

Recommendations to USCIS of the National SIJS Working Group

We appreciate the continuing opportunity for dialogue with USCIS on changes to the adjudication of SIJS. We understand that the National Benefits Center (NBC) has been selected as the centralized location for the adjudications of SIJS and SIJS-based adjustment applications. Since our last meeting with the USCIS Office of Public Engagement in September 2015, we have conducted a survey among private and non-profit practitioners to catalog best practices and challenges across the country and provide recommendations to USCIS in light of the pending changes in adjudications for SIJS. Overall, there are a wide variety of practices across the country in the filings for and adjudications of SIJS and SIJS-based adjustment. As a result, any centralization process will require significant coordination to avoid confusion and frustration by all stakeholders involved.

Recommendations on the USCIS Internal SIJS Working Group

We learned about the structure of the SIJS Working Group at our first meeting with the USCIS Office of Public Engagement in September 2015. We recommend that the USCIS Ombudsman be included in the SIJS Working Group. Additionally, the involvement of the Fraud Detection and National Security Directorate (FDNS) in USCIS's SIJS Working Group should be clearly explained and clarified. While we understand that fraud in immigration benefits is a concern, USCIS must create best practices regarding fraud detection that take into consideration the vulnerabilities of SIJ petitioners given their past abuse, neglect, and abandonment as well as their young impressionable ages. These practices should offer enhanced protections and differ considerably from fraud detention practices applied in the cases of adults in family-based benefits contexts.

Recommendation on Consent Function

Practitioners reported receiving RFEs and NOIDs which cite USCIS's consent function as a basis for the adverse action. USCIS correspondence typically states that it appears that the juvenile court action was commenced primarily to obtain an immigration benefit rather than to obtain relief from abuse, neglect, or abandonment. In some cases, practitioners report that the RFE or NOID states that "the 'primary purpose' requires a difficult assessment of each SIJ petitioner's subjective intent." These practices are not applied consistently within or across field offices and have resulted in arbitrary denials.

We recommend that USCIS renew its guidance to grant consent where applicants make an objective showing of the bona fides of their application. Specifically, USCIS SIJ field guidance (Yates Memorandum on Special Immigrant Juvenile Status #3 dated May 27, 2004) and AAO decisions establish that the agency only needs to "determine whether a reasonable factual basis exists for the [state] court's ruling."¹ The factual basis can be included in the state court order itself or in the immigration record as a whole. USCIS should only request evidence extraneous to the state court order when the order or the immigration record as a whole lacks sufficient facts. USCIS policy should develop a non-exclusive list of

¹ This reference to the 2004 Yates Memorandum is limited to the following paragraphs as other sections of the 2004 Yates Memorandum #3 do not reflect changes to the law or best practices: "Evidence to establish express consent, The District Director, in his or her discretion, shall expressly consent to dependency orders that establish -- or are supported by appropriate evidence that establishes -- that the juvenile was deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and that it is in the juvenile's best interest not to be returned to his/her home country. Such express consent should be given only if the adjudicator is aware of the facts that formed the basis for the juvenile court's rulings on dependency (or state custody), eligibility for long-term foster care based on abuse, neglect, or abandonment, and non-viability of family reunification, or the adjudicator determines that a reasonable basis in fact exists for these rulings. 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. The role of the District Director in determining whether to grant express consent is limited to the purpose of determining special immigrant juvenile status, and not for making determinations of dependency status.", http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files/Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf

possible forms of evidence to establish the grounds for consent to prevent inappropriate USCIS re-adjudication of state court child welfare matters and promote proper deference to state juvenile court determinations. Consistent application of an objective “reasonable factual basis” test to establish the grounds for consent will prevent inappropriate USCIS re-adjudication of state court child welfare matters and promote proper deference to state juvenile court determinations.

We also recommend that USCIS clarify that the consent function does not involve a separate determination as to the applicant’s subjective intent for the state court action. Such an inquiry is not found in the law, invites improper USCIS re-adjudication of the state court action, and gives unfettered discretion to the adjudicator.

