



**REPORT - PROMOTING ENHANCED ACCESS TO
SPECIAL IMMIGRANT JUVENILE STATUS (SIJS):**

**Addressing Abuse by “One Or Both” Parents And
Recognizing the Range Of Court Proceedings In Which SIJS Orders Can Be Issued**

BY: Charles Palladino and Leslye E. Orloff

The National Immigrant Women’s Advocacy Project,
American University, Washington College of Law¹

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This report has been developed to highlight issues that the U.S. Citizenship and Immigration Services should consider as it issues regulations governing implementation of recent legislative improvements to the protections available under immigration law offering Special Immigrant Juvenile Status to abused, abandoned and neglected children.

The National Immigrant Women’s Advocacy Project (NIWAP) was founded in April of 2012 at American University, Washington College of Law. NIWAP’s Director has thirty years and NIWAP’s Associate Director has six years of experience advocating for women and children immigrant victims of violence. NIWAP is designed to protect and expand the rights of immigrant women and their children. NIWAP seeks to create a legal, institutional, and policy framework that helps immigrant victims of violence against women end the destructive role that violence has played in their lives and the lives of their children and that supports all immigrant women in their struggles to care for and nurture their children, attain legal immigration status, and build safe, economically secure families and communities in which they and their children can thrive.

Our work is focused on four key areas, all of which are vital to alleviating poverty and improving the health and safety of immigrant women: immigration policies; economic empowerment; justice system relief for immigrant women; and rights and protections for victims of domestic violence, sexual assault and human trafficking. The ultimate agenda is to provide training, technical assistance, advocacy, research, materials and up to date information on government policies and best practices so that advocates, lawyers, police, prosecutors, judges and other professionals have the tools they need to help immigrant women, children and crime victims access the services, justice system and immigration relief, health care, housing, educational opportunities, benefits and other assistance they are legally entitled to receive. NIWAP works with professionals inside and outside of government to forge innovative solutions that improve legal protections and access to justice for immigrant women and children in the United States.

NIWAP is the sole source of technical assistance and training nationally for Office of Violence Against Women Grantee including courts, attorneys and advocates on the intersection of immigration and family laws and the broad range of issues that arise in protection order, custody, and divorce proceedings. Our work also includes assisting courts and litigants in cases

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arising in juvenile, child abuse, neglect and termination of parental rights proceedings. Over the past year, we have received a grant from the State Justice Institute (SJI) to train state family and juvenile court judges on the issues that arise in family court cases involving immigrant family members. Our SJI grant is a joint project with the Center for Public Policy Studies, Immigration and the State Courts Initiative, which is the primary source of national technical assistance to state courts on immigration issues.

In NIWAP's work, training and providing technical assistance to judges and attorneys representing immigrant victims of domestic violence, sexual assault, child and elder abuse in family courts, we have encountered questions and issues regarding the Special Immigrant Juvenile Program. Many of these issues could be addressed by providing detailed explanatory information in the preamble to the Special Immigrant Juvenile regulations and in the final regulations.

This paper focuses on two general recommendations.

- First, we recommend that language in the preamble and regulations confirm that the phrase "one or both parents" means that a child who has been abused, abandoned or neglected can attain SIJS status upon a showing that reunification with one abusive parent is not viable. The preamble and rule should confirm that a child's ability to attain SIJS status continues in cases in which the child has been reunited with or continues to live with his or her non-abusive parent, or other non-abusive family member or kinship care provider. Children who have been abused, abandoned or neglected by both parents should be able to attain SIJS status when state courts have issued rulings that avoid foster care and support placement with non-abusive family members or kinship care.
- Second, we recommend the SIJS regulations and preamble provide a non-exclusive list of the types of state court proceedings in which courts can make the types of findings needed to support SIJS applications for children who have been abused, abandoned, or neglected by one or both parents. Proceedings should not be limited to guardianship and adoption proceedings. Such a limitation would be particularly harmful to children living with protective parents including parents who are also victims of family violence perpetrated by the child's abusive parent.

This paper discusses each of these recommendations in more detail.

Recommendation 1 "One or Both Parents" and Elimination of Foster Care Requirement: The regulation and preamble should clarify the meaning of VAWA 2005 and TVPRA 2008 law reforms with respect to removal of the "foster care" requirement and the law reform change that SIJS eligibility stems from abuse by either "one or both parents." DHS is now authorized to grant SIJS status to juveniles --

- 1) When there has been a court order finding --
 - a. of battering, abuse,² neglect, abandonment, or other similar facts under state law;

² In light of the Violence Against Women Act of 2005 amendments, which directs that neither immigration officials nor the SIJS child applicant communicate with the parent who has battered, abused, neglected or abandoned (INA287(h)), and the statutory language under INA 101(a)(27)(J)(i) "or similar basis found under State law," the DHS regulations should clarify that

- b. that reunification with the parent who committed such acts is not viable;
- 2) When there is a finding that one parent committed these acts
- 3) No finding is required that both parents have committed such acts; and
- 4) SIJS status can be granted to immigrant children without the requirement that the child has been placed in foster care
- 5) When courts have issued finding, rulings, determinations granting custody or control of children to the broad range of individuals (and in more limited circumstances institutions) including a non-abusive parent (including a parent who has also experienced battering or extreme cruelty), grandparents, aunts, uncles, guardians or other kinship care placements.

