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Samantha Deshommes
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U.S. Citizenship and Immigration Services, Department of Homeland Security
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Submitted via <https://www.regulations.gov>

**Re: Docket No. USCIS-2009-0004, U.S. Citizenship and Immigration Services,
Department of Homeland Security, Special Immigrant Juvenile Petitions, Reopened
Comment Period**

Dear Ms. Deshommes:

On behalf of the Immigration & Nationality Law, Children & the Law, and Family Court & Family Law Committees (the “Committees”) of the New York City Bar Association (“City Bar”)¹, we respectfully submit this comment in response to the publication on October 19, 2019 of the above-referenced notice published in the Federal Register on October 16, 2019 (84 Fed. Reg. 55250), reopening the public comment period on the proposed rule “Special Immigrant Juvenile Petitions,” originally published for public comment on September 6, 2011 (76 Fed. Reg. 54978) (herein, the “Proposed Rule”).

I. INTRODUCTION

¹ With 24,000 members, the City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society.

Over the past six fiscal years, New York State received over 26,300 unaccompanied children released from federal immigration custody,² and additional migrant children have arrived in New York accompanied by a parent. Both the City and the State of New York have invested in the well-being of immigrant children through a range of efforts: City Council hearings, healthcare and school enrollment initiatives, and a public-private partnership to fund legal services, among others.³ Moreover, the City and the State of New York have long extended the protections of their laws, child welfare systems, and Family Courts to the most vulnerable members of society, including immigrant children who now call New York home.⁴ Members of the Immigration & Nationality Law Committee provide legal counsel to such children, many of whom have histories of parental maltreatment or other harm and privation, facts that may support eligibility for humanitarian relief such as special immigrant juvenile status (“SIJS”). It is from this perspective of community investment and based on this expertise that we submit these comments.

The existing regulations codified at 8 CFR § 204.11 are inconsistent with the statutory provisions governing SIJS. That is so because the statute governing SIJS was amended most recently in 2008 by the Trafficking Victims Protection Reauthorization Act but the corresponding regulations were not updated to reflect these amendments.⁵ The stated purpose of the Proposed Rule is to “implement statutorily mandated changes by revising the existing eligibility requirements, including protections against aging out, adding the revised consent requirements, and further exempting SIJ adjustments of status applicants from several grounds of inadmissibility.” (76 Fed. Reg. 54979). While the Committees agree that the regulations must be updated in order to align them with intervening changes to the statute, we also believe that various aspects of the Proposed Rule exceed the statutory authority conferred on the Department of Homeland Security (“DHS”) and require significant modifications to ensure that United States Citizenship and Immigration Services (“USCIS”) will exercise its adjudicative authority over SIJS petitions in a manner consistent with the governing statute.

First, the Proposed Rule departs from the statute in offering an overly broad interpretation of USCIS’s consent function. Congress intentionally assigned state courts the role of establishing the underlying facts of a child’s eligibility for SIJS, and USCIS the narrow role of consenting to the findings of the state court (as detailed below). The consent function in the Proposed Rule fails to accord correct deference to the juvenile courts’ role as expert adjudicators where it comes to child welfare issues and the best interests of children. Second, the Proposed Rule defines the term “juvenile court” in a way that would obstruct important avenues to SIJS eligibility. Third, the

² Office of Refugee Resettlement, Unaccompanied Children Released to Sponsors by State, available at: <https://www.hhs.gov/sites/default/files/unaccompanied-children-released-to-sponsors-by-state.pdf>. (All links cited in this letter were last checked on November 15, 2019).

³ See Fordham University School of Law and Vera Institute of Justice, *Unaccompanied Immigrant Youth in New York* (Aug. 2015), at 17, <https://www.fordham.edu/download/downloads/id/2416/unaccompanied-immigrant-youth-in-new-york-august-2-015.pdf>.

⁴ Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583, 603 (2007), available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/599.

⁵ Pub. L. 110-437, 122 Stat. 5044 (Dec. 23, 2008).

