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RE: [DHS Docket No. USCIS-2009-0004] Proposed Rules Special Immigrant Juvenile Petitions, 76 FR 23534

Comments of the National Immigrant Women's Advocacy Project, American University, Washington College of Law

The National Immigrant Women's Advocacy Project at American University Washington College of Law is writing to provide comments on proposed rule, *Special Immigrant Juvenile Petitions*. Our comments will analyze the current statute, the regulations, the USCIS Policy Manual Volume 6, Part J on Special Immigrant Juveniles and Volume 7, Part F, Special Immigrant-Based (EB-4) Adjustment as well as the three adopted decisions of the Administrative Appeals Office, *Matter of D-Y-S-C-* 2019-02 (AAO Oct. 11, 2019), *Matter of A-O-C-* 2019-03 (AAO Oct. 11, 2019) and *Matter of E-A-L-O-* 2019-04 (AAO Oct. 11, 2019) and provide both support for positions taken in the proposed regulations and/or the AAO decisions and will provide suggestions about how the proposed regulations can be improved.

1. Adopted Decisions

On October 11, 2019, DHS announced three adopted decisions from the Administrative Appeals Office.

We start our comments with an overview of the highlights of the Administrative Appeals Office (AAO) in *Matter of D-Y-S-C-* and *Matter of E-A-L-O-* as an Adopted Decision:

- *Matter of D-Y-S-C-* asserts a SIJS classification may only be granted upon USCIS'S consent to juveniles who meet all other eligibility criteria and establish that they sought the requisite juvenile court or administrative determinations in order to gain relief from parental abuse, neglect, abandonment, or a similar basis under state law, and not primarily to obtain an immigration benefit. This case demonstrates that USCIS'S consent is warranted where petitioners show the state juvenile or custody court proceedings made findings about the specific abuse, neglect or abandonment the SIJS applicant child suffered and granted the child relief from such parental maltreatment in addition to issuing an order containing findings that enable the child

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to file an SIJ petition with USCIS. The *Matter of D-Y-S-C-* provides some examples of what some of the forms of relief state courts offer child victims of maltreatment might include but not be limited to:

- Ordering placement or granting custody of the child;
 - Making a finding of parental sexual abuse or parental neglect which can in and of itself contribute to the child’s healing and/or treatment and the finding can be later used to stop abusive parents from attempting to access the child or reassert control over the abused child’s life;
 - Making findings based on best interest factors under state law that award custody or placement of a child that is in the child’s best interests and deny placement or custody to the parents who perpetrated the maltreatment or others; or
 - Issuing other court orders or taking other steps to protect the child from parental abuse, neglect or abandonment.
- When they are viewed as a totality, the state juvenile/family court orders together with the documents submitted to the juvenile court, petition, transcripts, and court records demonstrate a reasonable factual basis for the state court’s determinations. Then the child’s request for SIJS classification merits consent and should be granted. When there is evidence in the court record that the child sought help from the court to stop, remedy or heal from the parental maltreatment of abuse, abandonment or neglect that is sufficient in and of itself to merit consent granting the child’s SIJS petition even when the child also sought SIJS findings.
 - To establish the child cannot reunify with one or both of their parents due to abuse, neglect, abandonment or a similar basis, juveniles must provide evidence of a judicial determination that they were subjected to such parental maltreatment as defined under state law. Petitioners bear the burden of establishing the state law applied by the juvenile court.
 - USCIS does not require that the juvenile court had jurisdiction to place the juvenile in the custody of the unfit parent(s) in order to make a qualifying determination regarding the viability of parental reunification.
 - This decision also requires that USCIS consider the “totality of the evidence” in adjudicating SIJS applications.¹

Matter of E-A-L-O-, Adopted Decision 2019-04 (AAO Oct. 11, 2019)

- Determination of whether a state court order submitted to USCIS establishes eligibility for Special Immigrant Juvenile (SIJ) classification is a question of federal law within the sole jurisdiction of USCIS.

¹ *Matter of D-Y-S-C-*, Adopted Decision 2019-02 at 5 (AAO Oct. 11, 2019).

- A juvenile court dependency order alone will not warrant USCIS' consent to SIJ classification absent evidence the dependency declaration was issued in juvenile court proceedings granting relief from parental abuse, neglect, abandonment, or a similar basis under state law.

The final SIJS regulations should include the following drawn from the Adopted Decision in *Matter of D-Y-S-C- and Matter of E-A-L-O-*

- Where the totality of the evidence and orders in the state juvenile court case that included the SIJS findings contains a reasonable factual basis for the state court's determinations about facts that the parental perpetrated:
 - Abuse
 - Abandonment
 - Neglect or
 - Similar basis under state law; and
- The court offers the child help or at least one form of relief including but not limited to any of the following:²
 - Prevention of or obtaining relief from the abuse, abandonment, neglect or similar basis under state law
 - This includes applying state best interest statutes to issuing custody and placement decisions
 - Help escaping the abuse
 - Ameliorate the current or future effects of the abuse, abandonment or neglect of the child
 - Protecting the child against future abuse
- Then the child's request for SIJS classification merits consent and must be granted
- The state law definitions of abuse, abandonment, neglect and other maltreatment that is a similar basis under state law
- To gain approval of an SIJS petition there is no requirement that the juvenile court had jurisdiction to place the juvenile in the custody of the unfit parent(s) in order to make a qualifying determination regarding the viability of parental reunification.
- In adjudicating SIJS cases USCIS must consider the "totality of the evidence"³ in the case.