Background

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008) amended the eligibility requirements to achieve Special Immigrant Juvenile Status (SIJS). TVPRA 2008 expanded eligibility requirements to ensure that the immigrant child’s “reunification with one or both of the immigrant’s is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”³ Prior to the TVPRA 2008, the act required that to be eligible for SIJS status the immigrant child be eligible for long-term foster care. TVPRA 2008 explicitly deleted this requirement for long-term foster care from the law.⁴ This change in the SIJS eligibility updated immigration law to be consistent with changes occurring in the family courts and child protective services systems, which were moving away from the foster care system and toward alternate placement for children designed to be more nurturing, stable, less harmful, and more healing for children who had suffered trauma related to having experienced abuse, neglect, abandonment or other harm that under state law brought needy children under the protection of court orders.

The SIJS rules and preamble should clarify and provide detail confirming that

- (1) the addition of the “one or both parents” language expands eligibility to cover a range of children who previously had difficulty accessing SIJS protections
- (2) the reforms in legislative language allowing for placement with an “individual or entity” rather than foster care further expands SIJS eligibility, and
- (3) Congress made statutory changes that conform immigration law with changes in state laws and state child abuse and neglect agencies’ practices that promote placements of children that are healthier and have been proven to have better outcomes for children. The new immigration law amendments bring immigration law in step with these changes that include a preference for kinship care over foster care whenever possible. The SIJS amendments strive to ensure that immigrant children can benefit from safer,

the range of abusive treatment of a juvenile that qualifies that immigrant child for SIJS status would at a minimum include the full range of “battering or extreme cruelty” as it is defined for VAWA self-petitioning purposes. SIJS relief can also be based upon abusive actions including “abuse,” “neglect” and “similar basis under state law.” Since “extreme cruelty” has been defined by DHS in other contexts, it is among the behaviors that would constitute abuse or neglect for the purposes of SIJS status, and has a long history in state court family law, the final regulations should clarify that “extreme cruelty” can form a basis for SIJS status. The history of family court cases describing behaviors, power and control and coercive control that constitutes battering or extreme cruelty is discussed in detail in Leslye Orloff, Brittnay Roberts and Stefanie Gitler, “Battering and Extreme Cruelty: Drawing Examples from Civil Protection Order and Family Law Cases” (February 11, 2013) *available at* <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/reports-memos-social-science-research-and-related-data/Extreme-Cruelty-BIA-training-memo.pdf/view> and included here by reference.

³ I.N.A § 101(a)(27)(J)(i), 8 U.S.C. 1101 (a)(27)(J)(i).

⁴ 76 Fed Reg. 54978, 54979 (Sept. 6, 2011)(Proposed rule).

healthier placements open to all children by removing antiquated immigration law requirements that forced immigrant children to go into foster care or lose access to legal immigration status through SIJS.

Examples of children who were to benefit from these amendments include:

- a. children living with parents who have also been abused
- b. children being returned from state custody to live with an abused protective parent
- c. children who benefit from the family court equivalent of “alternatives to detention” where courts and child protective services agencies placed an abused, abandoned or neglected child with a family member, school teacher, kinship care or other placement designed to be better for the child and more in line with the child’s best interests than foster care

Discussion

The “One or Both Parents” Language Expands SIJS Eligibility.

The Proposed rule acknowledges the TVPRA 2008 expanded the eligibility for SIJS status when the language changed from long-term foster care to non-viability of reunification with one or both parents:

The TVRPA 2008 expanded eligibility for SIJ status in a number of ways. First, TVPRA 2008 replaced the requirement of eligibility for long-term foster care with a new requirement that a juvenile's reunification with one or both parents is not viable due to abuse, abandonment, neglect or a similar basis under State law.⁵

Because the law now says, “one or both parents” instead of long-term foster care, the plain reading of the statute indicates the child may stay with the non-abusive parent. For example, if a child has one abusive parent and one protective parent, the court may find that reunification of the abusive parent and the child not viable due to abuse. Because this is a finding that reunification with one parent is not viable, the child would be eligible for SIJS despite remaining with the protective parent.

This change is particularly important for families in which both the child and the immigrant parent have been victims of domestic violence. Examples include but are not limited to the following:

- Cases in which the abusive or neglectful parent is not a citizen or lawful permanent resident and the only option for the abused parent would be the U visa. If the parent and child are living in a jurisdiction in which they cannot obtain certification, the abused or neglected child can still file for SIJS.
- The child and the child’s immigrant parent are abused by an immigrant spouse/parent who is an (A), (E)(iii), (G), or (H) visa holder. The abused spouse can apply for work authorization under INA section 106, but the child cannot. Further, although the abused parent may not have a path to a visa that allows him or her to remain in the

⁵ *Id.*

United States (unless they qualify for a U visa), the abused child can qualify for SIJS and can continue to live with his or her non-abusive parent.

