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IMMIGRATION
LAWYERS
ASSOCIATION

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Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via e-mail: publicengagementfeedback@uscis.dhs.gov

Re: USCIS Policy Manual, Volume 6: Immigrants, Part J, Special Immigrant Juveniles; Volume 7: Adjustment of Status, Part F, Special Immigrant-Based (EB-4) Adjustment

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the new guidance on Special Immigrant Juvenile (SIJ) status found in Volume 6 and Volume 7 of the USCIS Policy Manual.

Founded in 1946, AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the Policy Manual and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Specific Comments on Volume 6, Immigrants

Part J, Chapter 1, Purpose and Background

A. Purpose

USCIS should amend the first bullet point in this chapter to clarify that children that have been “neglected or abandoned” may be eligible for SIJ classification, in addition to abused children..

*Children who have been abused, **neglected, or abandoned** prior to their arrival in the United States, or while in the United States;*

Part J, Chapter 2, Eligibility Requirements

D: Juvenile Court Order, (Parental Reunification)

We suggest that USCIS eliminate the language in the second bullet point that reads “prior to aging out of the juvenile court’s jurisdiction.” This language may cause confusion with family and juvenile courts, and is unnecessary given that automatic revocation occurs if the child reunifies with an offending parent by virtue of a juvenile court order. USCIS should remove this language because it may make it appear that it is impossible for courts to make these findings outside of the termination of parental rights (TPR) context. USCIS recognizes in its Policy Manual that TPR is not required for SIJ. Further, for many children, TPR may not be possible given burdensome service requirements, etc.

Parental Reunification – Declares, under the state child welfare law, that the petitioner cannot reunify with one or both of the petitioner’s parents ~~prior to aging out of the juvenile court’s jurisdiction~~ due to abuse, neglect, abandonment, or a similar basis under state law...

D: Juvenile Court Order, 1. Dependency or Custody

The first paragraph states that “[p]lacing the petitioner ‘under the custody of’ a person requires physical custody.” This statement is confusing, and incorrectly implies that actual physical custody is required. It should be revised to make clear that the *court* must grant physical custody, not that the child must actually be living with the person at all times. One of the roles of the person or entity with physical custody is to decide where the child will actually reside. As a result, USCIS should **add** the following language:

*Placing the petitioner “under the custody of” a person requires **that the court grant that person** physical custody. A qualifying court-appointed custodial placement could be with one parent, if reunification with the other parent is found to be not viable due to that parent’s abuse, neglect, or abandonment of the petitioner.*

AILA strongly suggests that USCIS eliminate the second paragraph in this section which incorrectly disallows temporary orders. USCIS inaccurately asserts that temporary orders “generally do not qualify for the purpose of establishing SIJ eligibility.” Section 235(d)(5) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008) does not support this interpretation. To ban temporary orders would make almost all orders disqualifying, outside of TPR and adoption, which are not required. In banning temporary placements, it appears USCIS is incorrectly conflating the placement requirement with the non-viability of reunification finding. Further, even an order labeled “temporary” may remain in effect until the child ages out of jurisdiction.

We suggest **replacing** the second paragraph with the following clarifying language:

~~Court-ordered dependency or custodial placements that are intended to be temporary generally do not qualify for the purpose of establishing eligibility for SIJ classification. [6] A court appointed custodian that is acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent, [7] is not considered a custodian for purposes of establishing SIJ eligibility.[8]~~

Petitioners with orders that only temporarily remove the child from the offending parent would be subject to possible revocation if the child is returned to the offending parent.

D: Juvenile Court Order, 2. Parental Reunification

AILA recommends that the language from footnote 11 be incorporated into the first paragraph of this section¹ and that USCIS otherwise eliminate the second paragraph. The second paragraph is overly burdensome, requiring an adjudication of paternity if the father is not listed on the birth certificate. Paternity determinations will be impossible where the father is unknown; for example, if the child is a product of a stranger rape or where the mother has since died and cannot give this information. Paternity determinations may also be impossible if there is no personal jurisdiction over the father in state court, which there often will not be if the father has never been to the U.S. In these circumstances, requiring a state court adjudication of paternity before a child can show that reunification with the father is not viable would be nonsensical. Requiring this would bar children from SIJ because their fathers have abandoned them and failed to take steps to foster a parent/child relationship, such that they cannot identify him or effect personal service over him in court. It makes sense to allow these children to be granted SIJ because the benefit focuses on the *effect* on the child, not the *intent* of the parent. The parent does not have to have intended to abandon the child (especially if he did not even know about the child) in order for the child to experience the harms of abandonment.

At a minimum, as an alternative recommendation, the last sentence of the second paragraph should be eliminated, and **replaced** with the following language:

The findings must be based upon the person (or persons) who is the petitioner's parent (or parents) [11] under state law. If the juvenile court order establishes that the person (or persons) is the petitioner's parent (or parents), USCIS generally considers this requirement met. However, if the record does not establish that the person (or persons) is the petitioner's parent (or parents), USCIS may request additional evidence. ~~For example, if the findings are based on a father not listed on the petitioner's birth certificate, a determination that the claimed father is the father under state law should be established in the juvenile court order. An adjudication of paternity is not required, but rather the record must provide a reasonable factual basis for the finding that the parent(s) has abused, neglected, or abandoned the child. Where USCIS requests additional evidence regarding a parent, acceptable documentation may include declarations from the child or other family members.~~

D: Juvenile Court Order, 4. Validity of Order, Continuing Jurisdiction

AILA recommends that the following language be **added** to the second paragraph:

However, this requirement does not apply if the juvenile court jurisdiction ended solely because:

¹ Footnote 11: "The term "parent" does not encompass a step-parent unless the step-parent is recognized as the petitioner's legal parent under state law, such as when a step-parent has adopted the petitioner."

