November 15, 2019

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

RE: DHS Docket No. USCIS-2009-0004, Proposed Rule, Reopening of the Comment Period,  
Special Immigrant Juvenile Status Regulations – Amendment

Dear Ms. Deshommes:

On behalf of the American Bar Association (ABA), I submit the following comments on the proposed rule to amend the regulations governing the Special Immigrant Juvenile (SIJ) classification and related application for adjustment of status to permanent resident. The ABA previously submitted comments in response to the original notice published in 2011. We take this opportunity to reaffirm our previous recommendations and to provide additional recommendations that reflect developments that have occurred since that time.

The ABA is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, and works to build public understanding around the world of the importance of the rule of law. Through its Commission on Immigration, the ABA provides continuing legal education to the legal community, judges, and the public on immigration topics; and develops and assists in the operation of pro bono legal representation programs. We use our experience and subject matter expertise to advocate for improvements to immigration law and policy.

The ABA is an interested agency with direct experience handling SIJ cases through two of its public service projects - the South Texas Pro Bono Asylum Representation Project (ProBAR) and the Children’s Immigration Law Academy (CILA). Established in 1989, in response to the overwhelming need for pro bono legal representation of Central American asylum-seekers detained in South Texas, ProBAR has a long history of providing critical legal services to people at risk of deportation. Through direct representation and mentoring of pro bono attorneys, ProBAR provides legal assistance to hundreds of children seeking SIJ status each year. ProBAR works primarily with unaccompanied children detained in the custody of the Department of Health and Human Services’ (HHS) Office of Refugee Resettlement (ORR) at the time they are screened for and apply for the SIJ classification. Although the numbers fluctuate, ProBAR annually serves more than 23,000 children in 16 immigration detention facilities located in the Rio Grande Valley in Texas.
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Located in Houston, CILA serves as an expert legal resource center and opened in 2015 in response to the thousands of Central American children fleeing violence and abuse in their home countries and seeking humanitarian protections offered under U.S. law. Since its inception, CILA has planned and presented more than 100 free trainings, in person and by webinar, and responded to more than 1,500 requests for technical assistance from non-profit, pro bono, and private immigration attorneys, many of whom are working with children eligible for SIJ status. CILA staff utilize their expertise in immigration and state court proceedings to provide training and assistance on all aspects of an SIJ case from the proceedings in state court, the application before USCIS, and representation in immigration court.

In addition to the first-hand experience and expertise gained through these projects, the ABA has promulgated numerous policies regarding our judicial system’s treatment of children and specifically, unaccompanied alien children, including in the ABA’s “Standards for the Custody, Placement and Care; Legal Representation and Adjudication of Unaccompanied Alien Children in the United States” (Updated August 2018).

The ABA supports the preservation and development of laws, regulations, policies, and procedures that protect or increase due process and other safeguards for immigrant and asylum-seeking children, especially those who have entered the United States without a parent or legal guardian, including as provided in Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. We also support preserving the availability of and the current statutory framework for Special Immigrant Juvenile Status. Our comments to the proposed rule reflect these goals and we urge you to incorporate them into the final rule.

Sincerely,

Judy Perry Martinez

Attachment
ATTACHMENT

Introduction

As noted above, the ABA previously submitted comments to the proposed rule when it was first published in 2011 and is supplementing those comments here. In addition, we are also providing comments on selected provisions of the USCIS Policy Manual which have significantly impacted SIJ adjudications.

On October 26, 2016, USCIS issued its Policy Manual, including Volume 6, Part J, Special Immigrant Juveniles, and Volume 7, Part F, Chapter 7, Adjustment of Status for Special Immigrant Juveniles.1 Subsequent to the issuance of the Policy Manual, the number of Requests for Evidence and Notices of Intent to Deny or Revoke SIJ status increased exponentially. According to information obtained by Reuters, USCIS issued 7,042 Requests for Evidence in FY2017 and FY2018, having previously issued no more than 440 in one year.2 Similarly, USCIS issued almost 2300 Notices of Intent to Deny or Revoke SIJ petitions in FY2017 and FY2018, having previously issued no more than 399 in one year. The number of appeals to the USCIS Administrative Appeals Office (AAO) also increased dramatically from 124 in 2016 to 546 so far in 2019. In addition, at least nine federal courts have ruled on SIJ appeals, including class action injunctions of USCIS policy in cases in New York, California, Washington, and New Jersey.