- Abusive parent was a lawful permanent resident (LPR) who was arrested and deported after being convicted of a weapons charge, drug charge or gang charge. The abusive parent was also a perpetrator of domestic violence against the child and the child's non-abusive immigrant parent. Since the loss of the abusive parent's LPR status and removal of the abusive parent were not related to domestic abuse, the child and the mother cannot self-petition. The child would qualify for SIJS under the new amendments and could continue to reside with their non-abusive immigrant parent. The abused immigrant parent may qualify for VAWA cancellation of removal but can only apply if she has been placed in removal proceedings. It can still be difficult to have removal proceedings initiated. Further, if the abused mother is placed in removal proceedings, she cannot offer her child protection through her VAWA cancellation case. The child could age out of protection if required to await his or her mother winning the VAWA cancellation of removal case and then attaining parole for the child. For the abused child, SIJS status is a more direct and effective remedy.

This change is also important for children of non-abused protective parents. Examples include but are not limited to the following:

- The child's immigrant non-abusive parent is undocumented or has a temporary visa through which they cannot provide a path to permanent residency for their child who has been abused, abandoned or neglected by the child's other parent who is also a non-citizen.⁶
- Child is the child of an abusive parent who is a diplomat. The state initiates child abuse and neglect proceedings against the diplomat. The abusive diplomat parent claims diplomatic immunity in the child abuse case and leaves the country. Alternatively, the State Department revokes the diplomatic visa. The child is remaining in the United States with the non-abusive parent. The non-abusive parent and abused child lose their visas as family members of diplomats. The child would be eligible to apply for SIJS while continuing to live with the non-abusive parent. The non-abusive parent might be able to attain another form of legal status (e.g. work or student visa).

Under the old rule, children can apply for SIJS if they have been abandoned, abused, or neglected. They can continue to file and will not be cut off from relief if they are placed by the courts or child protective services in alternative forms of placement that keeps the child out of the foster care system. These placements can include living with the non-abusive parent, a relative or other form of kindred care. Kindred care will be discussed further below. We recommend that USCIS refer to the examples above and ensure that the final rule is drafted in a

⁶ If the abusive parent were a citizen or lawful permanent resident and the child could prove battering or extreme cruelty, the child and his or her non-citizen parent would be eligible to file a VAWA self-petition. However, in applying for SIJS status, if the child proved abuse, abandonment or neglect, the child could attain SIJS status without having to prove whether abandonment or neglect constituted extreme cruelty.

manner that that will provide SIJS immigration relief to children in each of the scenarios described above. It would be very helpful for courts, attorneys, advocates, guardians ad litem, CASA volunteers, and state child abuse and neglect system workers to have language included in the preamble to the regulation listing these and other examples of cases in which children qualify for the protections offered by SIJS relief.

Placement with an “Individual or Entity” Further Expands Eligibility.

Because an SIJS petitioner is no longer required to qualify for long-term foster care, the TVPRA 2008 now allows state courts to issue a range of rulings that include the required SIJS findings. An SIJS petitioner can be placed with an individual or entity. The proposed rule also describes this change as an expansion: “TVPRA 2008 further expanded the group of eligible aliens to include those placed by a juvenile court with an individual or entity.”⁷

These Changes Signal a Preference for Kinship Care: The amendments made to the SIJS statute by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008⁸ are consistent with a growing awareness to the benefits of kinship care. By changing the long-term foster care requirement, the unaccompanied undocumented immigrant child now has the option to remain with the protective, non-abusive parent and still receive SIJS benefits. The second change, which allows immigrant children placed with an individual to be eligible for SIJS status, reinforces the idea children should not be punished because they are not placed in foster care. Placement with an individual, as opposed to placement with an agency, allows for the child to remain in a familiar, stable environment with either a non-abusive parent or other kin. This change removes requirements in SIJS immigration laws that were directly contrary to social science research, state laws and court rulings designed to promote placement with family members and other care providers who could provide the best care for children and youth traumatized by their experiences of abuse, abandonment or neglect perpetrated by one or both of their parents.

These amendments, in altering the requirements of long-term foster care and placement with an agency, follow the growing trend of state-supervised foster care system’s preferring kinship care, when available, to foster care. For instance, the Annie Casey Foundation’s “Stepping up for Kids Policy Report” issued in 2012 notes, “extended family members and close family friends care for more than 2.7 million children in this country, an increase of almost 18% over the past decade.”⁹ Further, the report reveals, “the children placed with kin by the formal foster care system represent one-fourth of all children who have been removed from their homes by the public child welfare system and placed in state custody.”¹⁰

⁷ 76 Fed Reg. 54978, 54979 (Sept. 6, 2011)(Proposed rule).

⁸ William Wilberforce Trafficking Victims Protection Reauthorization Act Of 2008, Pub. L. No. 110–457, 122 Stat. 5044 (2008).