Matter of A-O-C-, Adopted Decision 2019-03 (AAO Oct. 11, 2019)

- To be eligible for Special Immigrant Juvenile (SIJ) classification, juveniles must have been subject to a dependency or custody order issued by a "juvenile court," which is defined as a court in the United States having jurisdiction under *State law* to make

² See Restrictions on Legal Assistance to Aliens, 45 C.F.R. section 1626.4(b) (2014).

³ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274 and 299).

judicial determinations about the dependency, custody, placement, and/or care of juveniles. The specific title and type of state court and state court proceeding may vary, to gain approval of an SIJS petition juveniles must establish that the state court had competent jurisdiction to make judicial determinations about their dependency and/or custody and care as “juveniles” as defined under state law.

- Individuals must apply for SIJ classification while unmarried and under the age of 21. Federal immigration law mandates these filing requirements and contains related age-out protections.
- State law, not federal law, governs the definition of “juvenile,” “child,” “infant,” “minor,” “youth,” or any other equivalent term for juvenile which applies to state dependency or custody proceedings before the juvenile court.

The final SIJS regulations should include the following drawn from the Adopted Decision in *Matter of A-O-C-*

- To be eligible for SIJS the child applicant must be the subject of a dependency, placement, care, or custody order issued by a “juvenile court” as defined by state law.
- The definition of juvenile court should be:
 - Any court in the United States having jurisdiction under State law to make judicial determinations about the custody, placement or care of juveniles.
- The regulations should also contain a non-exclusive list containing examples of the types of state court proceedings in which SIJS findings can issue. These include but are not limited the following proceedings:
 - Child welfare
 - Dependency
 - Probate
 - Guardianship
 - Delinquency
 - Civil Protection Order
 - Custody and child support
 - Divorce
 - Paternity and Parentage
 - Adoption
 - Termination of Parental Rights
 - Declaratory Judgement
 - Domestication of a foreign court order
- State law, not federal law, governs the definition of “juvenile,” “child,” “infant,” “minor,” “youth,” or any other equivalent term for juvenile which applies to state dependency or custody proceedings before the juvenile court with jurisdiction over the custody or care of juveniles.

Analysis

Special Immigrant Juveniles Status (SIJS) is a form of humanitarian immigration relief that provides for a path to lawful permanent residence (LPR) for children who are unable to be reunited with one or both parents due to abuse, abandonment, neglect, or a similar basis under state law. SIJS status provides a path to legal permanent resident status and the hope of stability and safety for vulnerable immigrant children.

Family relationships form the core of the most common routes to lawful immigration status in the United States.⁴ This has long meant that children's immigration status is greatly reliant on their parents' status and actions.⁵ Recognizing that immigration law failed to provide protection for vulnerable immigrant children without lawful immigration status who are separated from their parents who perpetrated maltreatment of children, Congress created SIJS in 1990.⁶

SIJS has "evolved to include children who cannot reunify with one or both parents because of abuse, neglect, abandonment, or a similar basis under state law."⁷ While initially used sparingly, mostly for children in domestic foster care systems, over time Congress expanded this effective program to offer important humanitarian protection to greater numbers of immigrant children who have suffered abuse, abandonment, neglect, or similar harms perpetrated by at least one of the child's parents. SIJS was expanded by Congress to ensure that SIJS protections include children living with their protective parent who was not the perpetrator of the child maltreatment opening up SIJS protections under U.S. immigration laws to greater numbers of immigrant children to whom state courts offer relief from abuse, neglect, abandonment and other similar harms defined under state laws.⁸

⁴ See Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J.L. REFORM 107 (2016).

⁵ See David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58 (2006).

⁶ Although enacted in 1990 as § 153 of the Immigration Act of 1990, . L. No. 101-649, 104 Stat. 4978, Nov. 29, 1990, necessary technical amendments and regulations delayed implementation until late in 1993. See Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, Dec. 12, 1991; Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843-42851 (Aug. 12, 1993) (codified at 8 C.F.R. § 204.11 (2001)). Together with subsequent amendments, the provision is now codified at Immigration and Nationality Act (INA) § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J) (2012). *Appendix A: Statutory Provisions Related to Special Immigrant Juvenile Status*, Nat'l Immigrant Women's Advocacy Project, Special Immigrant Juvenile Status Bench Book: A National Guide to Best Practices for Judges and Courts (2017) [hereinafter SIJS Bench Book], available at <http://niwaplibrary.wcl.american.edu/pubs/appendix-a-sijs-statutory-and-regulatory-provisions/>. Incorporated herein by reference.

⁷ *Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles – Chapter 1(A) – Purpose*, Nat'l Immigrant Women's Advocacy Project, SIJS Bench Book 3 n.1 (2017), available at <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>.