Recommendation on RFEs and NOIDs

About half of practitioners surveyed reported a wide variety of problems with the clarity and specificity of RFEs and NOIDs. This included adjudicators attempting to interpret state law or using the primary purpose inquiry – which USCIS interprets to be part of its consent function – as an unfettered subjective framework for adjudication. Practitioners identified certain patterns for RFEs and NOIDs such as: I-360 denials for all filings supported by temporary orders in certain field offices; citing to and relying upon the child’s I-213 without providing it to the attorney; and questioning the child’s “primary purpose” in seeking state court protection for children on surge dockets, children residing with one parent, and children close to ages 18 or 21 when the state court made the SIJS findings. Other RFEs and NOIDs questioned jurisdiction, post-18 orders, and paternity issues, and many reflected confusion around state law.

We make the following recommendations on the RFE and NOID practice:

- Issue tailored RFEs and NOIDs which explains the specific evidence needed and the reason this evidence is needed, instead of merely asking for the entire juvenile court file or using boilerplate language;
- Halt reliance on I-213s as the basis for RFEs, NOIDs, or denials, in particular in light of the recent GAO report (GAO-15-521, Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody , July 2015) documenting significant flaws in the screening process that results in these I-213s;
- Refrain from using criteria that reflect bias against certain types of cases such as those of children from certain countries, children with one-parent claims, or children on surge dockets;
- Provide all alleged derogatory information and documents to the child and his or her attorney or record, given children’s vulnerability to the actions of others and their lack of access to information to defend themselves.

These recommendations promote the fundamental due process principles of fairness and notice. If implemented, they would give the child a meaningful opportunity to respond to USCIS’s concerns. Broad, vague RFEs asking for the entire juvenile court file leave advocates guessing why the initial filing did not establish SIJS eligibility in USCIS’s view and what specific information is needed to remedy the problem. Further, RFEs seeking juvenile court files may run counter to juvenile court confidentiality laws protecting these records.

Recommendations on Submission of Special Findings Orders

Our survey revealed a wide variety of practices in at least 42 jurisdictions in filing the SIJS special findings. This reflects both differences in state court proceedings as well as different local field office

practices. Please note that the United States contains 3,143 counties and county-equivalents, such as parishes, organized boroughs, census areas, independent cities, and the District of Columbia, and the survey covered a relatively small proportion of these locales. Amongst the practices that exist across field offices, practitioners file a range of documents with USCIS including: (1) standalone SIJS predicate orders with factual findings; (2) standalone SIJS predicate orders without factual findings where factual findings are in a separate court order; and (3) a combined order that contains the SIJS special findings as well as the dependency/placement/custody/guardianship order. Additionally, in roughly a dozen locations, factual findings are not included in the state court order(s), but a factual basis is provided through an attorney affidavit or case summary. Practitioners generally do not submit state court records unless they are pressured to do so by USCIS due to an RFE or NOID or NOIR.

It is imperative that any centralization process recognizes that there is not one uniform way in which special findings are presented to USCIS. We recommend that: (1) NBC be trained on the existence of the variable ways in which orders and supporting factual findings can be obtained; and (2) if USCIS will be electing a preferred way in which special findings should be submitted, the preferred format must be clearly communicated to practitioners in advance of their filings and not violate state confidentiality laws.

Recommendation on Identification Requirements for Biometrics Appointments

Across the country, practitioners report challenges in completing biometrics appointments at USCIS Application Support Centers (ASCs) for children applying for SIJS-based adjustment. We recommend that SIJS applicants be exempted from the identification requirement (as is the case with asylum applicants) so long as the applicant brings her I-360 receipt or approval to the appointment. In the event that SIJS applicants will not be exempted, we recommend that USCIS establish a policy that recognizes that the SIJS applicant can provide one identity document (on an approved list to be distributed to all ASCs) together with the I-360 receipt or approval notice. The approved list should include: Office of Refugee Resettlement Verification of Release Form; copy of the child's birth certificate from her country of origin; student identification from a U.S. school; identification from a vocational program or similar setting; identification from recognized non-profit youth organizations; municipal identification cards; consular identification; or affidavits of identity. We also recommend that USCIS establish a protocol for how ASCs should complete appointments for children who have no form of identity document, as is sometimes the case for unaccompanied children and other immigrant youth. There should also be clear instructions that the SIJS predicate order from juvenile court is not required to complete the appointment.