In conjunction with the re-opening of comments for the proposed regulations, the AAO adopted three precedential decisions governing SIJ cases, the first it has issued on this topic.3 For these reasons, it is not possible to comment on the proposed regulations without taking into consideration this subsequent policy and litigation. The proposed regulations do not appear to contemplate the Policy Manual, new federal case law, and AAO decisions so it is unclear whether or how they will be incorporated into a final rule. Therefore, the ABA supplements it is original comments to include comments on how USCIS policy regarding SIJ has both positively and negatively impacted the vulnerable population it seeks to protect.

The ABA supports regulations that are consistent with the letter and spirit of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)4 and that clarify ambiguous provisions of the statute. The ABA does not support regulations that create requirements beyond those mandated by Congress or that seek to exclude children who are otherwise eligible for SIJ status. The ABA seeks to ensure that “those who are victims and truly need protection from abuse, neglect, abandonment or a similar basis under state law receive the assistance they need,” as emphasized by USCIS in announcing the re-opening of the comment period for the proposed regulations.5

The ABA commends USCIS for incorporating the protections and expansions to SIJ status made by the TVPRA of 2008, including the clarification that dependency and custody are distinct options for qualifying for SIJ, that a child living with a non-offending parent is eligible, and that

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5 Id.
guardianship and adoption orders are qualifying orders. Additionally, many of the proposed regulations provide needed clarity and explanation without undue additional requirements. However, there are several provisions of the proposed regulations that we believe are problematic and must be revised. We offer these specific comments below.

PART 204 – IMMIGRANT PETITIONS

Section 204.11(a) Definitions

ABA COMMENTS: The proposed definition of “juvenile court” must be updated to reflect the statutory language adopted by the TVPRA that a court must have jurisdiction to make either an adjudication of dependency or custody. Instead the definition uses the previous language “care and custody” which has been the source of much of the federal litigation around SIJ. The statute does not use the words “care and custody.” Clarifying this language would provide certainty to SIJ applicants and reduce litigation. For example, in *R.F.M. v. Nielsen*, No. 18-CV-5068, 2019 WL 1219425 (S.D.N.Y. Mar. 15, 2019), the court found that 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.

Similarly, the ABA would recommend updating the title of the statute to “Special immigrant classification (Special Immigrant Juvenile)” by removing reference to dependency on a juvenile court as that is now only one option for obtaining SIJ status.

Section 204.11(b)(iv) Eligibility – Declaration of Dependency

ABA COMMENTS: The ABA reaffirms its previous comments to this section and incorporates them below.

The ABA is concerned that this provision operates on an erroneous legal premise about the effect of juveniles relocating to another state and will unduly burden SIJ applicants, making this benefit unavailable to previously eligible children simply because of their movement across state lines. It appears that USCIS has already recognized this error because the USCIS Policy Manual acknowledges the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) ⁶ and its subsequent impact on any court orders.⁷

First, the proposed regulations would impose new, unnecessary requirements on already overburdened free legal service providers who serve children in ORR custody—children who otherwise are likely to go unrepresented. ProBAR has worked with children who are transferred due to ORR bed space needs or their specialized needs, many at least once, and some several times. With the need for new orders, providers will be put in the position of trying to guess how long a child will remain in a particular placement and whether it is worth expending resources to pursue an order in that particular state.

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⁶ The UCCJEA (which superseded the UCCJA) has been enacted in every state, the District of Columbia., and the U.S. Virgin Islands.
In a world of many needs and scarce resources, the promptness with which a child flagged for transfer receives legal services could very well be affected. The ABA believes that unaccompanied children should be provided with appointed counsel at government expense for all stages of immigration processes and proceedings, and that the children be given the opportunity to consult with an attorney and provided with representation in a prompt fashion. Accordingly, the ABA cannot support a regulation that will lead to less effective representation for transferred children. See Coordinating Committee on Immigration Law (Midyear Meeting 2001); ABA Standards for the Custody, Placement and Care; Legal Representation and Adjudication of Unaccompanied Alien Children in the United States, pp. 11,16, & 53 (August 2018).

More specifically, it is not legally correct to suggest that a juvenile’s relocation to another state automatically nullifies the initial juvenile court order, and transfer of a dependent child to another jurisdiction does not automatically terminate the sending state’s jurisdiction. Pursuant to the UCCJEA and the Interstate Compact for the Placement of Children (ICPC)\(^8\), the state court that makes an initial determination legally maintains jurisdiction over a child in a number of situations despite a child’s relocation out of state.