⁹ *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families*, The Annie E. Casey Foundation, (2012)
<http://www.aecf.org/~media/Pubs/Initiatives/KIDS%20COUNT/S/SteppingUpforKids2012PolicyReport/SteppingUpForKidsPolicyReport2012.pdf>

¹⁰Population Reference Bureau’s analysis of the 2009, 2010, and 2011 Current Population Survey Annual Social and Economic Surveys; KIDS COUNT Data Center’s analysis of 2010 AFCARS data, *see*
<http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?loct=2&by=a&order=a&ind=6247&dtm=12994&ch=2621&tf=133>

The Casey report suggests the growing preference for kinship care is the result of several studies on the behavior of foster children:

[S]everal studies have found that children in kinship foster care are better able to adjust to their new environment and are less likely to experience behavioral problems and psychiatric disorders than those in the general foster care population. Finally, children in kinship care experience fewer school disruptions than children in non-kin foster care.

The report also cites the unanimous passage of the Fostering Connections to Success Increasing Adoptions Act, which provides additional resources to support kinship care, as a demonstration of bipartisan recognition of the importance of encouraging kinship care.¹¹

The rule and the preamble should define “individual or entity” to include the full range of placements family courts make in the best interests of children in a wide range of family court proceedings. Examples include but are not limited to:

- The protective non-abusive parent
- A grand parent
- An aunt or uncle
- A god parent
- A family member
- A close friend
- A next friend
- A school teacher
- A member of the child’s faith based community; or
- Another caring adult to whom the state court entrusts a child’s care

Limitations on Revocation of SIJS Application or Status Allow Abused Immigrant Children Who Are Placed by Courts in the Care of or Whom Courts Reunify With Abused Protective Parents to Receive SIJS Status.

A cornerstone of recent evolution of the U.S. child abuse and neglect system has been family reunification. As state courts and state child protection agencies have gained experience on the intersection of child abuse and intimate partner violence, they have come to understand the role that protecting the abused parent has on protecting the child from ongoing child abuse. Research among immigrant domestic violence victims found that protecting immigrant mothers through protection orders and access to legal immigration status had the effect of reducing the co-occurrence of child abuse and domestic violence in immigrant families.¹² Protecting the non-abusive parent results in less child abuse and neglect of children of abused immigrant parents.

¹¹ *Id.*

¹² Nawal Ammar, Leslye E. Orloff, Giselle Hass, and Mary Ann Dutton, “Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status.” Presentation at the International Family Violence Conference, San Diego, California September 19-25, 2004

The strong relationship between child abuse and domestic violence is well documented,¹³ with co-occurrence rates ranging from 30 to a 60%.¹⁴ Children living in houses where there was battering are twice as likely to be abused compared to those where there was no battering.¹⁵ Further, 45-75% of women in shelters report that their children experienced one or more forms of maltreatment.¹⁶ Research among immigrant women has found similar domestic violence and child abuse co-occurrence rates among immigrants (40-44%).¹⁷ However, among immigrant women there was a significant difference in child abuse co-occurrence rates between battered immigrant women who had sought help from a service provider (e.g. shelter, protection orders, immigration relief) with a co-occurrence rate of 23%¹⁸ compared to battered immigrants who had never sought help regarding domestic violence where co-occurrence rates rose to 77%.¹⁹ Children of help-seeking battered women were 20% less likely to have the abuser threaten the child and were one third less likely that the abuser would threaten to take the child away from his or her mother.²⁰

Historically many states had practices of removing children from abused parents and placing them in foster care. After years of litigation, advocates for battered women secured court rulings that such removals of children from the non-abusive parent's care was unconstitutional.²¹ As a result of these decisions, the failures of the foster care system and the benefits for children of remaining in the care and custody of their non-abusive parent, courts today generally place children with the non-abusive parent including when she has been a victim of domestic violence, putting protection orders and other court orders in place to offer protection to the abused mother and the abused child. The changes in SIJS immigration laws removing the requirement that a child have been placed in foster care to attain SIJS status parallel this evolution in the law. Congress, in amending INA Section 101(a)(27)(J), accomplished several changes in Special Immigrant Juvenile law with the goal of improving consistency with state family laws and state

¹³ J.D. Osofsky. Prevalence of Children's Exposure to Domestic Violence and Child Maltreatment: Implications for Prevention and Intervention, *Clinical Child & Family Psychology Review*, 6(3), 2003: 161-170; C.E. Cox, J.B. Kotch, M.D. Everson, A longitudinal Study of Modifying Influences in the Relationship Between Domestic Violence and Child Maltreatment. *Journal of Family Violence*, 18(1) 2003: 5-17; A.C. Huth-Bocks, A.A. Levendosky & M.A. Semel, The Direct and Indirect Effects of Domestic Violence on Young Children's Intellectual Functioning, *Journal of Family Violence*, 16(3) 2001: 269-290; B.E. Carlson. Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention. *Trauma, Violence & Abuse*, 1(4) 2000: 321-342; M. Jonson-Reid, Youth Violence and Exposure to Violence in Childhood: An Ecological Review, *Aggression and Violent Behavior*, Vol 3 (2) 1998, 159-179.

¹⁴J. Edleson, The Overlap Between Child Maltreatment and Woman Battering, *Violence Against Women*, 5(2)1999:865.

¹⁵Straus, M. A., & Gelles, R. J. (1990). Physical violence in American families. New Brunswick, NJ: Transaction Publishers.