Proposed Rule requires that juvenile court determinations remain in effect through USCIS adjudication, which is inconsistent with the statutory language and imposes burdensome requirements on petitioners and the state courts and agencies that protect and serve them. Fourth, in a preamble to the Proposed Rule, the statutory “similar basis” clause is given such a narrow interpretation so as to in effect deny needed SIJS protections to many children; this contravenes Congressional intent. The Committees recommend that USCIS withdraw the problematic regulations and issue a rewritten proposed rule to address these and other deficiencies.

Contemporaneously with the Proposed Rule, the Administrative Appeals Office (“AAO”) designated three adopted decisions to serve as guidance in future USCIS adjudications. In a positive development, the AAO announced that “USCIS does not require that the juvenile court had jurisdiction to place the juvenile in the custody of the unfit parent(s) in order to make a qualifying determination regarding the viability of parental reunification.”⁶ The Committees recommend that USCIS incorporate this holding into the final rule.

While the Proposed Rule raises numerous issues—including expansion of DHS’s consent function beyond what Congress prescribed; departure from the plain text of the mandatory 180-day adjudication timeline; and a discretionary interviewing process that would tolerate interviewing children without their attorneys present and would risk re-traumatizing children—these comments will focus primarily on concerns that directly impact the respective roles of the New York State courts and the federal government in the context of SIJS adjudications.

II. DISCUSSION

a. **The Proposed Rule Disturbs The Carefully Calibrated Statutory Balance Between State And Federal Decision-Making That Underlies The Successful Adjudication Of SIJS Petitions.**

SIJS-eligible children are, by definition, vulnerable because they have suffered parental abuse, neglect, abandonment, or similar circumstances. Accordingly, Congress recognized state “juvenile courts” as the appropriate authority for establishing and confirming the facts of abuse, abandonment, neglect or a similar basis underlying a petitioner’s eligibility for SIJS. In expanding the consent function to authorize USCIS to look behind and reexamine the validity of state court orders—a practice long disavowed by USCIS—the Proposed Rule upsets the balance between state and federal decision-making carefully calibrated by Congress.

Family Courts are the principal courts in New York charged with jurisdiction over the care and custody of minors in a variety of proceedings. The New York Family Court, established in 1962 by way of an amendment to the New York State Constitution and the enactment of the New York Family Court Act, was created to be a “special agency for the care and protection of the young and the preservation of the family.” *People ex rel. KM v. SF*, 917 N.Y.S.2d 827, 832–33 (Sup. Ct. 2011), (citing the 1962 Report of Joint Legislative Committee on Court Reorganization No. 2 F.C.A. Committee Comments p. 2). The Legislature conferred on the court a “wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs

⁶ *Matter of D-Y-S-C-*, Adopted Decision 2019-02 (AAO Oct. 11, 2019), at 6 n.4.

of those before it.” NY Fam. Ct. Act § 141. The New York State Constitution assigns the Family Court jurisdiction over proceedings for guardianship and custody of minors and for “the protection, treatment, correction and commitment of those minors who are in need of the exercise of the authority of the court because of circumstances of neglect, delinquency or dependency, as the legislature may determine.”⁷ Under this broad and flexible authority, Family Court judges make determinations about the custody and care of juveniles in a broad variety of matters. Their deep experience is precisely suited to the fact-finding role Congress intended the state courts to play in determining vulnerable children’s eligibility for SIJS.

New York’s commitment to promoting the safety and well-being of vulnerable children is consistent with Congress’s aim of protecting eligible children from deportation and providing them with a path to permanent status. *See* 8 U.S.C. § 1101(a)(27)(J). SIJS policies have been refined since the law’s 1990 inception, with New York courts contributing significantly to current understandings of the hybrid state-federal process whereby state courts first help to identify those children in need of protection, and federal authorities then act to prevent those children from being deported to unsafe or inappropriate situations. *See, e.g., In re Marisol N.H.*, 115 A.D.3d 185, 188-89 (2d Dep’t 2014). Only through such coordinated state-federal action is it possible to fully address the dual issues—a lack of parental care and the effect of possible deportation—confronting these children. In enacting and amending the SIJS statute, Congress was mindful that “Congress has plenary power over immigration” while “[s]tate courts have general jurisdiction over child welfare matters.” *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 265 (C.D. Cal. 2008). Accordingly, the federal SIJS statute contemplates an important and carefully delineated role for state juvenile courts such as New York’s Family Court, which DHS should be codifying, not undermining by second-guessing the measured judgments of the experienced jurists who enter special findings orders.

