NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

TO: USCIS
FROM: NIJC
DATE: July 18, 2013
RE: Challenges in the Adjudication of Petitions for Special Immigrant Juvenile Status

In recent months, NIJC has encountered an increasing number of Special Immigrant Juvenile Status (SIJS) adjudications that we believe are not in accord with the law, regulations and congressional intent. We wish to engage with USCIS on this issue in the hopes of clarifying the relevant legal interpretations to ensure that immigrant children who have been abandoned, abused, neglected or otherwise harmed are able to secure protection in the United States.

I. Background

When Congress created SIJS in 1990, it did so to protect vulnerable immigrant children who are in the United States without status. Initially, children seeking SIJS were required to establish that they (1) had been declared dependent on a U.S. juvenile court, (2) had been deemed eligible for long-term foster care, and (3) had secured a determination that it would not be in their best interests to return to their home countries. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005-06 (1990). In 1997, Congress amended the statute to require that children seeking SIJS be deemed eligible for long-term foster care due to abuse, neglect, or abandonment and added the requirement that the Attorney General "expressly consent" to the juvenile court dependency order. Immigration Act of 1997, Pub. L. No. 105-119, §113, 111 Stat. 2440, 2460 (1997).

In 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), modified the statute to its current version. A child may now obtain SIJ status if

(1) she has been declared dependent on a juvenile court, committed to the custody of a State agency or department or an individual or entity appointed by a U.S. State or juvenile court because reunification with *one or both* parents is not viable due to abuse, neglect, abandonment, or a similar State law basis;
(2) it has been determined that it would not be in the child's best interest to return to her home country; and
(3) the Secretary of Homeland Security consents to the grant of SIJ status.

INA § 101(a)(27)(J) (emphasis added). Pursuant to the TVPRA, a child need no longer prove eligibility for long-term foster care in order to obtain SIJS. The TVPRA eliminated that portion of INA § 101(a)(27)(J) and subsequent USCIS memoranda have specifically stated that the TVPRA removed the need for a juvenile court to deem a juvenile eligible for long-term foster care. USCIS Memorandum, Donald Neufeld and Pearl Chang, "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile States Provisions" HQOPS 70/8.5 (Mar. 24, 2009) (hereinafter the "Neufeld Memorandum") at 2; Implementation of the Special

Immigrant Juvenile *Perez-Olano* Settlement Agreement" PM-602-0034 (Apr. 4, 2011) (hereinafter the "Perez-Olano Memorandum") at 4.

No regulations have been promulgated to implement SIJS as set forth in the TVPRA and there are no precedential AAO decisions on SIJS. As such, guidance for analyzing the SIJ definition comes from regulations that predate the TVPRA, regulations proposed after the TVPRA, and three USCIS memoranda:

- 8 C.F.R. § 204.11[1]
- 76 Fed. Reg. 172 (Sept. 6, 2011) (proposed rule)
- USCIS Memorandum, William R. Yates /S/ by Janis Sposato, "Memorandum #3—Field Guidance on Special Immigrant Juvenile Status Petitions" HQADN 70/23 (May 27, 2004) (hereinafter the "Yates Memorandum")
- Neufeld Memorandum
- Perez-Olano Memorandum

In April 2011, the USCIS Ombudsman also issued recommendations regarding the adjudication of SIJS petitions, which serve as additional guidance for USCIS. USCIS Ombudsman, January Contreras, "Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices" (Apr. 15, 2011) (hereinafter the "USCIS Ombudsman Recommendations").