- *The petitioner was adopted, or placed in a permanent guardianship; or*
- *The petitioner was placed in another permanent custody arrangement, which could include a placement with the non-offending parent; or*
- *The petitioner was the subject of a valid order that was terminated based on age before or after filing the SIJ petition (provided the petitioner was under 21 years of age at the time of filing the SIJ petition). [15]*

D: Juvenile Court Order, 4. Validity of Order, Continuing Jurisdiction

The person or entity who has been granted physical custody can choose to let the child live with another person. This scenario should only create an issue with the validity of the order if the child is placed with the offending parent. AILA recommends that language in the fourth paragraph be **replaced** with the following clarifying language:

If, however, a child relocates to a new jurisdiction and is not living in a court ordered placement or with the court ordered custodian, then the petitioner must submit:

- *Evidence that the court is still exercising jurisdiction over the petitioner; or*
- *A new juvenile court order from the court that has jurisdiction.*¹¹⁷¹

Simply because a child has left a placement does not mean that the court has lost jurisdiction over the child. If, however, a child relocates to a new jurisdiction and is not living in a court ordered placement or with the court ordered custodian or with the permission of the court ordered custodian, then USCIS may request evidence that the court is still exercising jurisdiction over the petitioner. Such evidence may include a state statute regarding the court's jurisdiction.

D: Juvenile Court Order, 5. USCIS Consent

USCIS is relying on outdated language that is derived from the now repealed consent requirement.² This inaccurate language invites the adjudicator to engage in an inquiry regarding the petitioner's subjective intent in seeking a state court action, and invites arbitrary, capricious, and disparate treatment. TVPRA 2008 substantially amended the SIJ classification and "deleted the requirement to 'expressly consent' to State court dependency orders serving 'as a precondition to the grant' of SIJ status, and instead requires the Secretary of Homeland Security only to consent to the grant of SIJ status."³ The following language is unreasonable and should be removed from USCIS's Policy Manual:

In order to consent, USCIS must review the juvenile court order to conclude that the request for SIJ classification is bona fide, which means that the juvenile court order was sought to obtain relief from abuse, neglect, abandonment, or a similar basis under state law, and not primarily or solely to obtain an immigration benefit.

² See H.R. Rep. No. 105-405, at 130 (1997).

³ See CIS Ombudsman Recommendations to USCIS on SIJ Adjudications, Dec. 11, 2015, available at <http://www.aila.org/infonet/cis-ombudsman-sufficiency-sij-adjudications>.

USCIS should at a minimum add language that the adjudicator is only to engage in an objective analysis of whether there is a factual basis for the findings, and may not engage in a subjective inquiry.

Part J, Chapter 3, Documentation and Evidence

A: Juvenile Court Orders and Administrative Documents, 2. Findings

The first paragraph of this section describes the juvenile court's SIJ findings as "conclusions of law." As USCIS acknowledges in the second paragraph of this section, only the state court, following state law and procedures, can decide how various parts of its order are defined and where they should go in the order. USCIS should omit reference to "conclusions of law" vis-a-vis SIJ findings, which are found in various places in the manual.

Please note that some of these juvenile court documents may be confidential under state laws. In those cases, failure to provide a particular type of confidential document should not be held against the child, providing the child submits a predicate order containing specific findings.

Part J, Chapter 4, Adjudication

B: Expeditious Adjudication

TVPRA 2008 requires that USCIS adjudicate SIJ status within 180 days of filing. USCIS should amend the following language in the first sentence to clarify the 180-day requirement:

USCIS is required under the statute to ~~generally~~ adjudicates SIJ petitions within 180 days.

Specific Comments on Volume 7, Adjustment of Status

Part F- Special Immigrant-Based (EB-4) Adjustment, Chapter 7, Special Immigrant Juveniles

C: Eligibility Requirements, 4 Admissibility and Waiver Requirements (Juvenile Delinquency)

This section reads: "If any arrest or charge was disposed of as a matter of juvenile delinquency, the applicant must include the court or other public record that establishes this disposition." This language is misleading and may require applicants to violate state law confidentiality provisions governing disclosure of juvenile court records. The following language should be added to this section to clarify that applicants are not required to provide records in violation of state law.

*If any arrest or charge was disposed of as a matter of juvenile delinquency, the applicant must include the court or other public record that establishes this disposition **unless disclosing this information would be a violation of confidentiality under state law.***

D: Documentation and Evidence (Adjudication)

Similar to the comment immediately above, USCIS should add language to the beginning of this section to make clear that applicants are not required to provide records in violation of state law.

Conclusion

Thank you for providing this opportunity to comment on the newly published sections of the USCIS Policy Manual. We look forward to a continuing dialogue on this and related matters.

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION