



November 15, 2019

Via Federal e-Rulemaking Portal

Acting Director Kenneth T. Cuccinelli,  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
Washington, DC

Re: Special Immigrant Juvenile Petitions  
84 FR 55250 (Oct. 16, 2019), reopening 76 Fed. Reg 54978 (Sept. 6, 2011)  
Docket No. USCIS-2009-0004

Dear Acting Director Cuccinelli,

Brooklyn Defender Services (“BDS”) submits these comments in opposition to the U.S. Citizenship and Immigration Services (“USCIS”) Proposed Rule on Special Immigrant Juvenile Petitions, 76 Fed. Reg 54978, issued on September 6, 2011, which was reopened on October 16, 2019, 84 Fed Reg. 55250 (hereinafter, “Proposed Rule”), Docket No. USCIS-2009-0004.

BDS is a full-service public defender organization in Brooklyn, New York, that provides multi-disciplinary and client-centered criminal defense, family defense, immigration, and civil legal services, along with social work and advocacy support. BDS represents low-income people in nearly 30,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled, advised, or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn’s criminal court system. About a quarter of BDS’s criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore at risk of losing the opportunity to obtain lawful immigration status as a result of criminal or family defense cases. Our criminal-immigration specialists provide support and expertise on thousands of such cases. In addition, BDS is one of three New York Immigrant Family Unity Project (“NYIFUP”) providers and has represented more than 1,400 people in detained deportation proceedings since the inception of the program in 2013. BDS’s immigration practice also represents people in applications for immigration relief, adjustment of status, and naturalization before the United States Citizenship and Immigration Services (“USCIS”), and in non-detained removal proceedings in New York’s immigration courts.

As set forth below, BDS strongly opposes the Proposed Rule because it is a veiled attack on Special Immigrant Juvenile (“SIJ”) status as a pathway for abused, neglected, and abandoned children to secure immigration relief in the United States. The Proposed Rule contravenes the SIJ statute and Congressional intent, and undermines the validity and independence of the state judicial process. The Proposed Rule was reopened as part of a larger scheme to limit SIJ relief, and will result in SIJ petitions being delayed or denied to vulnerable young immigrants who are eligible for relief under the statute. Because the administrative process is not sound, the regulations are in conflict with the plain text and spirit of the SIJ statute, and the agency rationale for the Rule stigmatizes vulnerable immigrant children, BDS asks that USCIS immediately halt implementation of the Proposed Rule.

## 1. Background

SIJ status provides a pathway to lawful permanent residence and citizenship for young immigrants under the age of 21 who have been victims of abuse, neglect, or abandonment by one or both of their parents. SIJ enables these young immigrants, who have faced adversity at a young age, to live securely in the United States without the fear of deportation and to achieve the stability that will allow them to pursue educational, medical, and employment opportunities.<sup>1</sup>

SIJ status was created as part of the Immigration Act of 1990,<sup>2</sup> and implementing regulations were adopted in 1993, 8 C.F.R. § 204.11 (1993). The SIJ statute, 8 U.S.C. § 1101(a)(27)(J), was amended numerous times and the statutory criteria for SIJ eligibility has changed over time. The SIJ statute was last amended in 2008 by the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”),<sup>3</sup> which broadened the basis for SIJ to include relief for juveniles for whom reunification for *one or both* of the child’s parents is not viable due to “abuse, neglect, abandonment, or a similar basis found under State law.”<sup>4</sup> The TVPRA also amended the “consent” provision, eliminating the requirement that the Attorney General must consent to the *state court’s dependency order*, and instead provides that the Secretary of Homeland Security must consent to the ultimate grant of SIJ status.<sup>5</sup> The TVPRA additionally created “age-out” protections, which provided that as long as a petitioner was unmarried and under 21 at the time of *filing* the petition with USCIS, they were eligible for SIJ regardless of the

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<sup>1</sup> See 58 Fed. Reg. 42843, 42844 (Aug. 12, 1993) (explaining that SIJ status “alleviates hardships experienced by some dependents of United States juvenile courts” by providing “the opportunity to apply for special immigrant classification and lawful permanent resident status, with the possibility of becoming citizens of the United States in the future”).