II. Eligibility for SIJ Status Under Current Law

(1) *An immigrant who has been declared dependent on a juvenile court 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, and whose reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State Law*

A. <u>A juvenile court</u>

A "juvenile court" is "a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles." 8 C.F.R § 204.11(a); 76 Fed. Reg. 172. In the 2009 Neufeld Memorandum, USCIS further clarified that pursuant to the TVPRA, "petitions that include juvenile court orders legally committing a juvenile to or placing a juvenile under the custody of an individual or entity appointed by a juvenile court are now eligible." Neufeld Memorandum at 2. USCIS specifically provided the example of an alien on whose behalf a juvenile court appointed a guardian as someone who could now be eligible for SIJ status. *Id.*

In recent months, the USCIS Chicago District Office has issued Requests for Evidence, Notices of Intent to Deny, Denials, and Notices of Intent to Revoke in SIJS petitions where guardianship orders were issued by the Probate Division of the Circuit Court of Cook County, Illinois. The determinations state "your Form I-360 petition did not include the required juvenile court order which would establish your eligibility for . . . [SIJS]. The only document included with your petition is an order of the Circuit Court of Cook County, Illinois . . . establishing [an individual] as your guardian."

[1] 8 C.F.R. § 204.11 incorporate the changes in 1997 but not the TVPRA 2008 changes

To the extent the Chicago District Office intends this statement to mean that an order from probate court does not constitute an order from a "juvenile court" as described in INA § 101(a)(27)(j), such a finding is erroneous. Based on the plain reading of the statute and regulations, as supported by USCIS's own guidance, any state court that has the authority to make determinations regarding the custody and care of juveniles constitutes a juvenile court for purposes of the SIJS statute. If a state court with this authority issues an order with the necessary findings regarding a child's dependency and ability to reunite with one or both parents, such an order meets the first requirement of the SIJS statute. For example, the Illinois Probate Act, 755 ILCS 5/1 *et seq.* expressly confers jurisdiction upon the Circuit Courts of Illinois to hear and make judicial determinations about the custody and care of juveniles. Thus, the Probate Division of the Circuit Court of Cook County constitutes a "juvenile court" for purposes of INA § 101(a)(27)(J).

B. Reunification with one or both parents not viable due to abuse, neglect or abandonment

1. One Parent SIJ

The TVPRA broadened SIJS eligibility by allowing a child to seek SIJS if family reunification is not viable with one *or* both parents. In addition, the reason family reunification is nonviable may be due to abuse, abandonment, neglect *or a similar basis under state law*. The plain language of this revision makes clear that family reunification need only be "not viable" with *one* parent due to the abuse, abandonment, neglect or other similar basis under state law by *one parent*, not both. Thus, if a child was abandoned by her father at birth, but lived with her mother prior to entering the United States, the child's ongoing relationship with her mother should not prevent a child from establishing eligibility for SIJ status if she obtains a juvenile court order that contains the other requisite SIJ criteria.

2. Abuse, neglect, abandonment, or a similar basis under state law

Neither the statute nor the pre-TVPRA regulations define the terms "abuse," "neglect," or "abandonment." However, both the 2009 Neufeld Memorandum and the proposed TVPRA regulations make clear that the determination of whether a child has suffered abuse, neglect, abandonment or something similar under state law should be left to the expertise of the juvenile courts. Neufeld Memorandum at 4 ("During an interview, an officer . . . should avoid questioning a child about the details of the abuse, abandonment or neglect suffered, as those matters were handled by the juvenile court, applying state law."); 76 Fed. Reg. 172 at 54982 ("Determining the viability of reunification with one or both of a child's parents due to abuse, neglect, abandonment, or a similar basis under State law is a question that lies within the expertise of the juvenile court, applying relevant State law.").

Because the TVPRA broadened the criteria necessary to establish SIJ status to include juvenile court orders that found family reunification not viable due to a abuse, neglect, abandonment, "or a similar basis under State law," the proposed TVPRA regulations contemplate that where a juvenile court order finds reunification not viable due to "a similar basis under State law," additional evidence may be necessary to prove that the basis for the court order is similar to abuse, neglect, or abandonment. 76 Fed. Reg. 172 at 54981. The proposed regulations provide the example of a Connecticut law under which a child may be found "uncared for" as an example

of a state law that is similar in definition and benefits to abuse, abandonment, or neglect even though it does not use those particular terms. *Id.*

At no point, however, do any of the USCIS memoranda, the pre-TVPRA regulations, or the proposed regulations contemplate that an adjudicator may require more evidence to prove that the child was abused, neglected, or abandonment when the SIJS petition is based on a juvenile court order that specifically uses the terms abuse, neglect, or abandonment. The pre-TVPRA regulations, 8 C.F.R. 204.11, list the initial documents "which must be submitted in support of the petition" as including evidence of the child's age and "one or more documents which include" a juvenile court order with the requisite dependency finding and "[e]vidence of a determination . . . by a court or agency recognized by the juvenile court . . . that it would not be in the beneficiary's best interest to be returned to the [home country]." The 2004 Yates Memorandum, which also predates the TVPRA, also only lists these three items as the documentary requirements for an SIJ petition. Yates Memorandum at 3.

