and further their best interest. In fact, a parent who knows that a child is at risk of harm yet fails to take protective action would be seen as negligent and could be held criminally liable. An SIJS-eligible child may be residing with a non-parent who has taken them in and who assists them in connecting with counsel and seeking SIJS. Or a child may be seeking SIJS based on abuse by one parent, but the other parent has full custody of the child and has taken protective steps on the child’s behalf including seeking out immigration counsel to assist the child in pursuing immigration options including SIJS. The proposed regulation would punish a child in such situations and contradicts the one-parent eligibility provision that Congress created.

G. Discretion – Proposed 8 CFR § 204.11(c)(1)(ii)

The proposed regulations insert a separate discretionary element that is not found in the statute and is *ultra vires*. The SIJS statute has no discretionary component.¹⁹ Instead, if the petitioner

¹⁷ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2.D.5, www.uscis.gov/policy-manual/volume-6-part-j-chapter-2.

¹⁸ *Id.*

¹⁹ See *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.”); *accord, e.g.*, In re [Redacted], 2009 WL 2137990, at *4 (AAO Apr. 17, 2009) (acknowledging that *Polidoro* rule applies in SIJS context and approving SIJS petition).

meets the definitional statutory requirements of a special immigrant juvenile, he or she must be classified as a special immigrant juvenile and is eligible to seek adjustment of status. *See* 8 U.S.C. § 1101(a)(27) (“The term ‘special immigrant’ means . . .”). The definitional SIJ classification has no discretionary words, such as “may” or “in the Secretary’s discretion.” It appears that the agency may be conflating the SIJ classification with the requirement for adjustment of status. *Compare* 8 U.S.C. § 1101(a)(27)(J) (containing no discretionary language) *with* 8 U.S.C. § 1255(a) (“The status of an alien . . . *may* be adjusted by the Attorney General, *in his discretion* . . . to that of an alien lawfully admitted for permanent residence if” (emphases added)). This mischaracterization of the eligibility requirements for SIJ classification is also reflected in the commentary, which reference the potential need for an interview on the Form I-360 if “the juvenile has a criminal record.” 76 Fed. Reg. 54982. A criminal record might be relevant at the adjustment stage but has no relevance to whether a child meets the statutory requirements for classification as a special immigrant juvenile.

H. Specific Consent – Proposed 8 CFR § 204.11(c)(2)

The proposed regulation impermissibly expands the situations in which specific consent from the Secretary of Health and Human Services is required beyond that required by statute. The regulations should reflect the statutory specific consent requirement, rather than adding further situations in which specific consent is required. The proposed regulations and commentary require specific consent if the petitioner seeks a juvenile court order “determining *or altering*” custody status or placement. Proposed 8 CFR § 204.11(c)(2) (emphasis added); *see* 76 Fed. Reg. 54982 (stating that specific consent is required to a state court order “modifying” custody status or placement). However, the statute requires specific consent only when a juvenile court “*determine[s]* the custody status or placement of an alien in the custody of the Secretary of Health and Human Services.” 8 U.S.C. § 1101(a)(27)(J)(iii)(I) (emphasis added).

I. Interviews – Proposed 8 CFR § 204.11(e)

As articulated in the 2011 ICLN Comment, the default procedure should be to waive the SIJS interview, and USCIS should clarify that SIJS beneficiaries are always permitted to have their legal representative present at an interview. *See* 76 Fed. Reg. 54982 (stating that USCIS maintains discretion to interview a child separately when the agency believes it to be necessary). We also find problematic the commentary’s suggestion that although it is generally “not necessary to interview a juvenile (whether alone or accompanied) about the facts regarding the abuse, neglect, or abandonment upon which the dependency order is based,” USCIS “retains discretion” to interview. Officers should never interview a child about abuse, neglect, abandonment and similar topics. As USCIS recognizes in its Policy Manual, “[d]uring an interview, officers avoid questioning the petitioner about the details of the abuse, neglect, or abandonment suffered, because these issues are handled by the juvenile court.”²⁰ Such questions would reflect an inappropriate lack of deference to the juvenile court, which already adjudicated these issues, and a desire for a fishing expedition. They also run a risk of causing unnecessary re-

²⁰ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 4.C.2, www.uscis.gov/policy-manual/volume-6-part-j-chapter-4.

traumatization to already vulnerable children, especially since officers are not experts in child appropriate processes and trauma-informed techniques.

J. 180-Day Adjudication Mandate - Proposed 8 CFR § 204.11(h)

In 2008, Congress imposed a 180-day deadline for the adjudication of SIJS petitions. The statute plainly requires that an SIJS petition “shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.” 8 U.S.C. § 1232(d)(2). Despite this mandate, USCIS routinely fails to meet this deadline. *See, e.g., Moreno-Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208 (W.D. Wash. 2019) (ordering USCIS to comply with 180-day mandate). The commentary refer to the 180-day statutorily mandated deadline as a “benchmark” to which USCIS “intends to adhere.” 76 Fed. Reg. 54983. The proposed regulations allow USCIS to restart the 180-day clock if USCIS sends a request for what it deems “required initial evidence” or if the petitioner requests a rescheduled interview or biometrics appointment,²¹ and permit USCIS to suspend the clock when it issues a request for evidence. These exceptions provide the agency with license to restart and stop the clock at its whim depending on how it chooses to categorize any alleged deficiency in evidence. Congress’s mandate is clear and provides no exceptions to the 180-day deadline. The mandate promotes and furthers Congress’s intent in creating and expanding SIJS protections – to provide permanency, stability, and safety in a timely fashion to vulnerable children. USCIS must comply with the statutory, child-protective mandate.