The Proposed Rule purports to expand USCIS’s consent function in a manner that undervalues and undercuts the state court’s role. The Proposed Rule includes a requirement that USCIS consider whether “the State court order was sought primarily to obtain relief from abuse, neglect, abandonment, or a similar basis under State law and not primarily for the purpose of obtaining lawful immigration status.” Proposed 8 CFR § 204.11(c)(1)(i). This requirement is not authorized by, and is contrary to, the statute governing SIJS, under which only the DHS Secretary’s “consent[] to the grant of special immigrant juvenile status” is required. 8 USC § 1101(a)(27)(J)(iii). The Proposed Rule would exceed the agency’s rulemaking authority. In effect, it demands that a child—already adjudicated by a court of competent jurisdiction to have been subjected to abuse, neglect, abandonment, or similar—justify his or her need for state court intervention to USCIS’s satisfaction.

Furthermore, the Proposed Rule disregards the recommendations of the USCIS Ombudsman, which called on the agency to “interpret the consent function consistently with the statute by according greater deference to State court findings,”⁸ and the USCIS Policy Manual,

⁷ N.Y. Const. Art. VI, § 13(b).

⁸ *See* Citizenship and Immigration Services Ombudsman, *Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications*, (Dec. 11, 2015) https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015_2.pdf; *see also* Citizenship and Immigration Services Ombudsman, *Special Immigrant Juvenile Adjudications: An Opportunity*

which recognizes that the agency “relies on the expertise of the juvenile court...and does not reweigh evidence to determine if the child was subjected to abuse, neglect, abandonment or a similar basis under state law.”⁹ The Proposed Rule should be modified to reflect this guidance.

DHS should also be guided by the federal court interpretation of the consent function in *Flores Zabaleta v. Nielsen*, 367 F. Supp. 3d 208 (S.D.N.Y. 2019). There, the United States District Court for the Southern District of New York examined the agency’s “authority to withhold consent from a grant of SIJ status,” *id.* at 211, and found that through the TVPRA, “Congress decreased the agency’s authority under the consent provision.” *Id.* at 216. The court recognized and reiterated the Ombudsman’s position that “it [is] inconsistent with the statute for agency officials to seek the ‘evidence underlying State court dependency orders,’ and that by questioning whether state courts have made an ‘informed decision,’ the agency has caused ‘requests for documentation that are overly burdensome and intrusive.’” *Id.*

In sum, the interpretation of the consent authority in the Proposed Rule upends Congressional design, discounts the recognized expertise of the State courts, and injects a subjective component into USCIS’s consent role. The regulations should clarify that where a state court order provides for relief from abuse, abandonment, neglect, or relief addressing a similar basis, USCIS may not withhold consent. *See In Matter of D-Y-S-C-*, Adopted Decision 2019-02 (Oct. 11, 2019); USCIS, PM-602-0175.1 (Oct. 11, 2019) (“USCIS’ consent is warranted where petitioners show the juvenile court granted relief from . . . parental maltreatment, beyond an order enabling them to file an SIJS petition with USCIS.”)

b. The Proposed Rule Codifies A Definition Of “Juvenile Court” That Is Contrary To The Plain Language Of The Statute.

The regulatory definition of “juvenile court” must be clear and must mirror the language and intent of the statute governing SIJS. Misconstruing this definition will result in blocking access to SIJS for children who qualify under the statute’s plain terms.

The Proposed Rule would codify the definition of “juvenile court” as “any court located in the United States having jurisdiction over the custody and care of juveniles.” Proposed 8 CFR § 204.11(a). The proposed definition is impermissibly narrower than the plain language of the statute, which provides that a court that addresses either dependency *or* custody may rule on a request for a special findings order; accordingly, the definition of juvenile court must be, at a minimum, broad enough to include courts that address dependency as well as courts that address custody. By retaining the “custody and care” language in 8 C.F.R. § 204.11(a), USCIS is attempting to codify requirements for SIJS not supported by the statute. These extra requirements

for Adoption of Best Practices, (Apr. 15, 2011), <https://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf> (explaining that “USCIS is precluded from re-evaluating the facts and circumstances underlying the juvenile court dependency determinations,” and criticizing the agency’s practice of “seeking access to such evidence used by the [family] court,” which “has often been placed ‘under seal.’”)