¹⁶ M.M. McKay. (1994), The Link Between Domestic violence and Child Abuse: Assessment and Treatment Considerations, *Child Welfare* 73(1) 1994:29-39

¹⁷ Nawal Ammar, Leslye E. Orloff, Giselle Hass, and Mary Ann Dutton, "Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status." Presentation at the International Family Violence Conference, San Diego, California September 19-25, 2004

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002); *Nicholson v. Scopetta*, 344 F.3d 154 (C.A.2 (N.Y.) 2003); *Nicholson v. Scopetta*, 3 N.Y.3d 357, 820 N.E.2d 840 (N.Y. 2004). See generally David Lansner, The Nicholson Decisions¹ New York's Response to 'Failure to Protect' Allegations. ABA Commission on Domestic Violence Newsletter Fall 2008 available at https://www.americanbar.org/newsletter/publications/cdv_enewsletter_home/vol12_expert1.html

court procedures for assuming jurisdiction under state law to make determinations about the custody and care of children.²²

In many domestic violence cases the judge sitting in family, protection order, guardianship, juvenile, abuse, neglect, custody, divorce, paternity, child support, probate or other state court proceedings in which rulings concerning the placement, custody and care of children are determined try to avoid placing the children in the care or custody of the abuser²³ and placing the child in foster care when the abused parent has taken steps to separate from the abusive parent.²⁴

Two pieces of Congressional legislation underscore Congress' understanding that protecting battered mothers protects children and Congress' deep concern about the importance of protecting children, including immigrant children, from abusive parents. First, in 1990 both houses of Congress passed House Congressional Resolution 172:²⁵

“Expressing the sense of the Congress that, for purposes of determining child custody, credible evidence of physical abuse of one's spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse...Resolved

²² Immigration and Nationality Act § 101(a)(27)(j), 8 U.S.C. §1101 (a)(27)(j), amended by William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C.A. §1232 (2009).

²³ Men who perpetrate domestic violence against their intimate partners who are the mothers of their children, parent differently from non-abusive men. Edleson, J.L. “Children’s Witnessing of Adult Domestic Violence,” *J. Interpersonal Violence*, Vol. 14, No. 8, (1999), pp. 839-70; U.N. Children’s Fund, “Behind Closed Doors: The Impact of Domestic Violence on Children”, (2006), <http://www.unicef.org/protection/files/BehindClosedDoors.pdf>; Jaffe, P.G., D.A. Wolfe & S.K. Wilson, *Children of Battered Women*, *Developmental Clinical Psychology & Psychiatry* No. 21, Sage Publications, (1990), all cited in *Violence Against Women in the United States and the State’s Obligation to Protect*, Civil Society briefing papers on community, military and custody submitted to the United Nations Special Rapporteur on Violence Against Women, Rashida Manjoo in advance of her Mission to the United States of America January 24 – February 7, 2011, at p. 57, para. 66, www.law.virginia.edu/vaw. Perpetrators of domestic violence are less involved with their children and use parenting practices that are harmful to their children including spanking, shaming and displays of anger. Holden, G.W. & K.L. Ritchie, “Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women,” *Child Development*, Vol. 62, Issue 2, (1991), pp. 311-327; Holden, G.W., J.D. Stein, K.L. Ritchie, S.D. Harris & E.N. Juries, “Parenting Behaviors and Beliefs of Battered Women,” in *Children Exposed to Marital Violence: Theory, Research and Applied Issues*, p. 185, (G.W. Holden, R. Geffner & E.N. Juries eds., 1998), all cited in *Violence Against Women in the United States*, at p. 57, para. 67. Abusive men do not serve as role models for healthy relationships and conflict resolution in relationships. Bancroft, L. & J. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, Sage Publications, (2002); Levendosky, A.A. & S.A. Graham-Bergmann, “Mothers’ Perceptions of the Impact of Abuse on their Parenting,” *Violence Against Women*, Vol. 6, No.3, (2000), pp. 247-271.

²⁴ Administration for Children and Families, U.S. Department of Health and Human Services, Office on Child Abuse and Neglect, Children's Bureau., Caliber Associates. Bragg, H. Lien, *Child Protection in Families Experiencing Domestic Violence* (2003) has issued guiding principles for child protective services workers that recognize that offering protection to domestic violence victims, enhances protection for children and has the benefit in domestic violence cases of keeping children with their non-abusive parent. (“The following guiding principles can serve as a foundation for child protection practice with families when domestic violence has been confirmed. The safety of abused children often is linked to the safety of the adult victims. By helping victims of domestic violence secure protection, the well-being of the children also is enhanced. Perpetrators of domestic violence who abuse their partner also emotionally or psychologically harm their children, even if the children are not physically or sexually harmed. Identifying and assessing domestic violence at all stages of the child protection process is critical in reducing risks to children. It is important to understand potential effects of domestic violence to children beyond those that are physical in nature. If the family's circumstances are clear and it is appropriate, every effort should be made to keep the children in the care of the non-offending parent. Supportive, non-coercive, and empowering interventions that promote the safety of victims and their children should be incorporated in child protection efforts. Once domestic violence has been substantiated, the perpetrators must be held solely responsible for the violence while receiving interventions that address their abusive behaviors. CPS must collaborate with domestic violence programs and other community service providers to establish a system that holds abusers accountable for their actions”)

²⁵ House Concurrent Resolution 172, SPOUSE ABUSE—STATUTORY PRESUMPTION IN CHILD CUSTODY LITIGATION 104 STAT. 5182(1990)

by the House of Representatives (the Senate concurring), SECTION 1. It is the sense of the Congress that, for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse.”