Recommendations on Filing Practices for I-360s and SIJS-Based I-485 Applications

We recommend that USCIS accept both filing of stand-alone I-360s and jointly filed I-360s and I-485s, whether or not the petitioner is waiting for the NTA to be filed or in removal proceeding or asylum-only Adult with Child (AWC) proceedings. This would take into account a broad array of situations that children face. For example, some children are charged as arriving aliens and so USCIS has jurisdiction over their I-485s even if removal proceedings are ongoing. Additionally, ICE Trial Attorneys often urge practitioners to file the I-485s with USCIS for a variety of reasons even when the child is in active removal proceedings. We also recommend that if USCIS is unable to adjudicate the I-485 because the child is in removal proceedings, it should hold the I-485 filing in abeyance as is done with T Visa-based adjustment applications.

Recommendations on Interviews

We recommend, as a general matter, that interviews be used sparingly in SIJS cases. For stand-alone I-360s, there should be no interview. And we recommend that USCIS waive SIJS-based AOS interviews in all but the small number of cases where in-person inquiries are essential. We further recommend that criteria be clearly established for when any interviews are going to be conducted based on non-discriminatory grounds. Note that practitioners in our survey appreciated USCIS's waiving of SIJS AOS interviews for children who were vulnerable, young, far from the field office, or required to be in school. USCIS should exercise its discretion generously for SIJS AOS cases recognizing the impact that abuse, abandonment, and neglect can have on children and youth.

Where interviews are scheduled, we recommend adopting the following best practices identified by practitioners:

- Training interviewing officers specifically on SIJS and on the additional best practices identified here. This would promote deference to state court determinations and would discourage USCIS re-adjudication of the state court findings;
- Instructing interviewing offices to stop questioning children about abuse, neglect, abandonment, and reunification at SIJS-related interviews. USCIS guidance directs that officers "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." Donald Neufeld, Acting Associate Director, U.S. Citizenship & Immigration Services, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, at 4 (March 29, 2009). Despite this guidance, practitioners report that officers in some locations continue to question children about the abuse, neglect, or abandonment they suffered. This recommendation would help prevent unnecessary re-traumatization of vulnerable child SIJS applicants;
- Instructing interviewing officers to focus the adjustment of status questioning on the I-485 itself and not to use the interview as a fact finding mission to ask children everything about their lives, including asking about the immigration status of a guardian or parent;
- Training interviewing officers on trauma-informed interview practices, child-appropriate interviewing techniques (i.e., age-appropriate language, plain language), and avoiding hostile, aggressive, or accusatory practices;
- Allowing, but do not requiring, a support person in the room in addition to the attorney of record;
- Providing the attorney of record with copies of any adverse evidence that USCIS is using to question the child during the interview;
- Understanding that children often do not have certain information or documentation (such as government-issued ID, information regarding specific entry dates, etc.), and allow attorneys to clarify information as needed; and
- Scheduling SIJS-based interviews on a predictable day each month and at times that take into consideration children's ability to arrive on schedule. This will allow children to foresee and plan school absences, attorneys to maximize efficiency on a single day, and interviewing officers to complete appointments promptly.