As adopted in Texas, for example, the UCCJEA provides that except in emergency cases, a Texas court which has made a child custody determination has exclusive continuing jurisdiction over the determination until certain requirements are met—namely, 1) a Texas court determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent, have a significant connection with Texas and that substantial evidence is no longer available in Texas concerning the child’s care, protection, training, and personal relationships, or 2) a Texas court or a court of another state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the state. See TEX. FAM. CODE ANN. § 152.202 (a) (Vernon 2008); UCCJEA §202. Likewise, a Texas court may not modify a child custody determination made by a court of another state unless a Texas court has jurisdiction to make an initial determination and 1) the court of the other state determines it no longer has exclusive, continuing jurisdiction or that a Texas court would be a more convenient forum; or (2) a Texas court or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other State. See TEX. FAM. CODE ANN. §152.203; UCCJEA § 203.

The ICPC has similar provisions by which a state would maintain jurisdiction despite the child’s relocation interstate. Indeed, a stated purpose of the compact is to “[p]rovide for a state’s continuing legal jurisdiction and responsibility for placement and care of a child that it would have had if the placement were intrastate.” ICPC, Art. I, § G. The compact provides that in transfer cases, “[t]he sending state shall retain jurisdiction over a child with respect to all matters of custody and disposition of the child which it would have had if the child had remained in the sending state,” and “[s]uch power shall also include the power to order the return of the child to the sending state.” ICPC, Art. IV,§ A. The ABA supports cooperation between and among state, local and territorial officials in regards to placement of children and advocates for best practices under the Interstate Compact on the Placement of Children.

\(^8\) The Interstate Compact on the Placement of Children is an agreement among all 50 states, the District of Columbia, and the U.S. Virgin Islands. The text of this agreement has been ratified as uniform state law in all 52 jurisdictions.
In Texas, the ICPC is adopted in the Texas Family Code, Section 162.102. Article V provides that when a sending state places a child in a foreign state, the sending agency retains jurisdiction over that child until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. The premise of this proposed regulations that juvenile court jurisdiction over a child automatically terminates when the child relocates to another state is therefore incorrect.

The requirement of a new order would also pose potentially insurmountable obstacles for immigrant children who relocate. First, in order to obtain SIJ status or maintain eligibility, they would have to overcome new hurdles including obtaining otherwise unnecessary court orders. Second, state laws’ different definitions of abuse, abandonment, or neglect could cause a child to lose eligibility if required to obtain a new juvenile court order post-transfer, where his parent’s conduct meets one state’s definition of neglect, but not another’s. For an unaccompanied child who desperately needs to be placed in ORR’s Unaccompanied Refugee Minor (URM) program, this requirement could also prevent him/her from obtaining that benefit, which is provided for in the TVPRA. As previously stated, such a child would need an approved I-360 before being considered for the URM program and ORR requires that the I-360 be approved by the child’s 18th birthday. Delays resulting from having to obtain a second order in a new state court will exclude vulnerable children from the program. And for those who can obtain the new order, state jurisdiction will be further complicated when they are transferred yet again to their URM site and an order is obtained establishing program custody/conservatorship over them, as is required for URM eligibility. The result could very well be one child with three orders from three different states and a federally imposed jurisdicitional mess that the UCCJEA and ICPC were established to avoid.

Surely, lawmakers did not intend to present so many hurdles to protection for those children who move across state lines. Yet this requirement would do just that for children unable to convince the old state to relinquish jurisdiction, unable to persuade a new state to assert jurisdiction, unable to meet a new state’s definitions of abuse, abandonment or neglect, or simply unable to do any of the foregoing quickly enough for eligibility in the URM program. For all of the foregoing reasons, the ABA recommends that children who relocate across state lines not be required to obtain a new dependency order.

A second consequence of the eligibility language in the proposed regulation requires continuing dependency. Echoing the requirements of Immigration and Nationality Act (INA) § 101(a)(27)(J), proposed Section 204.11(b)(iv) provides that a child is eligible for SIJ classification if he or she “has been declared dependent on a juvenile court or has been legally committed to or placed under the custody of a State agency or department or an individual or entity appointed by a State or juvenile court.” However, proposed Section 204.11(b)(iv) goes further than the applicable INA section and continues, “Such dependency, commitment, or custody must be in effect at the time of filing and continue through the time of adjudication, unless the age of the petitioner prevents such continuation.”