Second, the Violence Against Women Act of 2005 amended special immigrant juvenile status law to ensure that children applying for SIJS status are not to be compelled to contact a parent or any family member of a who has been alleged to have battered, abused, neglected, or abandoned the child at any state of any proceeding involving children applying for special immigrant juvenile status.²⁶ In implementing TVPRA 2008 DHS directed its officers not to question SIJS applicant children applying for SIJS status about the details of the abuse because these matters have been addressed by state family courts experienced in working sensitively with traumatized children.²⁷

It is important that the Section 205.1 “Automatic Revocation” of the final rule be written in a manner that ensures that placement of or reunification of a child with a non-abusive parent, family member, or as discussed below various approaches to kinship care issued by any state court with authority over custody or care of children not lead to revocation of an SIJS case or SIJS status. The rule should limit automatic revocation to only those cases in which a family court issues an order reuniting a child with a parent when the court had previously deemed reunification with that parent not to be viable due to abuse, neglect or abandonment.²⁸ To accomplish this, the final rule could state that

“[automatic revocation occurs] upon state court ordered reunification of the SIJ beneficiary with a parent when a prior state court had deemed reunification with that parent, or both parents, not viable due to abuse, neglect, abandonment or other similar basis under state law.”²⁹

The plain reading of the SIJS statute as amended by VAWA in 2005 and TVPRA of 2008 ensures that children can attain, maintain and avoid revocation of SIJS immigration protections if they attain a court finding reunification of the child with *one parent* is not viable due to abuse, neglect, abandonment, battering³⁰ or similar factor under state law. It is extremely important that

²⁶ INA Section 287(i) VAWA 2005 amendment reads as follows: “(i) An alien described in section 101(a)(27)(J) of the Immigration and Nationality Act who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 101(a)(27)(J)(iii)(I) of such Act.” In implementing these provisions DHS directed its officers “Under no circumstances can an SIJ petitioner, at any stage of the SIJ process, be required to contact the individual (or family members of the individual) who allegedly abused, abandoned or neglected the juvenile. This provision was added by the Violence Against Women Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2006) and is incorporated at section 287(h) of the INA.” Donald Neufeld and Pearl Chang, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (March 24, 2009).

²⁷ Donald Neufeld and Pearl Chang, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (March 24, 2009) (“During an interview, an officer should focus on eligibility for adjustment of status and should avoid questioning a child about the details of the abuse, abandonment or neglect suffered, as those matters were handled by the juvenile court, applying state law”).

²⁸ 76 Fed Reg. 54978, 54986 (Sept. 6, 2011)(Proposed rule).

²⁹ *Id.*

³⁰ See INA 287 VAWA 2005

the final rule on SIJS ensures that SIJS revocation provisions are not triggered when a child is reunited with one protective parent, an abused protective parent, a family member, a family friend, or a kinship care placement.

Finally, Congress's growing support of kinship care and the removal of the long-term foster care requirement from the statute show a desire to keep the child, when possible, with family members, friends and other individuals who are in the best position to nurture the child applying for SIJS immigration protections. All SIJS children has suffered trauma and this approach best helps them heal, succeed in school and move on with their lives to become productive and contributing members of our communities.

The final SIJS regulation must clearly state that to be granted and to avoid revocation of SIJS status immigrant children are explicitly allowed to live with and not be separated from their non-abusive protective parent or other family or kinship care provider that state courts have ruled are appropriate placements for these needy and vulnerable children. The preamble to the final SIJS regulations should provide an illustrative, but non-exclusive, list encompassing the broad range of the types of placements with individuals that, if included in state court orders, would support qualification for special immigrant juvenile status.

Providing detailed direction and examples in the preamble to the regulations would go far in assisting state court judges and explaining to them the role they are required to play in these cases. The requirement that family courts make findings in order for juveniles to receive SIJS status is similar to the mandate that immigrant victims of criminal activity must submit U visa certifications as part of their U visa applications. DHS has produced training materials, policies and preambles to regulations providing guidance to law enforcement that is having the effect of promoting certifications.

The preamble of the final SIJS regulations needs to play the same role in clearly explaining to courts their role in the SIJS process and discussing the broad range of family court proceedings in which custody and care of children rulings can be made. The preamble and the regulations also need to clearly describe that, under federal immigration law, when the court has a case before it in which the court has the authority to decide that a parent has committed any of the following acts against a non-citizen child: battering, abuse, neglect, abandonment or other similar facts under state law, that DHS encourages courts to assist DHS and the juvenile by issuing findings and including in court orders rulings that reunification with one or both perpetrating parents is not viable. The preamble should also specifically clarify for courts that placement of a child in the foster care system is no longer required under immigration law for the child to receive SIJS benefits. Once a ruling regarding abuse and the non-viability or reunification with the abusive parent has been made, the new changes to immigration law allow the court to place the child in the care or custody of any individual or any institution that the court deems in the child's best interest. This includes placements and custody awards to non-abusive parents, including parents who have also been victims of domestic violence.