⁹ See USCIS Policy Manual, Volume 6, Part J, Chapter 2, Nov. 06, 2019.

are not only *ultra vires*, but limit access to this life-saving status by, in effect, requiring a custody determination where dependency already exists through another intervention.

Contrary to the Proposed Rule, the INA simply does not require that a court have jurisdiction over a petitioner’s care and custody (or custody as a juvenile) in order to qualify as a juvenile court. The distinction between custody and dependency must be maintained in order to protect access to SIJS for young people who seek state court intervention in a myriad of child welfare situations. This has been repeatedly and recently affirmed by both federal courts as well as the AAO. As indicated in the recent decision of *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 377 (S.D.N.Y. 2019), “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.”¹⁰ The agency did not appeal the decision in *R.F.M.* That the agency understands that its previous interpretation is incorrect was further echoed by the adopted decision of *Matter of A-O-C* as internal policy guidance in which “USCIS interprets the definition of juvenile court . . . to mean a court located in the United States having jurisdiction under state law to make judicial determinations about the dependency and/or custody of juveniles.”¹¹ The agency should promulgate a regulation that is consistent with *Matter of A-O-C*.

We have already seen the serious ramifications of USCIS incorrectly applying this definition in New York. New York SIJS applicants and legal services providers are still recovering from the wave of incorrect SIJS denials made over the last few years. These denials were reversed by the District Court in *R.F.M.*, and they had been justified in part by USCIS using its erroneous definition of juvenile court to justify ignoring valid New York Family Court orders. The Proposed Rule seeks to perpetuate that erroneous definition. The Committees urge DHS to redraft the definition of juvenile court in the Proposed Rule consistent with *A-O-C*, which would align with the statute’s language and protect access to SIJS for young people entering state juvenile courts seeking relief from abuse, abandonment, neglect or a similar basis resulting from myriad situations, and not just within the context of a custody determination.

c. Requiring The Continued Jurisdiction Of A State Juvenile Court Places Undue Hardship On Vulnerable Youth, State Child Welfare Agencies And State Courts, Especially In The Context Of Adjudication Times Beyond Children’s Control.

The Proposed Rule requires that the petitioner remain dependent on the juvenile court through the duration of the immigration adjudication process, unless the petitioner ages out of the juvenile court’s jurisdiction. Again, this change exceeds the agency’s rulemaking authority as there is no such requirement in the statute. The plain language of the statute defines a Special Immigrant Juvenile as someone “who *has* been declared dependent.” INA 101 (a)(27)(J)(i). The use of the past tense indicates that Congress wished for any young person who had been declared dependent on the court in the quest for relief from abuse, abandonment, neglect or a similar basis to be able

¹⁰ *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 377 (S.D.N.Y. 2019).

¹¹ *Matter of A-O-C*, Adopted Decision 2019-03 (AAO Oct. 11, 2019), at 4, n.2.

to petition for SIJS. It neither requires nor anticipates requiring a court to maintain jurisdiction beyond the time of filing the petition.

The Committees agree with the age-out protection in the Proposed Rule. This protection creates conformity between the regulations and the statute, and maintains access to SIJS for children who attain the age of 21 before USCIS completes its adjudication, the timing of which is unpredictable. It also codifies an acknowledgment that a child may age out of the jurisdiction of the state juvenile court before USCIS adjudication, and that this will not impact the child's continued eligibility. These are important protections, especially as a child has no control over the adjudication time of the application.

The Committees, however, specifically oppose the Proposed Rule's requirement that, absent age-out, geographic jurisdiction of the state court extend throughout the life of the adjudication process. Children generally lack control over where they live. Requiring a child to go back into a state juvenile court to transfer jurisdiction would waste the valuable judicial resources of already overburdened state courts, would be re-traumatizing for a child, and in some cases where USCIS adjudication is prolonged, would burden state child welfare agencies with artificially keeping a child in custody beyond the term necessary for the best interests of the child. Within the context of the unclear adjudication period proposed in these regulations, the requirement for continued jurisdiction is purposeless at best, and at worst will push otherwise eligible SIJS applicants out of the adjudication process, without statutory authority and without concern for the particular vulnerability and lack of agency of children.

d. The Preamble To The Proposed Rule Provides A False And Impermissibly Narrow Reading Of The Statute's "Similar Basis" Clause.