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

The TVPRA of 2008 provides that SIJ applicants “may not be denied special immigrant status . . . based on age if the alien was a child on the date on which the alien applied for such status.” TVPRA 2008, Pub. L. No. 110-457, § 235(d)(6), 122 Stat. 5044. Thus, USCIS may not deny a SIJ petition because the child’s dependency, commitment, or custody order lapsed due to age. In the Perez settlement agreement, USCIS specifically agreed that applicants would remain eligible for SIJ classification notwithstanding that their dependency, commitment, or custody orders lapse based on age prior to the time of application.9 Neither should USCIS disqualify applicants from SIJ classification or adjustment solely because their dependency, commitment, or custody orders lapse prior to their filing Forms I-360 or the adjudication of their applications based on reasons other than age, except in cases where a State court vacates its order as improvidently granted.

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

USCIS has recently begun interpreting dependency so narrowly as to exclude children who are in the care and custody of ORR, especially for the disproportionately high number of children who are detained in Texas. This practice appears to conflict with USCIS’ stated policy in the proposed regulations and AAO decisions which defer to state law. For example, the AAO has found that “although the Petitioner’s findings order may be valid under Texas law and for purposes within Texas, we find that it does not contain a qualifying dependency determination under federal law for SIJ purposes.”10 USCIS should not use the consent function to refuse to accept a dependency finding issued by a state judge that the child is dependent on the court in this instance. Surely, lawmakers did not intend to present so many procedural hurdles for those children who are in most need of this protection.

The following two examples help illustrate how USCIS policy is circumventing the statute’s purpose. On June 15, 2017, a Texas state court issued an order of dependency and SIJ-related findings for ten-year-old twin girls. The girls are victims of physical abuse and neglect at the hands of their biological mother, and victims of sexual abuse from a very young age at the hands of their stepfather. Both abusive parents reside in the girls’ native country, so the state court order provided the twin girls with an opportunity to remain safely in the United States under the care of their

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

biological father. However, approximately one year and a half after filing for SIJ, USCIS sent the twin girls a Notice of Intent to Deny and ultimately a denial. USCIS did not defer to the court order and instead found that “in accordance with Texas law,” the minor twin girls had not been placed under the custody of an individual or entity; that there was “no indication that the court made a determination regarding [their] custody under any enforceable provision of Texas law governing juvenile dependency or custody;” and, although the court stated it had jurisdiction and authority to issue the dependency order, USCIS found the order lacked a statement of state law upon which the dependency determination was made. As a result, the minor twin girls now find themselves again vulnerable and afraid of the present possibility of being forced return to their native country and continued abuse at the hands of their mother and stepfather. Despite complying with the statute by sharing their story before a Texas court, and securing a valid court order, the girls waited 3-times longer than statutorily required SIJ adjudication times and ultimately lost the protection designed for children like them, due to USCIS policy and practices.

In another example, on February 2018, a Texas state court issued an order of dependency and finding for a youth from Guatemala. He was a victim of abuse and neglect from his biological father who is an abusive alcoholic. The child and his mother were both subject to beatings at the hands of the father. The court's findings provided the child with an opportunity to avoid further harm in his native home with his parents. Approximately one year after filing for SIJ, USCIS sent a Notice of Intent to Deny and ultimate denied the child’s SIJ case. USCIS again did not defer to the state court findings and instead, assessed for itself that “there is no indication that the court declared you dependent or made any determination regarding your custody under any enforceable provision of the Texas law governing juvenile dependency or child custody.” (emphasis added)

Both of these examples demonstrate that USCIS is not recognizing the state judge's interpretation of state law. Due to its delay in excess of statutorily required adjudication timeframes, the child in this case lost his opportunity to seek SIJ entirely, as he has now turned 18 years old, an age that USCIS has also interpreted under its analysis of state law to no longer qualify for SIJ, despite the federal law’s definition in which 21 years is the age of majority for immigration purposes.

Section 204.11(b)(v) Eligibility – Non-viability of Reunification

ABA COMMENTS: The USCIS Policy Manual imposes additional criteria for this eligibility requirement that go beyond the requirements of the statute. USCIS should not include the provision creating additional requirements for children whose fathers are not listed on their birth certificate in the final regulations and should remove the requirements from the Policy Manual because they create undue burden for children whose parents are unknown to them through no fault of their own, including if the father abused or raped their mother. Again, this policy seems to target the most vulnerable of SIJ beneficiaries in contrast to the agency’s stated objectives.

Additionally, the restriction on the use of temporary orders should be deleted in the final regulations, as that requirement goes beyond the statute and is a matter for a state court to decide. For example, in child welfare proceedings, the evaluation of best interest and reunification are made at many status hearings throughout the life of the case. The procedural tools of courts should not be limited.