⁸ Only 287 children were granted special immigrant juvenile status in 1998. 1998 Stat. Y.B. Immigr. & Naturalization Serv. 32, *Table 5*, <https://www.dhs.gov/xlibrary/assets/statistics/yearbook/1998/1998yb.pdf>. That has certainly increased, with a peak of over 14,500 applications in the first three quarters of Fiscal Year 2016. See U.S. Citizenship & Immigr. Serv., Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year and Case Status 2010-2016 at 1, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I360_sij_performancedata_fy2016_qtr4.pdf (last visited Nov. 15, 2019).

Children separated from parents are very susceptible to various forms of violence, including child abuse, child sexual exploitation, incest, dating violence, domestic violence, sexual assault, and human trafficking.⁹ SIJS is one of several options that U.S. immigration law offers as possible forms of humanitarian immigration relief for immigrant children.¹⁰ Other forms of immigration relief that offer protection and help for immigrant children include: VAWA self-petitioning, VAWA cancellation of removal, VAWA suspension of deportation, U visas, T visas, and Continued Presence.¹¹

On the light of Congressional intent and practice in the field, we will analyze each issue pointed out on the Proposed Rules reopened for comment on October 16, 2019. The text of Proposed Rulemaking (NPRM) was published by DHS in the Federal Register at 76 FR 54978, on September 6, 2011, are copied here in italics. We also note below where we believe the final regulations should be amended to incorporate the adopted AAO decisions or portions thereof.

a. Clarify Dependency and Age

i. Dependency – Age and Types of Proceedings Under State Law

Proposed rule language: *An alien seeking SIJ classification must have been declared dependent on a juvenile court located in the United States, or such a court must have legally committed the juvenile to, or placed him or her under the custody of, a State agency or department of a State, or an individual or entity appointed by a State or juvenile court.*¹²

The original SIJS statute required that the child be dependent on the state court and eligible for long-term foster care. The statute was amended to clarify that this includes the placement of the child in the care or custody of an individual to allow children living with parents, family members, guardians, or next of kin to remain in their homes in the care of an adult in whose care the state court applying state law has placed or granted custody or guardianship of the child. The language remains reminiscent of traditional dependency language and some courts have mistakenly interpreted that to mean they can only make SIJS findings in dependency proceedings.¹³ It is important to clarify in the final regulation that SIJ findings can

⁹ *Review of the President's Emergency Supplemental Request for Unaccompanied Children and Related Matters: Hearing on S. 272 DHS Appropriations B. before the S. Comm. on Appropriations*, 113th Cong. 2 (2014) (statements of Jeh Johnson, Sec. of Dep't of Homeland Sec., and Sen. Dick Durbin).

¹⁰ See DHS Infographic: Protections for Immigrant Victims (Jan. 12, 2017), National Immigrant Women's Advocacy Project, <http://niwaplibrary.wcl.american.edu/pubs/dhs-protections1-6-links-121516/> (last visited Nov. 15, 2019).

¹¹ U.S. Citizenship & Immigr. Servs., *Immigration Options for Victims of Crimes* (2019), <http://niwaplibrary.wcl.american.edu/pubs/dhs-immigration-relief-for-crime-victims/>; U.S. Immigr. & Customs Enforcement, *Continued Presence: Temporary Immigration Designation for Victims of Human Trafficking* (2019), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Continued-Presence-Pamphlet-2019.pdf>.

¹² *Special Immigrant Juvenile Petitions*, 76 Fed. Reg. 54,978, 54,980 (Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205, and 245).

¹³ See Memorandum from Donald Neufeld to Field Leadership of U.S. Dep't of Homeland Sec., *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions 2* (Mar. 24, 2009) (<http://niwaplibrary.wcl.american.edu/pubs/imm-gov-uscismemotvpra2008-03-04-09/>) ("In short, the TVPRA 2008 removed the need for a juvenile court to deem a juvenile eligible for long-term foster care."); see also U.S. Citizenship & Immigr. Servs., *Immigration Relief for Abused Children: Information for Juvenile Court Judges, Child Welfare Workers, and Others Working With Abused Children* (2014),

be issued in a wide range of state court proceedings including, but not limited to divorce, custody, guardianship, dependency, adoption, child support, protection orders, parentage, paternity, termination of parental rights, declaratory judgments, domestication of a foreign order, or delinquency. Also, according to *Matter of E-A-L-O* a judicial decision of dependency declaration must be a judicial determination issued in accordance with state law that is governing the placement, dependency, custody or care of juveniles.

For most immigration purposes, a child is defined as “an unmarried person under twenty-one years of age.” While the definition of a child allows for SIJS filings up to age 21. The final regulations should confirm that any child who is under the age of 21 and who is under any form of state dependency, care, placement or has an ongoing court orders that govern the child’s custody or care at the time of filing the SIJS order qualifies for SIJS so long as the child is subject to some form of the state court’s jurisdiction on the date the child’s SIJS application is filed. In some jurisdictions, the definition of child is an individual who is younger than 18 years of age. Other states have extended the age at which children can enter the dependency system to permit persons between the age of 18 and 21 who meet other requirements to avail themselves of the jurisdiction of the state court and by extension, of the protections provided by SIJS.