Recommendations on 180-Day Adjudications

Though many surveyed practitioners reported improvements in the past few years, some practitioners continue to report problems with the SIJS-based I-360 180-day adjudication deadline. Practitioners reported delays related to lost files, transfer delays from ICE to USCIS, cases referred to Legal Counsel or FDNS, cases identified for RFEs and NOIDs without communicating this to the practitioner, and failure to

re-start the 180-day clock when practitioners respond to RFEs and NOIDs. There is also not a consistent process to inquire about any delay approaching or outside the 180-day timeframe; there appear to be multiple practices used by USCIS nationwide. We recommend that there be only one way to make an inquiry through a single point of contact at the NBC responsible for this issue agency-wide, and that if the I-360 is pending 150 days or more the practitioner be given access to a supervisory officer to resolve the delay.

Recommendations for Recognition of Applicants Who File Without Legal Representation

We would like to highlight that some children in certain parts of the country, particularly children under the care or custody of state child welfare agencies, may be submitting applications with the assistance of child welfare workers but usually without G-28s from legal representatives. In these cases, we recommend that USCIS work with child welfare agencies to ensure that these children receive correspondence through the child welfare agencies. We recommend that USCIS solicit input from state child welfare agencies in these unique circumstances as it moves toward centralization.

Recommendations on Training for Adjudications Officers

We recommend that training be conducted by civil society on general background issues such as child development and state courts. We specifically recommend the following modules:

- General Background Training
 - Child Development and Impact of Trauma on Child Development
 - Understanding the Long-Term Impact of Abuse, Abandonment, and Neglect on Children and Family Dynamics
 - Understanding the Office of Refugee Resettlement Process
 - Confidentiality Laws, Issues, and Factors in State Courts
 - SIJS and State Courts
 - History of SIJS and deference to state court procedures
 - Broad overview of the variety of state court proceedings and practices, including foster care and state child welfare proceedings (i.e., when a child may not be present for a proceeding; notice provisions; home investigations; CHINS; collaborative care process)
 - Avoiding role confusion (avoiding improper speculation that contradicts state court findings; clarifying who can make state law determinations and the state process vs. the USCIS role)
 - Country of Origin Conditions and Profiles of Children in Immigration Proceedings and Under State Protection
- Training on Adjudication
 - Incorporate experienced SIJS adjudications officers from offices that have best practices (i.e., New York, San Francisco, etc.)
 - Underscore that adjudication of SIJS-based AOS differs from other cases because SIJs are deemed paroled, various grounds of inadmissibility are inapplicable or waivable using a generous standard, and the positive exercise of broader discretion is particularly important
- Additional Interviewing Training
 - Trauma-informed interviewing
 - Child-sensitive interviewing
 - Culturally-responsive interviewing
 - Sensitivity to cultural, gender, and language dynamics (i.e., indigenous languages; capacity to understand complex legal language in the I-485)

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- Guidance on not interviewing children about harmful experiences or overly-broad topics

Recommendations on Communications Structure with the National Benefits Center

Practitioners across the country have highlighted best practices in field offices for both emergency SIJS cases and questions on pending SIJS cases. Based upon this, we make the following recommendations:

- Provide contact information for a point of contact, such as a supervisory adjudications officer, that requires a response within a targeted timeframe (i.e., three business days)
- Hold quarterly SIJS National Stakeholder calls with NBC
- Create emergency filing procedures, such as permitting in-person local field office filing in exceptional circumstances (i.e., age out of SIJS eligibility; age out of Unaccompanied Refugee Minor eligibility)
- Create a dedicated SIJS email inbox for inquiries that requires a response with a targeted timeframe (i.e., three business days)

Recommendations Submitted by the following Members of the National SIJS Working Group:

American Bar Association

Americans for Immigrant Justice

AILA

Association of Pro Bono Counsel

Brooklyn Defender Services

CLINIC

Fordham Law Frederick Center for Social Justice

Immigrant Legal Resource Center

Kids in Need of Defense (KIND)

Legal Aid Society of New York

Legal Services for Children

Mid-Minnesota Legal Aid

National Immigrant Justice Center

Public Counsel

Refugee and Immigrant Center for Education and Legal Services (RAICES)

U.S. Committee for Refugees and Immigrants (USCRI)

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