<sup>2</sup> Immigration Act of 1990, § 153, 104 Stat. 4978, 5005-06 (1990).

<sup>3</sup> Pub. L. 110-457 § 235(d)(1)(B), 122 Stat. 5044 (2008) (amending 8 U.S.C. § 1101(a)(27)(J)).

<sup>4</sup> TVPRA § 235(d)(1)(A) (codified at 8 U.S.C. § 1101(a)(27)(J)(i)).

<sup>5</sup> TVPRA § 235(d)(1)(B)(i) (codified at 8 U.S.C. § 1101(a)(27)(J)(iii)).

petitioner's age at time of adjudication.<sup>6</sup> Despite the various changes in the SIJ statutory scheme, the USCIS regulations governing SIJS petitions have not been updated since they were first promulgated in 1993.

On September 6, 2011, USCIS issued a Proposed Rule with the stated goal of aligning the requirements for SIJ eligibility under 8 C.F.R. § 204.11 with the SIJ statute. 76 Fed. Reg. 54978 (proposed Sept. 6, 2011). After a 60-day comment period, USCIS received over 50 formal comments. The rule was met with strong pushback,<sup>7</sup> with commenters expressing “significant concerns”<sup>8</sup> that some of the proposed regulatory language was “extraneous,” and “outside Congress’s intentions,”<sup>9</sup> as well as “unlawful[.]”<sup>10</sup> As a result, the comments to the 2011 Proposed Rule were never addressed and a Final Rule was never issued. USCIS did not announce this decision or provide any rationale; instead, it quietly took no action after the close of the comment period. The implication, however, was that the harms of the Proposed Rule, as drafted, were severe and outweighed the benefits of the few provisions that did bring the regulations in line with the statute.

In December 2015, the USCIS ombudsman recommended that DHS complete the rulemaking process.<sup>11</sup> In response, USCIS issued clarifying policy guidance in the USCIS Policy Manual in October 2016,<sup>12</sup> and noted that it would “continue the Federal

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<sup>6</sup> TVPRA § 235(d)(6) (codified at 8 U.S.C. § 1232(d)(6)).

<sup>7</sup> See, e.g., U.S. S. Comm. on the Judiciary, Comment Letter on Proposed Rule Concerning Special Immigrant Juvenile Petitions (Nov. 7, 2011); Tex. Dep’t of Family & Protective Servs., Comment Letter on Proposed Rule Concerning Special Immigrant Juvenile Petitions (Nov. 7, 2011); Kids in Need of Defense, Comment Letter on Proposed Rule Concerning Special Immigrant Juvenile Petitions (Nov. 7, 2011).

<sup>8</sup> Immigrant Children Lawyers Network, Comment Letter on Proposed Rule Concerning Special Immigrant Juvenile Petitions (Nov. 7, 2011) (ICLN was comprised of over 170 attorneys, advocates, and accredited representatives working on behalf of immigrant children nationwide); see also Immigrant Legal Resource Center, Comment Letter on Proposed Rule Concerning Special Immigrant Juvenile Petitions (Nov. 7, 2011); Ctr. for Human Rights & Constitutional Law, Comment Letter on Proposed Rule Concerning Special Immigrant Juvenile Petitions (Nov. 7, 2011)

<sup>9</sup> Kids in Need of Defense Comment Letter.

<sup>10</sup> Ctr. for Human Rights & Constitutional Law Comment Letter.

<sup>11</sup> See Maria Odom, *Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications*, USCIS Ombudsman (Dec. 11, 2015) (hereinafter, USCIS Ombudsman Rec. (Dec. 11, 2015)) [https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015\\_2.pdf](https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015_2.pdf).