The age to which a child who is already in state care, has a custody or child support order, or has a dependency or placement order can remain in state care, under a custody or placement order, or continue to receive various forms of support, help or assistance also varies by state. USCIS should continue to consider the petitioner’s age at the time the SIJS petition is filed in determining whether a child meets the age requirement. If the child was under the age of 21 and still under the jurisdiction of a state juvenile, family, probate, guardianship or other court orders under state law on the date of the filing of the SIJS application, the child meets the SIJS age eligibility requirement and the final regulations should clarify that USCIS cannot deny SIJS classification solely because the child may be older than 21 by the time the adjudication is complete.

b. Viability of Parental reunification with one or both of the child’s parent due to abuse, neglect or abandonment, or similar basis under state law must be determined by the juvenile court based on applicable state law

To qualify for SIJS, the non-viability of reunification with a parent must be “due to abuse, neglect, abandonment, or a similar basis found under State law.”¹⁴ There is no governing federal definition of these terms, and USCIS states the “order (or orders) should use language establishing that the specific findings (conclusions of law) were made under state law.”¹⁵ The final regulations should include such language.

http://niwaplibrary.wcl.american.edu/pubs/uscis_sijs_brochure/ (stating that “SIJ eligible children may . . . [b]e living with a foster family, an appointed guardian, or the non-abusive parent and noting that the highlighted examples are not an exhaustive list) (emphasis added). Therefore, for immigration law purposes, a juvenile is dependent upon the state court if he or she “[h]as been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court.” 8 C.F.R. § 204.11(c)(6) (2012).

¹⁴ INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

¹⁵ *Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles*, in Nat’l Immigrant Women’s Advocacy Project, SIJS Bench Book 12, <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>.

i. Similar basis under State Law

The term “similar basis under the state law” was added to the statute to give judges more leeway in states that use terminology or recognize additional state laws governing child protection, child welfare, and other state laws that protect child best interests that prevent a child’s reunification with a parent. The SIJS statutory amendment adding “similar basis under State law” accommodates the range of statutory language employed in various jurisdictions to determine when a state court can make decisions about custody, care, placement and protection of children, beyond the narrower categories of abuse, neglect or abandonment. For example, a court may exercise jurisdiction to make a decision related to care and custody of “a destitute child” in New York or a child who is “without proper custody or guardianship” in Michigan. Children who are orphans whose parents are deceased were included in the original protections offered by SIJS and are protected under many state laws. Many states cover death of a parent under state abandonment laws so as to offer protection to vulnerable children. For example, a parental death with no arrangement for future custody or which leaves the child without any provision for support may fit within the state law definition of neglect. Where there is a legitimate underlying child welfare/child best interest reason for the state court to exercise jurisdiction over a decision regarding the care and custody of a child, similar basis was created to address these cases where the maltreatment may not fit under state law into the state definitions of abuse, neglect, or abandonment.

The commentary to the proposed regulations states that in order to establish SIJS eligibility based on “similar basis,” the petitioner has the burden of proof to establish that the basis is similar, i.e., the “nature and elements of the State law must be similar to the nature and elements of abuse, abandonment, or neglect.” 76 Fed. Reg. 54981. This burdensome inquiry that ignores the state court’s expertise in determining whether a particular state law ground is a “similar basis” to abuse, neglect, or abandonment. USCIS adjudicators in SIJS cases should not second guess a state court’s finding that a child has been abused, abandoned or neglected under state law when the court makes factual findings describing the maltreatment suffered by the child that meets one or more of these state law definitions.¹⁶

However, there are legal categories in each jurisdiction that have different title from abuse, neglect and abandonment but as a matter of law fall are under these conceptual umbrellas. These are forms of maltreatment of children that by definition are equal to or more maltreatment than the definitions of abuse, abandonment and/or neglect under state law. The most common

¹⁶ Chloe Canetti & Leslye E. Orloff, *Appendix K - State Law Definitions of Child Abuse*, Nat'l Immigrant Women's Advocacy Project (Dec. 19, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-K-State-Law-Definitions-of-Child-Abuse-Chart.pdf> (Incorporated herein by reference); Rafaela Rodrigues & Leslye E. Orloff, *Appendix L - State Law Definitions of Abandonment*, Nat'l Immigrant Women's Advocacy Project (Sept. 20, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-L-Abandonment-of-Children-Statutes-Definitions.pdf> (Incorporated herein by reference); Tolulope Adetayo, Chloe Canetti & Leslye E. Orloff, *Appendix M - State Law Definitions of Child Neglect*, Nat'l Immigrant Women's Advocacy Project (Oct. 2, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-M-State-Law-Definitions-of-Child-Neglect-Chart.pdf> (Incorporated herein by reference).

examples of these state laws are state domestic violence laws.¹⁷ Virtually all state domestic violence laws include child abuse as a domestic violence crime.¹⁸ Other examples include state forced marriage¹⁹ which always include sexual assault and child abuse and child endangerment laws which in all states are defined as more than child neglect and often include forms of child abuse as well.²⁰ Children who have been victims of domestic violence, forced marriage and child endangerment are children without proper care or custody who are as a matter of state law always in a situation similar to that of an abused, abandoned or neglected child. Depending on the precise wording of the relevant jurisdiction’s statute, NIWAP’s review of all state domestic violence, forced marriage, and child endangerment laws found that children subjected to these forms of maltreatment under state law always meet the definition of a child who has been abused, abandoned or neglected under state law. Thus, the final SIJS regulations should provide that when a child has been a victim of domestic violence, forced marriage, or child endangerment the child is presumed to have suffered sufficient maltreatment equal to or greater than abuse, abandonment or neglect under state law to qualify for SIJS without having to prove that these state laws are similar to abuse, abandonment or neglect.