The ABA also has concerns about what the proposed regulations, in addressing consent, leave out. In its adopted AAO decision, Matter of A-O-C-, USCIS clarifies that a juvenile court’s dependency declaration must be made in accordance with state law governing such declarations. In an
accompanying statement by then USCIS Director Ken Cuccinelli,\(^{11}\) he stated that USCIS is thus “no longer requiring evidence that a state court had the authority to place a petitioner in the custody of an unfit parent in order to make a qualifying determination regarding parental reunification for purposes of SIJ classification.” This decision should be reflected in the proposed regulations.

Last, the regulations do not provide clarity on what constitutes non-viability of reunification when a parent’s rights are not legally terminated, a common scenario for a child living with a parent or non-parent caregiver. This ambiguity has resulted in opposite decisions from the AAO on the same language in an order. *Compare Matter of S-M-R-I- (Dec. 18, 2018)* (grant of SIJ where parent shared custody with brother and had supervised visitation) with *Matter of V-A-A-E- (Dec. 18, 2018)* (denying SIJ where parent was not granted custody rights and had supervised visitation). Since termination of parental rights is not required, and without it, state courts will not typically wholly limit access to a child, USCIS must be flexible in reviewing custody orders. Where a court does not completely limit access to a child, a judge may be uncomfortable with finding that “reunification” is not viable, as required by the federal statute. Accordingly, orders that otherwise satisfy the SIJ definition may be lacking in explicit language regarding non-reunification. As an example, under Texas law, reunification is not defined by statute and a finding that reunification is not viable is not typically made outside the child welfare context. Accordingly, it would be appropriate for a Texas state court to award a child’s mother sole custody, while providing that the father retain certain non-custodial rights, and never reference reunification. It is implicit that reunification with the child’s father is not viable. USCIS should therefore not require an explicit non-reunification finding in such cases.

**Section 204.11(b)(vi) Eligibility – Best Interest**

**ABA COMMENTS:** The ABA applauds the recognition that the state court is best suited to make the best interest finding for SIJ eligibility purposes because best interest is often a key consideration in any child welfare, custody, or commitment proceeding. USCIS should not incorporate the additional requirements for the best interest not to return finding that were included in its Policy Manual, making specific requirements of the court when making the best interest finding rather than relying on the state court’s expertise and jurisprudence. Specifically, the requirement that the court determine that “a placement in the child’s, or his or her parents’, country of nationality or last habitual residence is not in the child’s best interest,” should be replaced with “a finding that a particular custodial placement is the best alternative available to the petitioner in the United States.”

Where a child’s non-offending parent is residing in the U.S., it is implicit that it is not in the child’s best interest to return to their home country. State courts have, in such cases, determined that the placement remains with the non-offending parent who is in the United States. State courts are tasked with deciding the person, not the location, that is the best placement for the child. A rigid system of adjudication will only be to the detriment of child victims of parental mistreatment. If a state court, those most apt to make decisions of the care and custody of a child, awards custody of a child to a resident of the state in order to avoid further trauma to the child, immigration

adjudicators should also accept the court’s findings without placing additional burdens on the family.

**Section 204.11(c)(1)(i) Consent**

The ABA hereby incorporates by reference its prior comments regarding proposed Section 204.11(c)(1)(i) regarding consent. The ABA remains concerned that as drafted, this provision will exclude vulnerable youth from SIJ protection and create significant delays in an already lengthy adjudicatory process. As previously stated, nothing in the TVPRA amendments to the SIJ status provisions in the INA would require that this provision be added. For these reasons, and those elaborated below, the ABA would recommend that the provisions found in proposed Section 204.11(c)(1)(i) be stricken altogether.

**History of DHS Express Consent in SIJ Process**

The requirement for express consent by DHS was not a part of the original statutory SIJ definition as adopted in 1990. Neither was a finding of abuse, abandonment or neglect. Both became SIJ classification requirements through amendments included in an appropriations bill enacted in 1998.12

These changes were made in response to the perception that some individuals were relinquishing their parental rights so that their children could be classified as special immigrant juveniles.13 The legislative history available discusses, for example, the belief that some international students sent to study in the U.S. were using the provision to apply for adjustment of status.14

Thus, DHS had to expressly consent to the juvenile court order serving as a precondition to the grant of status, and eligibility was limited to children declared dependent because of abuse, abandonment or neglect. Subsequently, pursuant to the TVPRA of 2008 the express consent requirement was simplified, requiring DHS consent to the grant of SIJ classification instead of expressly consenting to the juvenile court order itself. In making this change, Congress recognized the “State court authority and ‘presumptive competence’ over determinations of dependency, abuse, neglect, abandonment, reunification, and the best interests of children.”15 The original statutory changes thus addressed Congress’ concerns about misuse of the SIJ classification, and the subsequent statutory change (via the TVPRA of 2008), attempted to ensure that the consent function was applied in such a way that paid appropriate deference to the State courts.