Recommendation 2: Instructing Courts on the Full Range of Proceedings in Which DHS, For SIJS Purposes, Will Recognize Child Custody, Care and Placement Decisions Can Be Made

In addition to listing guardianship and adoption proceedings, the final SIJS rule should provide a more comprehensive list of the range of state court proceedings in which state court

judges can make the types of determinations required for children applying for Special Immigrant Juvenile Status.

We appreciate and agree with the proposed rule's clarification that "a juvenile adopted or placed under guardianship is eligible for SIJ classification under amended section 101(a)(27)(J)(i) of the Act, 8 U.S.C. 1101(a)(27)(J)(i)."³¹ The proposed rule uses language from the section to provide support for the clarification: "this section allows eligibility where a petitioner has been "legally committed to, or placed under the custody of...an individual... appointed by a State or juvenile court located in the United States."³² The full provision in the act includes "an agency or department of state."³³ This broad language allows a "juvenile court" to enter SIJS findings in a wide variety of proceedings. Moreover, whether a court, under the federal definition, is a "juvenile court" is determined by the court's function as the proposed rule notes, "the term "juvenile court" includes any court having jurisdiction to make judicial determinations about the custody and care of juveniles."³⁴ Because the definition of "juvenile court" is determined by function instead of the specific way in which the court is titled in the particular jurisdiction, we strongly recommend that the rule and the preamble to the rule provide clear direction to state courts by providing a non-exclusive list of the wide array of possible proceedings in which SIJS findings may be entered.

In addition to the inclusion of adoption and guardianship, the language of the act allows for other proceedings including but not limited to custody proceedings, motions for declaratory judgment, dependency proceedings, termination of parental rights, probate court, adoption proceedings, paternity and child support proceedings, protection orders, and delinquency proceedings. Since "dependency" includes cases in which state courts issue orders legally governing the custody and care of children, courts could issue the required SIJS findings when they issue rulings governing the legal placement of children with either individuals or institutions in any of the above listed proceedings.

The table below provides a non-exclusive list the types of state court proceedings in which courts issuing rulings on the care, custody, and/or placement of children should be encouraged by DHS to issue SIJS findings when the facts would support such findings in the individual case. The final SIJS rule explicitly provide a list in the preamble authorizing state court judges in each of the following proceedings to enter SIJS findings. The preamble to the regulations should also make clear that this is a non-exclusive list, recognizing that there may be other types of court proceedings similar to those listed below in which state courts will have jurisdiction to issue rulings on the care, placement, custody or dependency of a child in which SIJS findings could also be appropriately made.

Such a detailed list would go far toward educating state court judges about when SIJS findings are permissible. It would also help educate state court judges about one of the important remedies that is available to immigrant children, about which many state courts remain unaware. Without knowledge about the forms of humanitarian relief available under current immigration laws for children (e.g. VAWA self-petitioning, VAWA cancellation of removal, U Visas, T Visas and Special Immigrant Juvenile Status), rulings by state courts intended to help promote

³¹ 76 Fed Reg. 54978, 54980 (Sept. 6, 2011)(Proposed rule).

³² *Id.*

³³ INA § 101(a)(27)(J)(i), 8 U.S.C § 1101(a)(27)(J)(i).

³⁴ 76 Fed Reg. 54978, 54980 (Sept. 6, 2011)(Proposed rule).

the well-being, healing and the stabilization of children who have suffered abuse, battering, neglect, abandonment, and extreme cruelty, will not work effectively for foreign born children. DHS, in issuing the final regulations, needs to do all it can to educate state court judges about these important remedies and the role state court judges can and must play for children whom Special Immigrant Juvenile Status was designed to benefit.

The table below contains a non-exclusive list of state court proceedings in which SIJS findings may be entered. These findings include findings of fact that reunification with one or both parents is not viable due to abuse, neglect, abandonment, battering or extreme cruelty or other similar basis under state law.

<p><u>Family Court</u></p>	<p>Custody/Divorce/Legal Separation Proceedings: SIJS findings can be made in these family court in which a parent, family member or any other third party is being awarded custody of juvenile due to battering, extreme cruelty, abuse, neglect, abandonment, or other similar grounds in which one or both of the child’s parents is a factor in the custody determination.</p> <p>Motions for Declaratory Judgment: Juveniles over the age of 18, but under the age of 21, can initiate an action before the family court requesting a declaratory judgment containing the findings required for the immigrant juveniles SIJS application. The abused, neglected, abandoned, or battered immigrant child presents testimony and introduces supporting evidence to the court sufficient to receive a court order containing SIJS findings. In these cases, immigrant children are not required to serve their abusive parents with notice of the SIJS proceeding.</p>
<p><u>Child Abuse, Neglect and Dependency Proceedings</u></p>	<p>In any suit affecting the parent-child relationship state courts make determinations and enter orders regarding the custody and care of children. State courts hearing child abuse and neglect cases are encouraged to use best practices supported by current evidence based research in placing children. Placements can include kinship care, placement with a non-abusive parent, relative, family friend, god parent or, if no other placements are available, foster care. Child abuse and neglect and other dependency proceedings meet the requirements of a dependency proceeding under SIJS and Courts should be authorized and encouraged include SIJS related findings in the court orders issued in these cases.</p>
<p><u>Termination of Parental Rights</u></p>	<p>State courts issuing rulings in termination of parental rights proceedings should be authorized and encouraged to include SIJS findings in their court orders when one or both parent’s parental rights are terminated due to battering, extreme cruelty, abuse, neglect or abandonment, or other any similar basis under that state law.</p>