Juvenile Court Based on Applicable State Law

*The term ‘juvenile court’ includes any court having jurisdiction to make judicial determinations about the custody and care of juveniles.*²¹

The proposed regulation’s definition of “juvenile court” is not consistent with the current statute. The regulation defines “juvenile court” as “any court located in the United States having jurisdiction to make judicial determinations about the custody and care of juveniles.” Courts have been interpreting²² “juvenile court” for the purposes of SIJS cases federal immigration law defines a state “juvenile court” as any “court located in the United States having jurisdiction under State law to make judicial determinations about custody and care of juveniles. The definition of “juvenile court” in SIJS cases is governed by the federal immigration laws definitions and is not limited to the state law definition of “juvenile court.”

¹⁷ Tolupe Adetayo, Rafaela Rodrigues, Chloe Canetti & Leslye E. Orloff, *Appendix N - State Law Definitions of Domestic Violence Include Child Abuse*, Nat’l Immigrant Women’s Advocacy Project (Dec. 14, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-N-Domestic-Violence-Includes-Child-Abuse-and-Child-Neglect.pdf> (Incorporated herein by reference).

¹⁸ *Id.*

¹⁹ Tolupe Adetayo & Leslye E. Orloff, *Appendix P - Forced Marriage as Child Abuse: State Laws*, Nat’l Immigrant Women’s Advocacy Project (Dec. 27, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-P-Forced-Marriage-Chart.pdf> (Incorporated herein by reference).

²⁰ Tolupe Adetayo, Rafaela Rodrigues, Monica Bates & Leslye E. Orloff, *Appendix O - States Definitions of Child Endangerment as More Severe Than Neglect*, Nat’l Immigrant Women’s Advocacy Project (Dec. 27, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-O-Endangerment-Chart.pdf> (Incorporated herein by reference).

²¹ Special Immigrant Juvenile Petitions, 76 Fed. Reg. at 54,980.

²² *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 377 (S.D.N.Y. 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.”)

USCIS has made it clear that the “title and the type of court that may meet the definition of a juvenile court will vary from state to state. Examples of state courts that may meet this definition include: juvenile, family, dependency, orphans, guardianship, probate, and delinquency courts.”²³ Thus, courts can issue SIJS findings in any case in which the court is entering orders regarding the care, custody, dependency, or placement of a child, regardless the specific title and type of state court.

Matter of A-O-C-, Adopted Decision 2019-03, at 4 n.2 (AAO Oct. 11, 2019) correctly 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” (emphasis added). Therefore, we suggest that text of regulations adopts the text of decision *Matter of A-O-C-* to include “*and/or* custody and care of juveniles.” We also recommend that the text of the regulations include the full list “care, custody, dependency, and/or placement” of a child. This will provide significant help to state court judges trying to understand the federal law definition of “juvenile court.”

c. USCIS Consent

*This proposed rule provides that consent will be granted to otherwise eligible SIJ petitioners where the qualifying State court order was sought primarily for the purpose of obtaining relief from abuse, neglect, abandonment, or some similar basis under State law, and not primarily for the purpose of obtaining lawful immigration status.*²⁴

d. The final regulations should use “reasonable factual basis” for grating SIJ classification

In Matter of D-Y-S-C- AAO held that when the court findings and record as a totality of the evidence contains a reasonable factual basis for the requisite SIJS state court determinations, this is sufficient for USCIS to provide consent. Moreover, a reasonable factual basis for the juvenile court’s determinations may be shown by a totality of the evidence through “factual findings in the juvenile court order(s), the underlying petition for dependency or custody, other supporting documents submitted to the juvenile court and transcripts or other records of the judicial or administrative proceedings if available, or affidavits or records attesting to the evidence presented to the juvenile court and consistent with its determinations.”²⁵

USCIS Policy Manual correct and reasonably states that “the evidence needed does not have to be overly detailed, but must confirm that the juvenile court made an informed decision in order to be considered ‘reasonable.’”²⁶ Therefore the final regulations should make clear that

²³ USCIS Policy Manual, Vol. 6, Part J – Special Immigrant Juveniles, available at <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter1.html#S-A> (last checked November 15, 2019).

²⁴ Special Immigrant Juvenile Petitions, 76 Fed. Reg. at 54,981.

²⁵ *Matter of D-Y-S-C-* at 8.

²⁶ USCIS Policy Manual, Vol. 6, Part J, Chapter 2 - Eligibility Requirements – Special Immigrant Juveniles, available at <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2> (last checked November 15, 2019).

where the totality of the evidence in the state court orders and record from a proceeding ordering a child’s dependency, custody, placement or care based on factual findings of abuse, neglect, abandonment, or a similar basis under State law is sufficient evidence to demonstrate that there is a reasonable factual basis for granting special immigrant juvenile status. Where the court makes findings that demonstrate the court made an informed decision and there is a reasonable factual basis for the court’s order providing help, protection, relief or other assistance to a child who has suffered abuse, abandonment, neglect or other similar harm under state law, USCIS should honor the state court order and not seek additional evidence from the court that may be incompatible with state confidentiality provisions.