<sup>12</sup> USCIS Memo from L. Rodriguez, USCIS Director, to M. Odom, USCIS Ombudsman, re: Response to Recommendations on Special Immigrant Juvenile Adjudications, dated Apr. 19, 2016, (hereinafter, USCIS Memo (Apr. 19, 2016))

rulemaking process to amend its regulations governing the SIJ classification and related applications for adjustment of status to lawful permanent residence.”<sup>13</sup>

## **2. The Underlying Purpose of Reopening the Proposed Rule Is To Thwart Vulnerable Immigrants From Obtaining Immigration Relief**

The reopening of the stale 2011 proposed SIJ regulation is part of a larger two-year attack on young immigrants seeking safety and a better future in the United States. The proposed changes to SIJ are meant to limit children—many of whom come from the northern triangle region in Central America—from obtaining status in the United States. Through the child separation policy, the *Flores* regulations regarding children in detention, and attempts to dismantle the asylum system, this Administration has shown a complete disregard for vulnerable immigrants who come to the United States because of the trauma they suffered. This Proposed Rule is further proof; it is intended to—and will in fact—increase SIJ denials for immigrant children who are victims of trauma and who are eligible for SIJ under the statute, which is contrary to the congressional intent of the SIJ statute.

### **a. USCIS’s Stated Rationales for Reopening the Proposed Rule Are Merely Pretext**

USCIS’s purported rationales in reopening the comment period were to (a) realign USCIS regulations with congressional intent and implement statutorily mandated changes, and (b) “address shortcomings in the regulations that threaten the integrity of the SIJ program.”<sup>14</sup>

First, the Administration’s claims that the Proposed Rule will merely “realign” USCIS regulations with the SIJ statutory scheme are false, because in many respects (discussed in detail below), the purposed regulations not only require more than the SIJ statute, but are in conflict with congressional intent and the plain text of the statutory scheme. Specifically, the Administration is attempting to regulate around the TVPRA, which it has explicitly criticized.<sup>15</sup> In the press release reopening the Proposed Rule,

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<https://www.dhs.gov/sites/default/files/publications/USCIS%20Reponse%20to%20CISOMB%20SIJ%20Recommendation%20R.pdf>; USCIS SIJ Policy Manual (updated Oct. 26, 2016).

<sup>13</sup> USCIS Memo (Apr. 19, 2016).

<sup>14</sup> USCIS Press Release, *USCIS Clarifies Special Immigrant Juvenile Classification To Better Ensure Victims Of Abuse, Neglect And Abandonment Receive Protection* (Oct. 15, 2019) (hereinafter, USCIS Press Release (Oct. 11, 2019)), <https://www.uscis.gov/news/uscis-clarifies-special-immigrant-juvenile-classification-better-ensure-victims-abuse-neglect-and-abandonment-receive-protection>.

<sup>15</sup> DHS Press Release, *Unaccompanied Alien Children and Family Units Are Flooding the Border Because Of Catch and Release Loopholes* (Feb. 15, 2018), (hereinafter, DHS Press Release (Feb. 15, 2018)) <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and> (criticizing the TVPRA’s

Acting Director Cuccinelli once again criticize the SIJ statute, “Congress needs to address loopholes in the SIJ program to better protect children.” The Proposed Rule is improper, as the Administration is attempting through regulation to circumvent legislation it does not like.