Limiting an adjudicator's ability to demand additional evidence of abuse, neglect or abandonment beyond the juvenile court order (except where the court order is based on a "similar basis under State law") is consistent with the purpose of the SIJS statute and the efficient, reasonable adjudication of SIJS petitions. As noted in both the Neufeld Memorandum and the proposed regulations, abuse, abandonment, and neglect are based on state law definitions, which vary significantly from state to state. A juvenile court judge is therefore in the best position to determine whether a child has been abused, abandoned, or neglected as defined under that particular state's laws. The USCIS Ombudsman reiterated this point in its April 2011 recommendations regarding SIJ adjudications:

> 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 state tribunals specializing in family law.

USCIS Ombudsman Recommendations at 7.

In addition, USCIS has made clear that petitioning for SIJS (the purpose of which is to protect vulnerable immigrant children) should not involve the child having to relive the abuse, neglect, or abandonment from which she has escaped. *See* Neufeld Memorandum at 4 ("Under no circumstances can an SIJ petitioner, at any stage of the SIJ process, be required to contact the individual (or family members of the individual) who allegedly abused, abandoned or neglected the juvenile."). Requesting additional evidence from the child's family members or friends to corroborate the abuse, abandonment or neglect conflicts with this guidance and the purpose of the SIJ statute. Thus, if a juvenile court order contains the requisite findings regarding the abuse, abandonment or neglect that the child has suffered, USCIS should not require additional proof that the abuse, abandonment or neglect has occurred.

Finally, requiring a child to provide additional proof to support the juvenile court order would result in relitigating the juvenile court proceedings before USCIS, which is both inefficient and an undue burden on the applicants, who are children. *See Moncrieffe v. Holder*, 133 S.Ct. 1678, 1690 (US 2013) (Precluding the relitigation of a noncitizen's criminal case in immigration court

"promotes judicial and administrative efficiency and fairness," particularly because noncitizens are not guaranteed legal representation and often have little ability to collect evidence.).

(2) *It has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence.*

Similar to the determination of what constitutes abuse, neglect or abandonment, determining the best interest of the child is an issue that falls within the expertise of the juvenile court. This is particularly the case where a child welfare specialist or guardian ad litem was involved with the juvenile court proceedings. For the same reasons the juvenile court order should be sufficient, in most cases, to establish abuse, abandonment or neglect, USCIS should find that the juvenile court's determination regarding the best interest of the child sufficient to meet the best interest prong of the SIJ statute.

(3) *The Secretary of Homeland Security consents to the grant of special immigrant juvenile status*.

The TVPRA modified the "consent" provision of the SIJ statute so that children not in the custody of the Department of Health and Human Services need only obtain DHS consent to the grant of their SIJ petition. USCIS has clarified that consent means that the SIJ classification is bona fide and not sought "primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment." Neufeld Memorandum at 3. Approval of the SIJ petition is evidence of consent. *Id*.

Although the consent requirement has changed throughout the three versions of the SIJ statue, even in 2004 when the SIJ statute was more restrictive than it is today, USCIS emphasized that an adjudicator should not look behind a juvenile court order to determine whether a petition is bona fide:

> The adjudicator generally should not second-guess the court rulings or question whether the court's order was properly issued. Orders that include or are supplemented by specific findings of fact as to the above listed rulings will usually be sufficient to establish eligibility for consent. Such findings need not be overly detailed, but must reflect that the juvenile court made an informed decision.