Most importantly, the USCIS Policy Manual recognizes that an immigration related motive may be one of the reasons that the immigrant child may be seeking a state court order.²⁷ The final regulations should confirm that where the state court findings and/or the state court order submitted by an immigrant child as evidence in their SIJS petition includes findings that provide a reasonable factual basis for the state court’s SIJS determinations this is sufficient for USCIS consent. The final rule should also state clearly that an immigration related motive may be one reason, but not the sole reason for the state court’s order.

e. Best Interest of the child

When SIJS was created in 1990, the statute expressly required that the best interests of the child be applied to SIJS cases.²⁸ State courts that adjudicate cases involving children have particularized training and expertise with regard to applying best interests of the child factors to cases involving child custody, placement, dependency, welfare, abuse, neglect, and a wide other state court proceedings to which state best interests of the child laws apply.²⁹ As such, SIJS application procedures must rely on the expertise of state court judges who regularly make decisions regarding the care, custody, placement, safety, health, welfare, and a range of critical life issues³⁰ affecting children and apply state best interest of the child laws to these decisions.³¹

²⁷ USCIS Policy Manual, Volume 6 - Immigrants, Part J - Special Immigrant Juveniles at 8 (2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-D1-USCIS-SIJS-Policy-Manual-Full-Vol-6.pdf>.

²⁸ Requiring a determination regarding SIJS children that “it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence.” Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5006 (1990).

²⁹ See generally *Gao v. Jenifer*, 185 F.3d 548, 555 (6th Cir. 1999); *Eddie E. v. Superior Court*, 167 Cal. Rptr. 3d 435, 438 (Cal. Ct. App. 2013); *B.F. v. Superior Court*, 143 Cal. Rptr. 3d 730, 734 (Cal. Ct. App. 2012); *In re Erick M.*, 820 N.W.2d 639, 641-42 (Neb. 2012); *In re Marisol N.H.*, 979 N.Y.S.2d 643, 645 (N.Y. App. Div. 2014); *In re Hei Ting C.*, 969 N.Y.S.2d 150, 152 (N.Y. App. Div. 2013); *In re Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 719 (N.Y. App. Div. 2013); *In re J.L.E.O.*, No. 14-10-00628-CV, 2011 WL 664642, at *1 (Tex. App. Feb. 4, 2011).

³⁰ *Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles, Chapter 1(A): Purpose in Nat’l Immigrant Women’s Advocacy Project*, SIJS Bench Book 1 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/>.

³¹ *Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles, Chapter 2(A): Determining Eligibility*, in Nat’l Immigrant Women’s Advocacy Project, SIJS Bench Book 4 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/> (directing courts to apply their state laws and procedures to cases involving requests by immigrant children for SIJS findings); *Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles, Chapter 2(D)(3): Best Interests*, in Nat’l Immigrant Women’s Advocacy Project, SIJS Bench Book 4 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/> (directing USCIS to defer to the state courts on matters of state law including best interests and the state law definitions of abuse, abandonment, or neglect).

Each child has unique needs, life experiences, and in the case of foreign-born children applying for SIJS, trauma histories. To be effective in meeting the needs of all children, state best interest laws are complex, flexible, and adaptable so that the particular factors that take precedence for an individual child are determined on a case-by-case basis.³² A child's best interest is determined by judges on an individual basis applying state best interest of the child law factors to the specific facts of each child's case taking into consideration each child's individual needs, context, maltreatment history, health, mental health, and personal context, as well as his development,³³ including brain development, and the impact of any trauma that the child suffered.³⁴

NIWAP has developed and incorporates herein by reference charts that track the requirements of state best interest laws in 55 U.S. states, jurisdictions and territories.³⁵ NIWAP's best interest of the child charts track the most common factors that state laws require that courts consider when conducting a best interest of the child analysis and issuing decisions to which state best interest of the child laws apply. Below we summarize and cite in the footnote charts that contain the full text³⁶ of each state's best interests of the child laws with regard to each of the following factors:

- Family Violence: Child abuse, neglect, sexual assault, kidnapping, or other physical or mental harm to the child.³⁷
- Child's Needs: The child's physical, emotional, educational, developmental, age, religious, cultural, ethnic, linguistic, physical and mental health, welfare, safety, vulnerabilities, sexual orientation, and social needs.³⁸
- Fitness-Caregiving Capacity: Parent's fitness and capacity to be a caregiver to meet the child's needs (e.g., food, clothing, medical and mental health, safety, financial support, nurturing); the level and type of involvement or non-involvement in the

³² U.N. Comm. on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶20 CRC/GC/2005/6 (Sept. 2005).

³³ *Id.*

³⁴ *Appendix E: Understanding the Significance of a Minor's Trauma History in Family Court Proceedings*, in Nat'l Immigrant Women's Advocacy Project, SIJS Bench Book 3 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-e-effects-of-trauma-on-minors-fact-sheet/> (Incorporated herein by reference).