Second, claims that SIJ petitioners are threatening the integrity of the SIJ program are intended to stigmatize and vilify these child immigrants. As it has in the asylum context,<sup>16</sup> the Administration is attempting to justify curtailing relief by claiming—without support—that immigrants are abusing the SIJ system. USCIS alleged in its press release announcing the reopening of the instant comment period that, “In recent years, the SIJ classification has increasingly been sought by juvenile and young adult immigrants solely for the purposes of obtaining lawful immigration status and not due to abuse, neglect or abandonment by their parents.”<sup>17</sup> Such claims of loopholes or abuse bely the fact that, to be eligible for and petition for SIJ, a child must make an evidentiary showing before a state court that the child meets the legal standards under state law, *i.e.*, the child must prove to the satisfaction of a state court judge that they have been abused, neglected, or abandoned (or a similar basis under state law), that reunification with one or both parents is thus not viable, and that it would not be in the best interest of that child to return to their home country (or country of last residence). In BDS’s experience representing children in family court proceedings who later applied for SIJ, we were required to provide evidence, testimony, and legal briefing to satisfy the evidentiary standard in New York Family Court. Claims of “loopholes” and “abuse” are meant to induce fear and shroud the Administration’s attempts to dismantle the SIJ process.

**b. While Attempting To Dismantle the SIJ Statute, USCIS is Abusing the Administrative Process**

In reopening the Proposed Rule, the Administration ignored the regulatory history of the rule and the fact that the Proposed Rule had been criticized by the public and *de facto* rejected by the agency. The Administration reopen an old, proposed rule that had received serious criticism for being unlawful and contrary to the statute, without first attempting to address those comments. It is unclear whether this constitutes a sound administrative process. What is clear is that the Proposed Rule is the latest attempt by DHS and USCIS to destabilize the SIJ process, as they have attempted to do over the last two years. It is necessary to place the Proposed Rule in this context.

In February 2018, USCIS quietly issued internal legal guidance, claiming that juvenile courts did not have the requisite jurisdiction over youths aged 18 to 21 to issue

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expansion of SIJ eligibility to include juveniles that cannot be reunited with only *one* parent, as oppose to both).

<sup>16</sup> USCIS Press Release (Oct. 15, 2019).

<sup>17</sup> *Id.*

the necessary orders to apply for SIJ, because the courts could not order custody or reunification for youths over 18.<sup>18</sup> USCIS never publicized the change; rather, it began issuing denials and revocations for SIJ petitioners who applied after they had turned 18.<sup>19</sup>

Concurrently, on February 15, 2018, DHS issued a press release entitled “Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes,” which criticized the TVPRA’s expansion of SIJ eligibility:

“We must end abuse of the Special Immigrant Juvenile (SIJ) visa to ensure the applicant proves reunification with *both parents* is not viable due to abuse, neglect, or abandonment and that the applicant is a victim of trafficking. This is necessary as many [unaccompanied children] are able to obtain a Green Card through SIJ status even though they were smuggled here to reunify with one parent present in the United States.”<sup>20</sup>

A few months later, on July 13, 2018, USCIS issued a new policy memorandum that limited the circumstances in which it would issue Requests for Evidence (“RFE”) and Notices of Intent to Deny (“NOIDs”). RFEs and NOIDs allow a petitioner to respond to agency questions or determinations prior to a denial. As such, USCIS would deny more cases without first giving the petitioner an opportunity to provide additional evidence or clarify where an adjudicator had misinterpreted the law or facts.<sup>21</sup> Notably, shortly prior to issuing this SIJ policy meant to increase denials, USCIS issued an agency-wide policy change that required applicants to be charged and placed in removal proceedings upon denial of their applications if they were otherwise in unlawful status; this June 2018 memo would apply to SIJ petitioners.<sup>22</sup> Prior to these memos, it was exceedingly rare for

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<sup>18</sup> See *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 374 (S.D.N.Y. 2019).

<sup>19</sup> In March 2019, a federal court in New York found that the February 2018 Legal Guidance and related policy as to 18 to 21 year old SIJ petitioners was unlawful in that it contravened the SIJ statute and applicable state law, and ordered that USCIS cease utilizing the policy to adjudicate SIJ petitions. See *R.F.M.*, 365 F. Supp. 3d at 277-78.

<sup>20</sup> DHS Press Release (Feb. 15, 2018) (emphasis added).