With this history in mind, it is clear that the language in proposed Section 204.11(c)(1)(i) essentially reverts the express consent requirement to pre-2008 law, thereby ignoring

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congressional intent as expressed in adoption of the TVPRA. Although the proposed language does not require DHS consent to the juvenile court order, it essentially directs DHS adjudicators to re-try those matters expressly delegated to the State courts for decision and resolution. In doing so, and as previously stated, it subjects children seeking the benefit to needless and harmful re-traumatization and may fail to protect eligible children unable to satisfy its requirements.

The Policy Manual Utilizes the Same “Primary Purpose” and “Bona Fide” Language, Negatively Affecting Adjudications

As drafted, this provision essentially instructs USCIS adjudicators to presume fraud and state court incompetence in fact finding in every SIJ case. The language in the provision mirrors language in the USCIS Policy Manual, and it is clear that it is already negatively impacting adjudications in the form of delays and improper denials.

As stated in the ABA’s prior comments to this proposed provision, the logic behind the primary purpose language is flawed at its core. It assumes that a state court order cannot be sought both to obtain relief from abuse, neglect or abandonment and to obtain lawful immigration status. Congress never intended to exclude from SIJ protection those children who are subject to possible removal and who need protection from that removal to protect them from further abuse, abandonment or neglect. Indeed, a child not subject to removal would not need SIJ protection. How a child will prove a motivation that will satisfy USCIS is unclear. In cases where there is no indicia of fraud, USCIS should not require more from the state court order than set forth in the statute. A child should not have to show prior or extensive state court involvement, for example. In some cases, all a child needs to protect him/her from further mistreatment is that he/she not be required to return to an unsafe situation. It is clear that requiring vulnerable children to overcome a presumption of fraud and burdening them with establishing a proper motive was not what Congress intended.

The USCIS Policy Manual indicates that “USCIS generally defers to the court on matters of state law and does not go behind the juvenile court to reweigh evidence and make independent determinations about abuse, neglect or abandonment.” This is in line with the statute. But the “bona fide” language in the policy manual and the proposed regulations nullify that deference. In practice, even though a child comes to USCIS with an order that was issued by a judge charged with making findings of fact and applying state law to those facts, he/she must then demonstrate to USCIS that the findings the judge made had a sufficient factual basis, and that the legal determinations had a sufficient state law basis.

Since inclusion of this language in the Policy Manual, advocates, including those at ProBAR, have seen significant delays in adjudications. Related to the delays have been the issuance of Requests for Evidence and Notices of Intent to Deny where USCIS has sought to go behind a valid state court order. In some cases, ProBAR has received Notices of Intent to Deny months, or more than a year, after submission of Form I-360. These delayed Notices questioned the validity and enforceability of state dependency orders.

As a technical assistance provider, CILA has received numerous requests from advocates seeking guidance in responding to USCIS notices that question the validity of state court orders. For

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16 USCIS Policy Manual, Part J, Chapter 2.A.
example, in Matter of A-V-M\textsuperscript{17}, USCIS took the position that failure to cite to state law in the final order indicates that the court did not follow state law. ("Here, the juvenile court awarded custody of the Petitioner to her mother, after finding that the Petitioner's father had abandoned and neglected her and had subsequently passed away. However, although the order indicates generally that the findings of abandonment and neglect were made under Maryland state law, it does not cite any applicable state child welfare provisions under which the findings were made. The underlying complaint to the juvenile court in the record similarly lacks any references to applicable state law."). Similarly, in Matter of A-G-M-V\textsuperscript{18}, USCIS took the position that if the court does not include the specific facts and evidence upon which it relied in the order, the court did not consider the evidence. ("The juvenile court did not make specific factual findings or identify the evidence or information on which it relied in rendering the requisite determinations."). This scrutiny is not just legally and procedurally incorrect, but bestows upon USCIS authority that it simply does not have. As noted in a report by the USCIS Ombudsman, “Juvenile court dependency determinations are not a matter of federal law. USCIS is not vested with authority to make dependency determinations. It is not empowered to engage in post-decision legal or factual review of such decisions and it lacks the expertise possessed by tribunals specializing in family law.”\textsuperscript{19}