<u>Probate Court</u>	State courts issuing court orders in guardianship proceedings should be authorized and encouraged to issue SIJS findings when the juvenile who is the subject of the guardianship proceeding has been abused, neglected, battered, subjected to extreme cruelty or abandoned.
<u>Adoption Proceedings</u>	State court adoption proceedings involve the issuance of court rulings in which the court terminates the parental rights or either or both parents or in which a birth parent voluntarily gives up parental rights and those rights are transferred to another individual. When an immigrant child is being adopted who has been abused, neglected, abandoned, battered or subjected to extreme cruelty or another similar basis under state law the adoption court should be authorized and encouraged to enter SIJS findings.
<u>Paternity and Child Support Proceedings</u>	The most common circumstances in which SIJS findings may be entered in a paternity and child support cases would be cases brought by a custodial parent against a non-custodial parent who has abandoned the immigrant child. This occurs in a number of circumstances including when the natural parent does not recognize the child as their own or when the child was born as the result of rape or incest. In these proceedings the court issues orders establishing paternity, legally recognizing the custodial parent, and awarding child support to that parent needed for care of the child based on the state's child support guidelines. State courts issuing court orders in paternity and child support cases are making findings about custody and determinations about the care of children and should be explicitly included by DHS as state courts authorized to enter SIJS orders in appropriate cases.
<u>Protection Orders</u>	<p>The jurisdictional basis upon which state courts are authorized under state law to issue protection orders in civil or criminal court cases require findings that family violence has occurred against a spouse, former spouse, a child or another relationship covered by the state protection order statute. This must be based on findings by the court that a crime or another form of abuse, neglect, battering or harm listed in the state protection order statute has occurred. State courts issuing protection orders in civil or criminal court cases must be authorized and encouraged to enter SIJS findings when the protection order includes custody, visitation, and/or child support orders. The circumstances in which it would be appropriate for a protection order to include SIJS findings include but are not limited to the following:</p> <ul style="list-style-type: none"> • The child has been abused by one parent and the protection order gives custody to the non-abusive parent

	<ul style="list-style-type: none"> • One of the child’s parents has abused the other parent; the abuse occurred in the presence of the immigrant child and the court enters findings that such abuse constitutes abuse or neglect of the child; the protection order includes a custody award to the non-abusive parent and protects both the abused parent and the child from ongoing abuse; • An abused child files a protection order against their abusive parent that orders their abusive parent and include provisions about the care or custody of the child; • An under 21 year old immigrant child files a sexual assault protection order against their sexually abusive parent.
<u>Delinquency Proceedings</u>	State courts in juvenile delinquency proceedings should be authorized to issue SIJS findings when the court issues orders confining juveniles to state juvenile detention centers, boot camps, or other forms of supervision in which the state is responsible for the care and custody of the juvenile. This can include placement of delinquent children under the custody of probation departments, foster care and other state agencies. ³⁵ Experiencing child abuse, battering, extreme cruelty, being neglected or being abandoned are traumatic events that have profound effects on child development and contributes to juvenile delinquency. ³⁶
<u>Criminal Proceedings</u>	State criminal courts issue orders, findings and have jury verdicts returned in a broad range of criminal court cases in which crimes are perpetrated against children. When these crimes are perpetrated by one or both of the child’s parents and the child is an immigrant, criminal courts should be authorized and encouraged to issue SIJS findings

Conclusion

For all of the above reasons, we encourage the Department of Homeland Security in issuing final SIJS regulations to include in the regulations and the preamble to the regulations information that will provide much needed guidance to state civil, family and criminal courts and specifically authorizing judges, in a broad range of listed state court proceedings, to issue SIJS findings. The preamble to the regulations should encourage state courts to enter such orders when the case before them involved an immigrant child and when reunification with at least one of the child’s parents is not viable due to abuse, neglect, abandonment, battering or extreme

³⁵ Angie Junck, Special Immigrant Juvenile Status: Relief for Neglected, Abused and Abandoned Undocumented Children, JUV. & Fam. L. 48, 55

³⁶ Ajay Chaudry, Randolph Capps, Juan Pedroza, Roberts Santos, Rosa Maria Castaneda, Roberts Santos & Molly M. Scott. Facing Our Future, Children in the Aftermath of Immigration Enforcement, (The Urban Institute, February 02, 2010), available at <http://www.urban.org/publication>.

cruelty or another similar basis under state law. Courts should be instructed by the preamble to explore whether these SIJS findings are appropriate any time the state court issues any court order making findings about or determining the custody, care, or placement of a child with any individual or government agency or institution.