The TVPRA added "a similar basis found under State law" to the bases for non-viability of reunification with one or both parents that may support SIJS eligibility. The Preamble to the Proposed Rule interprets the "similar basis" clause in a contrived and distorted manner that is designed to weaken its role in the statute.

First, the Preamble states that "the petitioner must establish that this State law basis is similar to a finding of abuse, neglect or abandonment." 76 Fed. Reg. 54981. However, it is the juvenile court, and not the child who is the subject of a state proceeding, that is best positioned to make legal determinations under state law, and the statute must be flexible enough to account for the variations allowed by state laws throughout the country. USCIS must accept the conclusion of a court of competent jurisdiction as to non-viability of a child's reunification on a basis under state law that is similar to abuse, neglect or abandonment.

Second, the Preamble erroneously states that "[t]he nature *and elements* of the State law must be similar to the nature and elements of abuse, abandonment, or neglect." *Id.* (emphasis added). A state law basis for non-reunification may be similar in nature to one of the three enumerated bases, without matching the "elements" of the basis. In other words, various state laws may provide bases for recognizing the non-viability of parental reunification in circumstances that have a similar impact on the child, or give rise to similar needs for court intervention as do the enumerated bases, without having similarly defined elements. In fact, the Preamble goes on to

recognize that a similar basis entails “a case-by-case determination because of variations in State law,” and that a similar basis may be found where affected children “are equally entitled to juvenile court intervention and protection” or where outcomes are similar to those for abused, neglected, or abandoned children. *Id.* Under New York law, for example, children who are destitute or who have experienced the death of one or both parents may be equally entitled to Family Court intervention and protection, as are abused, neglected, or abandoned children, and the state may make similar provisions for children in these circumstances. Also, in these circumstances, the lived experiences of children who may be traumatized or isolated are substantially similar to those of children who suffer abuse, neglect, or abandonment. But this is so without regard to matching the legal elements of abuse, neglect, or abandonment. USCIS should clarify that establishing a similar nature and similar elements are not, in fact, requirements for a qualifying “similar basis.”

Third, it is long-settled USCIS policy that the terminology in juvenile court orders may vary from state to state, and need not be identical to terminology used in the SIJS statute. *See, e.g.,* 6 Policy Man. Ch. 3.2 (“[t]he juvenile court order may use different legal terms than those found in the INA as long as the findings have the same meaning as the requirements for SIJS classification”). If the “similar basis” clause is interpreted as a mere recognition that states may use synonyms for the terms “abuse,” “neglect,” or “abandonment,” then the statutory amendment would be reduced to mere surplusage.

Finally, the Preamble “encourages” petitioners to provide USCIS with copies of relevant state statutes “to more clearly meet their burden of proof.” 76 Fed. Reg. at 54981. This directive is not merely *ultra vires*—it actually flouts the congressional delineation of the respective roles of the state courts and USCIS. By permitting USCIS to “rel[y] on the expertise of the juvenile court” (6 Policy Man. Ch. 2.D.5), Congress relieved USCIS of the need to re-litigate issues that have already been addressed by state courts and otherwise engage and interpret a voluminous body of state law that lies outside USCIS’s traditional expertise. In any rule that is finalized, USCIS should clarify that it does not perform interpretations of state law but, rather, defers to juvenile court expertise.

III. CONCLUSION

The Committees are concerned with the ways that the Proposed Rule promotes USCIS’s questioning of the decisions and jurisdiction of the juvenile courts of New York and other states. Since the SIJS statute was first enacted by Congress, New York state courts have partnered with the federal government to protect the best interests of vulnerable immigrant children who have been abused, abandoned, neglected or suffered similar circumstances. The Committees urge DHS to respect this carefully crafted and congressionally mandated partnership between the states and the federal government, and revise the Proposed Rule to mirror the language and intent of Congress when it recognized that the particular expertise of state juvenile courts is required to protect vulnerable youth.

Respectfully,

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