<sup>21</sup> USCIS, Policy Memorandum: Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator’s Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b), (July 13, 2018), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM\\_10\\_Standards\\_for\\_RFEs\\_and\\_NOIDs\\_FINAL2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf).

<sup>22</sup> USCIS, Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens PM-602-0050.1 (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Casesand-Issuance-of-NTA.pdf>. This memo went into effect starting Nov. 19, 2017 for I-360 petitions. See USCIS, Notice to Appear Policy Memorandum, <https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum>.

children applying for SIJ to be placed in removal following a USCIS denial of their SIJ petition or application for adjustment of status.

Lastly, on October 11, 2019, USCIS adopted three non-precedential Administrative Appeals Office (“AAO”) decisions that “clarified” the requirements for SIJ status to provide policy guidance to USCIS adjudicators. USCIS Acting Director Cuccinelli described that these clarifications were necessary to ensure SIJ protects “deserving juvenile immigrants, while also promoting program integrity and upholding our laws.”<sup>23</sup> Notably, one of the points USCIS sought to “clarify” was that it required evidence supporting the reason that a juvenile is dependent on a state court to ensure a petitioner is not just seeking relief from the juvenile court “primarily to obtain an immigration benefit.” This point mirrors proposed regulation 8 C.F.R. § 204.11(c)(1) and the commentary at 76 Fed. Reg. at 54982. It seems administratively improper to issue guidance on adjudicating SIJ petitions, while also purporting to partake in a public comment period on the same change. In addition, such peeks behind juvenile court orders undermine the integrity and independence of the state court proceedings.

### **3. The Proposed Regulatory Changes Are in Conflict with the Text and Spirit of the SIJ Statute**

The Proposed Rule does not align the regulations with the statutory structure. Rather, the Proposed Rule goes beyond what the SIJ statute requires and is, thus, in conflict with the text and spirit of the SIJ statutory scheme. The effect of such changes will be to delay adjudications, increase the likelihood that USCIS will erroneously deny applications, place a heavier evidentiary burden on petitioners at the USCIS-level, and overall make it more difficult for vulnerable children to secure a pathway to lawful permanent residence.

#### **a. The Proposed Definition of Juvenile Court Is Inconsistent with the Statute and Federal Caselaw**

The proposed regulation perpetuates a definition of “juvenile court” that is inconsistent with the SIJ statute, a definition which a federal judge has already properly interpreted contradicts the SIJ statute and enjoined.<sup>24</sup> Proposed regulation 8 C.F.R. § 204.11(a) defines “juvenile court” as “any court located in the United States having jurisdictions to make judicial determinations about the *custody and care* of juveniles.” (emphasis added). However, the SIJ statute’s plain language requires a juvenile to be declared dependent on a juvenile court *or* placed in a qualifying custody arrangement. The proposed regulation removes the disjunctive, and does not account for the fact that a

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<sup>23</sup> USCIS Press Release (Oct. 11, 2019).

<sup>24</sup> *R.F.M.*, 365 F. Supp. 3d at 377.

court can be a juvenile court even if it only has jurisdiction to make dependency determinations, but not custody determinations.

Moreover, USCIS attempted just last year to institute this definition by policy. In certain states, juvenile courts have jurisdiction for youth up to 21 years of age, but can only issue custody orders for those under 18. For example, under New York State Law, New York Family Court has jurisdiction to issue guardianship orders for youths aged 18 to 21, which makes the youth “dependent” on the court under the SIJ statute.<sup>25</sup> In February 2018, USCIS declared a new policy in a USCIS Legal Guidance regarding SIJ petitions for those aged 18 to 21 and, soon after, began denying SIJ petitions consistent with that policy. The first prong of the policy provided that certain courts did not qualify as a “juvenile court,” because they lacked jurisdiction to make custody determinations for petitioners between their 18th and 21st birthdays. The U.S. District Court for the Southern District of New York found this policy contravened the plain text of the statute and lacked a reasoned explanation, and the court ordered USCIS to cease applying this policy when adjudicating SIJ petitions. *R.F.M.*, 365 F. Supp. 3d at 377.<sup>26</sup> During the litigation, USCIS conceded that a New York guardianship order was a dependency order under the SIJ statute, and the Judge found that the SIJ statute provides that a dependency order alone is sufficient to establish eligibility.<sup>27</sup> Nonetheless, USCIS now seeks to promulgate this erroneous definition of “juvenile court” in their proposed regulations. This is a further example of how the Proposed Rule’s aim is to limit access to SIJ, circumvent statutory requirements, and undermine judicial processes.