³⁵ Morgan Lewis & Bockius LLP, *Appendix Q - Best Interests of the Child Matrix*, Nat'l Immigrant Women's Advocacy Project (Dec. 29, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q-Best-Interests-of-the-Child-Matrix.pdf> (Incorporated herein by reference).

³⁶ Morgan Lewis & Bockius LLP, *Appendix Q1 - Best Interests of the Child - Factors in State Law*, Nat'l Immigrant Women's Advocacy Project (Dec. 29, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q1-Best-Interests-of-the-Child-All-Factors.pdf> (Incorporated herein by reference).

³⁷ Morgan Lewis & Bockius LLP, *Appendix Q7 - Best Interests of the Child - Family Violence*, Nat'l Immigrant Women's Advocacy Project (Dec. 29, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q7-Best-Interests-Family-Violence.pdf> (Incorporated herein by reference).

³⁸ Morgan Lewis & Bockius LLP, *Appendix Q4 - Best Interests of the Child - Child's Needs Factor*, Nat'l Immigrant Women's Advocacy Project (Dec. 29, 2017), http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q4-Best-Interests-Child_s-Needs.pdf (Incorporated herein by reference).

child’s life, the capacity to provide a consistent routine, and the involvement of a non-parent caregiver or a de-facto custodian in the child’s life.³⁹

- Substance abuse or mental illness of a parent or other potential caregiver.⁴⁰
- Continuity and stability of the home environment, the child’s adjustment to school, home, community, continuity of care and caregivers, and the potential.⁴¹

2. Inadmissibility in Special Immigrant Juvenile Status Cases

Final regulations should confirm that SIJS children are eligible for both SIJS inadmissibility waivers and any other waivers they qualify for under the INA.

“The proposed regulations state that certain inadmissibility grounds, such as INA § 212(a)(2)(A), “may not be waived.” Proposed 8 CFR § 245.1(e)(3). While these provisions cannot be waived under the generous waiver standard for SIJS-based adjustment applicants found at INA § 245(h)(2)(B), they may be waived under other provisions of the INA if the child otherwise qualifies, such as INA § 212(h).” The final rule should add language confirming that SISJ eligible children may receive both SIJS related inadmissibility waivers and any other waivers they qualify for under other provisions of the INA including but not limited to INA § 212(h).

3. Court’s Continuing Jurisdiction – Must Be Consistent with State Family Laws

*When an SIJ petitioner relocates to another state, the initial juvenile court dependency order will no longer be in effect because the juvenile will no longer be under the initial court’s jurisdiction. The petitioner must therefore obtain a new dependency order.*⁴²

This proposed rule’s requirement that when a child moves from one jurisdiction to another they child is required by the regulations to seek a new dependency or custody order in another state is totally inconsistent and contrary to all state family court procedural laws. Once a state court issues an order exerting jurisdiction over a child, that state court’s order receives full faith and credit in other U.S. jurisdictions and continues in full force and effect. Whether and when a new state gains jurisdiction to issues orders regarding that child is governed by a complex set of state and federal laws that specifically include:

³⁹ Morgan Lewis & Bockius LLP, *Appendix Q10 - Best Interests of the Child - Parental Fitness Factor*, Nat’l Immigrant Women’s Advocacy Project (Dec. 29, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q10-Best-Interests-Parental-Fitness.pdf> (Incorporated herein by reference).

⁴⁰ Morgan Lewis & Bockius LLP, *Appendix Q12 - Best Interests of the Child - Substance Abuse, Mental Illness, and Criminal History Factor*, Nat’l Immigrant Women’s Advocacy Project (Dec. 29, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q12-Best-Interests-Substance-Abuse-Mental-Illness-Crim-Hist.pdf> (Incorporated herein by reference).

⁴¹ Morgan Lewis & Bockius LLP, *Appendix Q6 - Best Interests of the Child - Continuity & Stability of Child Factor*, Nat’l Immigrant Women’s Advocacy Project (Dec. 29, 2017), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q6-Best-Interests-Continuity-Stability-of-Child.pdf> (Incorporated herein by reference).

⁴² Special Immigrant Juvenile Petitions, 76 Fed. Reg. at 54,980.

- The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)⁴³ which each state has its own state version of;⁴⁴
- The Parental Kidnapping Prevention Act⁴⁵ which is a federal law government family court jurisdiction all child custody cases;
- The Interstate Compact on Placement of Children⁴⁶
- Violence Against Women Act⁴⁷ which provides full faith and credit to protections orders and the custody provisions contained in state protection orders.

These laws make up a complex set of state laws that must be complied with when a new state attempts to exert jurisdiction over a child who is newly arrived in a new state and/or when state government or parent seeks to exert jurisdiction to amend court orders regarding custody or placement of a child that is already subject to another state’s court order. A careful review of these laws will demonstrate that the proposed rule is legally incorrect and will be impossible to comply with as a matter of state, federal and inter-state family laws.

First, once a court has assumed jurisdiction over a child and has issued state court orders regarding that child’s custody or placement, a court in the new jurisdiction does not have jurisdiction under state law to exert jurisdiction without complying with the complex rules set out in the state and federal laws listed above in this section. As a result, the requirement set forth in the proposed regulation that assumes incorrectly that the prior states orders do not continue to be valid and also incorrectly that a child can go into court in the new jurisdiction and obtain a new order are both not legally correct and a matter of state and federal family law.