Yates Memorandum at 4-5. As explained *supra*, the Neufeld Memorandum also prohibits adjudicators from examining the harms underlying the juvenile court order. Neufeld Memorandum at 4. Likewise, the USCIS Ombudsman Recommendations specifically state that USCIS is "expressly prohibited from engaging in a *de novo* review of the facts and circumstances underlying the determination of dependency." USCIS Ombudsman Recommendations at 5. If basic filing criteria are met, the TVPRA only permits USCIS to require additional evidence in very limited circumstances, such as when the dependency order fails to specify whether it was issued on the basis of abuse, neglect or abandonment. *Id*.

Recent decisions from the Chicago District Office have referenced statements a child made to DHS officials at the border regarding her reasons for coming to the United States as evidence

that the SIJ petition was not bona fide. Relying on statements made during border interviews to overcome a juvenile court finding is improper. The U.S. Court of Appeals for the Seventh Circuit has repeatedly admonished adjudicators for placing significant weight on these statements, particularly in cases involving vulnerable individuals, such as asylum seekers, and when the omitted information involved sensitive matters such as past persecution. *See e.g.*, *Moab v. Gonzales*, 500 F.3d 656, 660-61 (7th Cir. 2007) (noting that interviews at the border "are not always reliable indicators of credibility," especially when the interview is not intended to elicit the details of the present claim for relief, or where the applicant "has a reasonable fear of governmental authority") (internal citations omitted). In *Moab*, the Court found it reasonable that the petitioner had not revealed his sexual orientation during a credible fear interview since revealing that information had caused him harm in his home country. *Id*. at 661. Other Courts have also criticized adjudicators for relying on airport and border interviews, particularly where the petitioner had suffered sexual trauma. *See Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002) ("[T]he assumption that the timing of a victim's disclosure of sexual assault is a bellwether of truth is belied by the reality that there is often delayed reporting of sexual abuse.")

These warnings are even more relevant in the case of children who have left behind family in their home countries after having suffered trauma. Children may come to the United States with preconceived notions regarding the U.S. immigration system and may be reluctant to talk to strangers due to embarrassment and past trauma. Asylum Officer Basic Training Course, Guidelines for Children's Asylum Claims, September 1, 2009 at 14, 22; Jeffrey Weiss, INS Office of International Affairs, Guidelines for Children's Asylum Claims, December 10, 1998 at 5, 7. For these reasons, it is improper for USCIS adjudicators to rely on extraneous information and evidence beyond the juvenile court order to determine whether a child has a bona fide SIJS petition.

(4) Expiration of the guardianship does not defeat SIJS eligibility.

The Chicago District Office has issued notices in several cases indicating that SIJS cannot be approved where the guardianship secured in state court is no longer in force at the time of SIJS adjudication because the child has turned 18. This interpretation is erroneous per the *Perez-Olano* settlement agreement and accompanying USCIS policy memo. *Perez-Olano, et al. v. Holder, et. al*, Case No. CV 05-3604 (C.D. Cal. 2005). The memo states, "USCIS will not, based on age or dependency status, deny or revoke any SIJ petition if, at the time the class member files or filed the petition, the class member was under 21 years of age and was the subject of a valid dependency order that was later terminated based on age." Perez-Olano Memorandum. As such, whether an applicant remains subject to a dependency order at the time of adjudication should have no bearing on the viability of the application.

III. Recommendations

- USCIS should consider state courts that have jurisdiction to make determinations regarding the custody and care of juveniles as "juvenile courts" for purposes of INA § 101(a)(27)(J), including probate and family courts

- USCIS should recognize SIJS eligibility among children who have been abused, abandoned, neglected, or otherwise similarly harmed by one parent regardless of whether the other parent has a positive relationship with the child.

- USCIS should accept a state court order as evidence that the child has been abandoned, abused, neglected, or similarly harmed. USCIS should not require additional evidence of the harm or look behind the state court order. USCIS should not accord weight to statements children made at the time of apprehension in determining whether their petitions are bona fide.

- USCIS should look at whether a state court order was in place at the time the SIJS petition was filed and should not make findings that SIJS applicants have aged out of eligibility if they are no longer under 21 or subject to a state court order at the time of adjudication.