### **b. Federal Regulations Cannot Interfere with the Functions of a State Court**

The Proposed Rule provides that DHS’s consent to SIJ classification will be granted where the qualifying State court order was sought primarily for “the purpose of obtaining relief from abuse, neglect, abandonment, or a similar basis under state law, *and not primarily for the purpose of obtaining lawful immigration status.*” 76 Fed. Reg. at 54981 (proposed regulation 8 C.F.R. § 204.11(c)(1)(i)). This language would allow USCIS to serve as a *de facto* appellate court with power to set aside a state juvenile court’s dependency order. State courts are the experts in issues of child welfare and applying

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<sup>25</sup> Family Court Act § 115(a)(i), (c), *accord* N.Y. Const. art. VI, § 13; Family Court Act §§ 661(a).

<sup>26</sup> The court also found that the USCIS legal guidance incorrectly interpreted New York law and, in fact, New York Family Courts could make custody determinations over youths up to 21 years old. *R.F.M.*, 365 F. Supp. 3d at 378. Additional class actions challenging this USCIS policy were also certified by federal courts in California (February 2019), Washington (July 2019), and New Jersey (September 2019). *J.L. v. Cissna*, No. 18-cv-04914-NC, 2019 WL 415579 (N.D. Cal. Feb. 1, 2019); *Moreno Galvez v. Cuccinelli*, No. C19-0321-RSL, 2019 WL 3219418 (W.D. Wash. July 17, 2019); *W.A.O. v. Cuccinelli*, No. 2:19-cv-11696, 2019 WL 4509333 (D.N.J. Sept. 17, 2019).

<sup>27</sup> *R.F.M.*, 365 F. Supp. 3d at 367, 377.

relevant state law, which is why Congress vested the power to determine whether a child is eligible for SIJS in the state courts. The Proposed Rule would usurp that power from state courts and allow federal immigration agencies to second-guess state court findings; as such, this provision of the Proposed Rule is in conflict with both the SIJ statutory scheme and notions of state sovereignty.

Notably, in the 2011 comment period several commenters raised these issues. The Texas Department of Family and Protective Services argued that the consent requirement “casts doubt on the integrity of juvenile court judges, and usurps the role assigned by statute to the juvenile court judge.”<sup>28</sup> U.S. Senate Committee on the Judiciary urged that this provision be amended “to show deference to state court orders that find that an immigrant child is the victim of abuse, abandonment, or neglect . . . given [state courts’] depth of expertise in adjudicating such matters.”<sup>29</sup>

In practice, this proposed regulation would allow USCIS to require and request the files supporting the state court orders to “prove” that the orders were not issued for the purposes of obtaining immigration benefits. *Cf Matter of A-O-C-*, Adopted Decision 2019-03 (AAO Oct. 11, 2019).<sup>30</sup> In fact, USCIS has already been interpreting its consent function to require that a petitioner establish the SIJ classification is “bona fide,” *i.e.*, not primarily or solely to obtain an immigration benefits. USCIS has been issuing RFEs requiring petitioners to provide additional factual information that establishes there is a non-immigration basis underpinning the state order, and such RFE’s could include requests for documents from the juvenile court file.

USCIS should not question the state court process, which is outside of its purview. It should instead respect the Congressional mandate empowering state courts to make SIJ factual determinations and should adhere to its previous policy that USCIS “relies on the expertise of the juvenile court” and “does not reweigh the evidence.” 6 USCIS PM J.2(D)(5). This is consistent with the December 2015 recommendation by the USCIS

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<sup>28</sup> Tex. Dep’t of Family & Protective Servs, Public Comment at 2.

<sup>29</sup> U.S. S. Comm. on the Judiciary, Public Comment at 1.

<sup>30</sup> *Matter of A-O-C-*, *inter alia*, explains that USCIS’s consent authority was warranted as juvenile court proceedings had granted relief from parental maltreatment, and the petition submission included a high level of documentation, including additional evidence from Texas Department of Family and Protective Services and the juvenile court file. Such high level of documentation, however, is neither the norm nor required under the SIJ statute, and highlighting this matter as “guidance” in light of the Proposed Rule’s consent regulation is concerning.

ombudsman that USCIS should “interpret the consent function consistently with the statute by *according greater deference* to State court findings.”<sup>31</sup>

**c. The Proposed Regulation Effectively Eliminates SIJ Eligibility Under a “Similar Basis,” Which Is Provided By Statute**

The SIJ statute, as amended by the TVPRA, provides for SIJ eligibility where reunification with a parent is not viable due to “abuse, neglect, abandonment, *or a similar basis found under State law.*” 8 U.S.C. § 1101(a)(27)(J) (emphasis added). On the “similar basis” clause of the statute, the commentary to the proposed regulation explains that the petitioner has the burden of proof to establish that the “State law basis is similar to a finding of abuse, neglect, or abandonment,” *i.e.*, that the “nature and elements of the State law must be similar to the nature and elements of abuse, abandonment, or neglect.” 78 Fed. Reg. at 54981. First, defining a “similar basis” as needing to match the “nature and elements” of abuse, neglect, and abandonment, threatens to essentially eliminate the “similar basis” prong of the statute. USCIS acknowledges that prong is important because State law governs these definitions, which vary from state to state. *Id.*

Second, the Proposed Rule requires extra documentation to meet the petitioner’s burden, none of which is necessary under the SIJ statute. The Proposed Rule explains that petitioners are “encouraged” to include copies of state laws on abuse, abandonment, and neglect, or “equivalent concepts” so they can “more clearly meet their burden.” It also includes a list of additional evidence petitioners should include to establish that a basis is similar under state law, such as, *inter alia*, opinions or letters from social workers or medical professionals working with the child, evidence that the state treats the petitioner (in terms of services for example) similarly to an abused, abandoned, and neglected child, and evidence showing conduct and acts that led to the victimization of the petitioner. Not only does this extra evidence put additional burdens on children to prove their case, it could allow for RFE’s asking for evidence that is difficult to obtain from a child’s home country or is in the possession of the abusive parent, and it could result in unnecessarily disclosing sensitive medical and psychological information to USCIS or in children undergoing unnecessary but traumatic psychological evaluations. Moreover, it provides USCIS an additional vehicle to issue RFE’s for the purposes of peeking behind, and second-guessing, the state court orders.

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<sup>31</sup> USCIS Ombudsman Rec. (Dec. 11, 2015) (emphasis added). The basis for the ombudsman’s recommendation suggested that requests to review the underlying court documents where petitioners’ have already established the necessary findings were themselves improper.

**d. The Proposed Rule Impedes on a Child’s Access to Counsel at a Crucial Juncture in their Immigration Case**

An individual interviewed by USCIS has a right to counsel pursuant to 8 C.F.R. § 292.5(b).<sup>32</sup> In addition, where USCIS requires a person to appear for an interview, that person is “compelled to appear in person” and has a right to counsel under APA § 555(b). The proposed regulation states that USCIS may require an interview for a SIJ adjudication as a “matter of discretion.” 78 Fed. Reg. at 54982. In addition, while USCIS states that a petitioner may bring a trusted adult or attorney to support them at the interview, USCIS maintains that it can interview a child separately from the child’s chosen trusted adult or legal representative at its discretion. See proposed regulation 8 C.F.R. § 204.11(e); 76 Fed. Reg. at 54982. Additionally, USCIS maintains that it has the discretion in that interview to ask a child about the facts regarding the abuse, neglect, or abandonment of their parent. *Id.*

First, an interview is unnecessary in the majority of SIJ cases. Second, it is crucial for a child to be accompanied by their legal representative. Children have the right to appointed counsel in many other civil contexts—such as paternity, child support, adoptions<sup>33</sup>—because there is a recognition of a child’s special disadvantages and vulnerability. “[T]here exists a pervasive contemporary recognition of the importance of counsel in proceedings involving children.”<sup>34</sup> Furthermore, the TVPRA went so far as to require that the government “ensure to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody of the [federal government] . . . have counsel to represent them in *legal proceedings or matters.*”<sup>35</sup> Although not all SIJ petitioners are unaccompanied children it is notable that the same statute that broadened SIJ relief also identified this specific group of immigrants as especially deserving of counsel. Moreover, although USCIS interviews are technically administrative, they are adversarial in that the petitioner carries the burden to prove their eligibility. Such interviews are also under oath and recorded, and may be used if a child is later placed in removal proceedings. They can also impact physical liberty, because a denial could result in being placed in removal proceedings and, for SIJ petitioners over 18, could result in detention.

Third, it is inappropriate for USCIS to interview a child regarding the details of abuse, neglect, or abandonment, and even more so without a legal representative to

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<sup>32</sup> See also Section D.2, USCIS Adjudicators Field Manual (recognizing that an individual has a right to counsel under 8 C.F.R. §292.5(b)).

<sup>33</sup> See, e.g., *Matter of Jamie TT*, 599 N.Y.S.2d 892, 894 (App. Div. 1993).

<sup>34</sup> Benjamin Good, *A Child’s Right to Counsel in Removal Proceedings*, 10 Stan. J.C.R. & C.L. 109 (Jan. 2014), <https://law.stanford.edu/wp-content/uploads/2018/05/good.pdf>

<sup>35</sup> 8 U.S.C. § 1232(c)(5) (emphasis added).

ensure the necessary safeguards are in place. A SIJ petitioner has, by definition, suffered significant trauma at the hands of a parent at a young age, and has already proven this to a state juvenile court judge, who is an expert in findings of child abuse and neglect; USCIS is not. Thus, it is particularly important for a legal representative to be present.

**e. The Proposed Rule Allows USCIS to Delay Adjudication**

The Proposed Rule would weaken the statutory mandate that USCIS must adjudicate a SIJ petition within 180 days. *See* 8 U.S.C. 1232(d)(2) (providing that a SIJ petition “shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed”). The commentary to the Proposed Rule refers to this 180-day statutory mandate as a “benchmark” to which USCIS “intends to adhere.” 76 Fed Reg. at 54983. Even more troubling, the proposed regulation permits USCIS to restart the 180-day clock in certain circumstances and pause it in other circumstances, proposed regulation 8 C.F.R. 204.11(h), even though the statute contains no exceptions or circumstances where USCIS may pause or restart the clock. This is particularly troubling given the increased backlog and delay times for USCIS adjudications, combined with the increased issuance of RFEs and NOIDs, which empower USCIS to delay the SIJ adjudication process at their discretion.

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BDS strongly opposes the Proposed Rule. We request that USCIS consider these recommendations and immediately halt the implementation of the Proposed Rule. Please do not hesitate to contact us if you have questions regarding our comments. Thank you for your attention and considering our concerns.

Sincerely,

/s/ Brooke Menschel

Brooke Menschel  
Civil Rights Counsel

/s/ Sonia Marquez

Sonia Marquez  
Civil Rights—Immigration Attorney