The TVPRA of 2008 clearly intended to eliminate the requirement that USCIS consent to the juvenile court order itself. The “primary purpose” and “bona fide” language in the policy manual and proposed Section 204.11(c)(1)(i) aims to, as a practical matter, revive it; requiring after-the-fact approval of the State court’s actions in requiring a review of evidence in the record for proof of the petitioner’s primary motive and a “bona fide” basis to grant SIJ status. Based on the experience of ProBAR and CILA, it is clear that this provision, if added to the regulations, would inappropriately encroach upon the deference Congress gave to state courts, put all the power in the hands of USCIS adjudicators, exclude vulnerable children from protection, and unnecessarily and harmfully re-traumatize petitioners.

\textit{Section 204.11(d)(ii) Petition Procedures – Factual Basis}

\textbf{ABA COMMENTS:} The ABA reaffirms its prior comments regarding proposed Section 204.11(d) regarding specific findings of fact and incorporates them below.

The ABA is concerned that as drafted, this provision vests USCIS with authority it does not have in requiring adjudicators to conduct de novo factual and legal reviews of juvenile court orders. In addition, if adopted, this provision could cause the re-traumatizing of applicant children and violations of their right to privacy and to a promptly conducted full and fair process. Accordingly, the ABA’s recommendation would be that this provision be stricken altogether.

\textsuperscript{17} \url{https://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2017/OCT242017_03C6101.pdf}
\textsuperscript{18} \url{https://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2016/APR222016_01C6101.pdf}
The proposed procedures provision bestows upon USCIS authority that it simply does not have. As noted in the USCIS Ombudsman report:

“When USCIS requests the evidence underlying juvenile court dependency orders, it is, in effect, engaging in an inappropriate review of the state tribunal’s decision. Juvenile court dependency determinations are not a matter of federal law. USCIS is not vested with authority to make dependency determinations. It is not empowered to engage in post-decision legal or factual review of such decisions and it lacks the expertise possessed by tribunals specializing in family law.” CIS Ombudsman Recommendations, Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices, p.6 (April 15, 2011).

USCIS has a clearly defined role in the adjudication of SIJ applications. As the CIS Ombudsman has indicated, the TVPRA permits USCIS to require additional evidence relating to the basis for the juvenile dependency order in limited circumstances:

“Generally speaking, such evidence may be requested when the dependency order fails to specify whether it was issued on the basis of abuse, neglect or abandonment. Furthermore, where the juvenile court order indicates that the dependency determination was based on factors such as parental failure to meet psychosocial or medical needs ‘the petitioner must establish that such a basis is similar to a finding of abuse, neglect, or abandonment’ and USCIS may request the evidence necessary to make that showing.” Id., p. 5.

Beyond the limitations on USCIS’ authority are the practical consequences of this proposed procedural provision. As previously stated, in certain cases it is simply not in a child’s best interest to be aware of all of the facts that form the basis for his/her SIJ claim. In those cases, detailed state court orders, which are a matter of public record in some states, become especially problematic. Family court practitioners often exclude detailed findings of fact from orders for this very reason—to protect a child’s privacy and prevent painful details from becoming a matter of public record. To require a different procedure in SIJ cases once again imposes new court system designed to protect all children, whether potential immigrants or U.S. citizens. In other jurisdictions, where records relating to juvenile orders are routinely sealed, obtaining a copy of orders or other filings from the state court is likely to cause significant delays in adjudication of SIJ applications.

The USCIS Ombudsman’s office has already identified this as a cause for concern in recent recommendations to the USCIS Director in indicating:

Stakeholders have told the Ombudsman that one practical effect of requests for evidence underlying dependency orders is to burden applicants with onerous documentary requests, including requests that juvenile courts pull and copy sensitive files. Thus, some stakeholders report that they have refrained from advising eligible children to seek SIJ status because re-adjudication of the dependency issue can upset the child, intrude on the child’s privacy, and lengthen processing times.” Id., pp. 6 -7.
ABA standards and policies regarding the protection of children from traumatization, the respecting of their right to privacy, and their right to prompt, full and fair adjudication of their claims have already been noted. Because of the significant likelihood that the proposed procedures would lead to further traumatization of applicant children, expose them to and expose their own sensitive information, and cause significant delays in their access to protection via the juvenile visa, the ABA cannot support the addition of this provision to the regulations, and recommends that it be stricken.