Proposed 8 CFR § 204.11(b)(iv) requires that the petitioner remain dependent on the juvenile court at the time of filing and through the adjudication, unless the petitioner ages out. This continuing jurisdiction requirement does not exist in the SIJS statute. *See* INA § 101(a)(27)(J)(i) (defining a special immigrant juvenile as someone “who *has been* declared dependent . . .” (emphasis added)). The proposed rule fails to recognize that under state family laws one a court has assumed jurisdiction over a child and issued custody or placement orders, those orders remain in effect until the child’s age of majority. This is true even when the child moves to another state. It is only when a parent or a state family or juvenile court seeks to change the terms of the order and there is a substantial change in circumstances under state family law that under some limited circumstances a new state may gain jurisdiction to change the original court’s order. It often required consultation between the judges in the two states and

⁴³ *Uniform Child-Custody Jurisdiction and Enforcement Act* (1997), 9(1A) U.L.A. 657 (1999).

⁴⁴ *Appendix - Uniform Child Custody Jurisdiction and Enforcement Act: Guide for Court Personnel and Judges*, National Council of Juvenile and Family Court Judges, https://www.ncjfcj.org/sites/default/files/UCCJEA_Guide_Court_Personnel_Judges_Final.pdf.

⁴⁵ *Parental Kidnapping Prevention Act*, 28 U.S.C. § 1738A (1980).

⁴⁶ *The Interstate Compact on the Placement of Children: A Manual and Instructional Guide for Juvenile and Family Court Judges*, National Council of Juvenile and Family Court Judges & the American Public Human Services Association (Fall 2001), https://www.ncjfcj.org/sites/default/files/ICPCManualandGuideFullDoc_0.pdf.

⁴⁷ *See* 18 U.S.C. § 2266(5) (2006).

often can result in the state that issued the original order continuing to maintain jurisdiction over the child even when the child no longer resides in the state.

The proposed rule that deems that a state court's order ends when a child moves to a new jurisdiction and requires the SIJS applicant child to obtain a court order in the new state is setting up an impossible requirement that is inconsistent with federal and state family laws that no child will be reasonably able to comply with. This requirement must be deleted from the final rule.

4. 180-Day Adjudication Deadline

TVPRA 2008 contained a provision for expeditious adjudication of SIJ petitions within 180 days. See TVPRA 2008 section 235(d)(2), 8 U.S.C. 1232(d)(2). USCIS intends to adhere to the 180-day benchmark, taking into account general USCIS regulations pertaining to receipting of petitions, evidence and processing, and assuming the completeness of the petition and supporting evidence. Proposed 8 CFR 204.11(h); 8 CFR 103.2. The 180-day timeframe begins when the SIJ petition is receipted, as reflected in the receipt notice sent to the SIJ petitioner. 8 CFR 103.2(a)(7). If USCIS sends a request for initial evidence, the 180-day timeframe will start over from the date of receipt of the required initial evidence. 8 CFR 103.2(b)(10)(i). If USCIS sends a request for additional evidence, the 180-day timeframe will stop as of the date USCIS sends the request, and will resume once USCIS receives a response from the SIJ petitioner. 8 CFR 103.2(b)(10)(i). USCIS will not count delay attributable to the petitioner or his or her representative within the 180-day timeframe. USCIS interprets the 180-day timeframe to apply to adjudication of the Form I-360 petition for SIJ status only, and not to the Form I-485 application for adjustment of status. USCIS does not interpret the 180-day timeframe to mean that an unadjudicated petition at the end of the timeframe will be automatically approved.⁴⁸

This proposed rule is inconsistent with the requirements of the federal SIJS statute which provides no exceptions to the 180-day mandate.⁴⁹ This proposed rule should be amended to pause the adjudication time clock only for the total number of days between the time the request for further evidence (RFE) is issued and the date on which the SIJS applicant child files a response to (RFE) or the maximum number of days the child is given to respond to the RFE, whichever is shorter. If USCIS sends a request for additional evidence, the 180-day timeframe would only stop as of the date USCIS sends the request, and the 180-day clock will must then resume in exactly the place it was paused on the date that USCIS receives a response from the SIJ petitioner.

According to the Policy Manual, the USCIS timeframe to adjudicate SIJ petitions is 180 days. The 180-day timeframe begins on the Notice of Action receipt date. If the petitioner has not submitted sufficient evidence to establish his or her eligibility for SIJ classification, the clock stops the day USCIS sends a request for additional evidence and resumes the day USCIS receives the requested evidence from the petitioner. We consider that the version stated in the Policy Manual better correspond to SIJ legislative purpose and should replace the language in the proposed rule. This approach is similar to the way USCIS calculates time frames in other case

⁴⁸ Special Immigrant Juvenile Petitions, 76 Fed. Reg. at 54,983.

⁴⁹ See 8 U.S.C. § 1232(d)(2) (requiring 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”).

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types when RFEs are issued including for example VAWA self-petitioning, T visa and U visa cases.