K. Automatic Revocation – Proposed 8 CFR § 205.1(a)(3)(iv)(B)

The proposed regulation eliminates revocation grounds that are no longer applicable in light of intervening statutory changes enacted through the 2008 TVPRA. The proposed regulation adds a ground for revocation that needs revision in order to be consistent with the SIJS statute. The proposed regulation allows for automatic revocation of an approved petition “[u]pon reunification of the beneficiary with one or both parents by virtue of a juvenile court order, where a juvenile court previously deemed reunification with that parent, or both parents, not viable due to abuse, neglect, or abandonment.” Proposed 8 CFR § 205.1(a)(3)(iv)(B). In circumstances where a juvenile court initially deems reunification not viable with both parents, and then subsequently orders reunification with one parent, such a child is still eligible for SIJS as a child “*whose reunification with 1 or both of the immigrant’s parents is not viable. . .*” INA § 101(a)(27)(J)(i) (emphasis added). Thus, a child who reunifies with only one parent but where the court finding of non-reunification with the other parent still stands remains eligible for SIJS.

²¹ The agency does not explain why a biometrics appointment would be required at all as part of an SIJS petition’s adjudication. The Policy Manual chapter on SIJS does not contemplate biometrics, nor do the general Form I-360 instructions require biometrics. The commentary’s reference to biometrics comprising part of “initial evidence,” *see* 76 Fed Reg. 54982, is confusing, since the agency would initiate biometrics, if at all, once an application is filed and deemed complete. *See* Form I-360 Instructions at 10 (Apr. 12, 2018) (treating biometrics as something that USCIS may request after a petition is received and deemed complete). In any event, biometrics should not be imposed on SIJS petitioners as they would further exacerbate the agency’s challenges in meeting the 180-day adjudication mandate and can be completed, as they are now, during the adjustment of status process.

This should not result in automatic revocation. Automatic revocation in this scenario is contrary to the SIJS statute, which expressly provides for one-parent SIJS.

L. Inadmissibility Waivers – Proposed 8 CFR § 245.1(e)(3)

As raised in the 2011 ICLN Comment, the proposed regulations’ statement that certain inadmissibility provisions “may not be waived” is not an accurate reflection of the INA. While it is true that certain inadmissibility grounds cannot be waived under INA § 245(h), some SIJS-based adjustment applicants have other waivers available to them, such as a waiver of inadmissibility under INA § 212(h). The regulation should be amended to say that those inadmissibility grounds “may not be waived under the waiver provision found at INA § 245(h)(2)(B).” Otherwise, the proposed regulation would contravene the INA.

M. No Fee – 76 Fed. Reg. 54984

We agree with USCIS’s determination not to charge a fee for the filing of Form I-360. USCIS correctly notes that these vulnerable youth, about whom a juvenile court issued a dependency or custody order and made findings related to non-viability of parental reunification and the child’s best interest, “are not able to pay the filing fee.” 76 Fed. Reg. 54984. Further, Congress recognized the financial hardship of this population by exempting them altogether from the public charge inadmissibility ground. INA § 245(h)(2)(A). For this reason, USCIS should similarly exempt SIJS beneficiaries from a fee for filing the adjustment of status application. A universal fee exemption would reduce the burden on this vulnerable population to fill out additional fee waiver paperwork and obtain the required documentation, and would save on agency resources in adjudicating fee waiver applications.

N. Obtaining Evidence from Other Sources – 76 Fed. Reg. 54982

As indicated in the 2011 ICLN Comment, the commentary to the proposed regulations contains a problematic statement authorizing 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.” 76 Fed. Reg. 54982. Contacting government entities directly to obtain sensitive information about vulnerable children raises a number of concerns including: (1) it gives the impression that USCIS adjudicators are authorized to second-guess the state court’s findings; (2) it suggests that USCIS has authority to obtain sensitive records which may be protected by various privacy laws²²; (3) it unnecessarily intrudes on the privacy rights of vulnerable children as well as third parties who are not subject to any USCIS adjudication (*e.g.* siblings, custodian, foster family); and (4) USCIS contact with a local government entity that could result in the local government agency imputing negative conduct to the child thus leading to the child’s stigmatization. USCIS does not explain why, in a situation where further evidence is needed, the agency would not employ the RFE mechanism to request that information directly from the petitioner and their counsel instead of approaching a government entity. Using the RFE mechanism to request more information where necessary respects privacy interests and allows

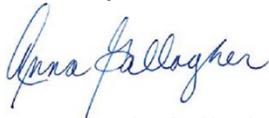
²² See, *e.g.*, Cal. Welf. & Inst. Code §§ 827, 831; ; Family Educational Rights & Privacy Act, 20 U.S.C. § 1232g; 34 CFR § 99.30.

the child and his or her legal representative to disclose information responsive to the request while not providing sensitive records that are outside of the purview of USCIS. This is consistent with current policy, wherein “USCIS is mindful that there are often confidentiality rules that govern disclosure of records from juvenile-related proceedings” and generally “do[es] not request information or documents from sources other than the SIJ petitioner or his or her legal representative.”²³

III. Conclusion

Thank you for the opportunity to submit these comments. We appreciate your consideration. Please do not hesitate to contact Michelle Mendez, Director of CLINIC’s Defending Vulnerable Populations Program, at mmendez@cliniclegal.org, should you have any questions about our comments or require further information.

Sincerely,



Anna Marie Gallagher
Executive Director

²³ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 3.B, www.uscis.gov/policy-manual/volume-6-part-j-chapter-3.