Section 204.11(e) Interview

ABA COMMENTS: The ABA is concerned that the commentary to this section suggests that a juvenile’s criminal record is somehow tied to eligibility for I-360. Adjudications in juvenile proceedings are not considered “convictions” for immigration purposes. See Matter of Devison, 22 I & N Dec. 1632 (BIA 2000); Matter of Ramirez-Rivero, 18 I & N Dec. 135 (BIA 1981). Furthermore, juvenile adjudications are often subject to sealing and requiring the petitioner to request the records may violate state law or cause them to lose other protections by unsealing the records. Any inadmissibility issues should be addressed at the I-485 stage and should not require juvenile records to be unsealed.

The ABA also is concerned that the commentary suggests that a child represented by an attorney can be interviewed without the attorney present at USCIS discretion. This is especially troubling given the unique vulnerabilities of SIJ petitioners. The ABA Unaccompanied Alien Children (UAC) Standards require that a child have access to meaningful legal representation throughout all immigration questioning, immigration adjudications, and any proceedings relevant to his immigration case. We strongly oppose the language in the commentary and urge USCIS to make clear that represented children are not to be further interviewed unless their attorney is present.

Section 204.11(h) Timeframe

ABA COMMENTS: SIJ applicants are currently experiencing significant delays, well beyond the 180 days, in the adjudication of their Form I-360’s. The statute mandates adjudication of SIJ petitions in 180 days; this is not merely a “benchmark” as it appears to be referenced as in the commentary to this section. Delays beyond the 180 days may negatively impact children in removal proceedings or those from whom USCIS seeks additional state court evidence. Therefore, the ABA recommends revising the language in the commentary to emphasize the importance of compliance with the 180-day timeline.

PART 205 – REVOCATION OF APPROVAL OF PETITIONS

Section 205.1 Revocations

ABA COMMENTS: The requirement that an SIJ petitioner must be unmarried is not supported by the statute or legislative history. While this was previously a requirement under the regulations, this requirement is outdated due to passage of the TVPRA. In fact, the statute nowhere posits any requirement that a SIJ applicant be unmarried. Specifically, an SIJ petitioner should not be required to stay unmarried, subject to automatic revocation, during the period in which USCIS is adjudicating adjustment of status. The requirement to be unmarried is part of eligibility for SIJ status, not adjustment of status. Requiring a young adult to remain unmarried while waiting for a
visa to become available and USCIS to process their application is an undue burden and reaches beyond the statute. Furthermore, long wait times for visa availability for adjustment of status for some SIJ beneficiaries means they have to remain unmarried for years or risk losing their status.

Additionally, the ABA is troubled by a trend of USCIS revoking previously approved I-360s based on an additional review for I-360 eligibility at the adjustment stage. Revocations should be limited to those listed in the regulations: automatic revocations or revocations for good cause such as fraud. This practice has denied SIJ status to petitioners who applied before the more stringent standards of the USCIS Policy Manual were implemented but who are being retroactively held to those standards.

PART 245 – ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

Section 245.1 Eligibility – Adjustment of Status

ABA COMMENTS: Long wait times for visa availability for unaccompanied children from El Salvador, Guatemala, Honduras, and Mexico who are in removal proceedings, combined with the absence of authority for immigration judges to terminate proceedings or administratively close cases, has put SIJ beneficiaries in a situation that was not contemplated by Congress when it created a statutory exception for SIJ beneficiaries to adjust status from within the United States. To address this gap in law, SIJ beneficiaries should be given deferred action similar to VAWA recipients to allow them work authorization and protection from deportation while waiting for a visa to become available to adjust status in the United States. 20

The ABA recommends that USCIS promulgate a regulation authorizing administrative closure of removal proceedings for cases where an I-360 has been approved but a visa is not yet available for adjustment. This regulatory option is the type of situation contemplated by Matter of Castro Tum 27 I&N Dec. 271 (A.G. 2018). Such a regulation would avoid forcing an immigration judge to issue an order of deportation for an SIJ beneficiary despite a state court judge making a best interest finding to the contrary. Congress explicitly deemed SIJ beneficiaries as paroled for the purposes of adjustment so that they are not forced to return to their home country to consular process. At least one federal court of appeals has found that SIJ beneficiaries cannot be deported. See Osorio-Martinez v. Att’y Gen., 893 F.3d 153, 167, 172 (3d Cir. 2018).