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VIA Federal eRulemaking Portal

Maureen Dunn
Chief, Division of Humanitarian Affairs
Office of Policy and Strategy
United States Citizenship and Immigration Services
20 Massachusetts Ave. N.W.
Washington, DC 20529-2140

DHS Docket No. USCIS-2009-0004: Special Immigrant Juvenile Status Petitions

Dear Chief Dunn:

The Immigration Reform Law Institute (IRLI) respectfully submits this public comment to the Office of Policy and Strategy, United States Citizenship and Immigration Services (USCIS), in response to the agency's notice of reopening of the comment period for proposed rulemaking (NPRM) published in the Federal Register. 84 Fed. Reg. 55250 (October 16, 2019).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws.

IRLI also provides expert immigration-related legal services, training, and resources to public officials, the legal community, and the general public.

A. Summary

IRLI's primary concerns with the proposed regulatory scheme for adjudication of petitions for Special Immigrant Juvenile Status (SIJS) by USCIS are the prevention of fraud and false identity offenses by petitioners, their family members, or guardians, and also ensuring the mandate of Congress that USCIS not consent to petitions where the primary intent is to obtain an immigration benefit. Confirming the *bona fides* of applicants for immigration benefits has, of course, always been a core problem facing DHS and its predecessors. In particular, both Congress and the former INS recognized that SIJS presents unique challenges, notably the incentive for misrepresentation of an alien juvenile's family circumstances, and the evidentiary issues posed by Congress' decision to split fact-finding and adjudicative responsibilities between state and federal tribunals.

IRLI respectfully offers recommendations to improve the adjudicative integrity and efficiency of the 2011 proposed regulations. IRLI's comments and analysis tracks the order of the topics discussed in the agency's Supplementary Information published in the 2011 NPRM, 76 Fed. Reg. 54978.

B. Comments and Analysis

1. Petitioners in Married or Similar Emancipated Status

IRLI agrees with proposed 8 C.F.R. §204.11(b)(1)(iii) in the reopened NPRM, which retains the requirement that a juvenile must remain unmarried from the time a Form I-360 is filed until the petition is granted. 76 Fed. Reg. 54980. The legal status of married emancipated young persons is incompatible with that of an abused or abandoned child dependent upon a state juvenile court. IRLI recommends that the final regulation further clarify that USCIS will consider these other essentially similar indicia of emancipation when determining whether federal consent is warranted. For example, the regulation should clarify that the status of a civil union, or common law marriage—in particular where the alien or the alien's domestic partner, as well as any dependents for which they themselves have custody, have claimed state, local or federal public benefits granted or calculated on the basis of such status—will be indicia of the legal equivalent of emancipation through marriage.

2. Juvenile Court Dependency

IRLI strongly objects to proposed 8 C.F.R. § 204.11(b)(1)(iv), to the extent that it presumes that SIJS eligibility will continue even if the alien moves out of the state—and thus the jurisdiction of the juvenile court which has declared the petitioner dependent. USCIS should only recognize moves to another jurisdiction when the juvenile remains in and pursuant to the custody of an "*individual* custodian" appointed by the juvenile court. For example, USCIS should continue to recognize the dependency order where the custodian moves to another state due to changes in the custodian or guardian's employment, or for the juvenile's educational benefit.

In IRLI's view, any independent move to an out-of-state residence by the dependent juvenile is presumptively an indicator of emancipation. By enacting the statute, Congress sought to address the practical condition of dependency, not create loopholes intended to qualify emancipated young adults for permanent residency. This position is particularly applicable where the juvenile is aged 18 or over at the time of the change in physical location, and as a matter of state law can no longer be ordered to remain under the control of the custodian appointed by the state juvenile court, upon whose dependency the juvenile's SIJS petition is conditioned.

The final regulations should clarify that a change of residence to another state, by a dependent juvenile who has been committed or placed in the custody of an *institution* by that state's juvenile court system, will terminate an order of dependency for purposes of USCIS' consent to SIJS. An appropriate exception would be where the institution in the state to which the juvenile will move has pre-approved a qualifying order of dependency or, at least, has invoked pre-existing legislation that authorizes the recognition of a sending state's dependency order as a matter of comity.

3. Viability of Reunification Under State Law

Unless the SIJS petition includes supporting documentation that the move was necessary to prevent further abuse, neglect, or abandonment, USCIS is well within its discretion to consider the move as occurring primarily to obtain an immigration benefit. Correctly construed, the SIJS statute treats dependency due to abuse, neglect or abandonment and emancipation in binary fashion. Emancipation creates a strong presumption that the state court finding that parental

reunion not be viable, pursuant to 8 U.S.C. § 1101(A)(27)(J)(i), is no longer in force as a matter of law, and thus should no longer be recognized by USCIS as a basis for consent.

Congress required USCIS to accept findings of state juvenile courts as to the non-viability of parental reunification, while also recognizing that each state had unique juvenile protection laws. IRLI believes that uniform elements of abuse, neglect, abandonment or similar could be identified that would generally ensure that SIJS did not turn on the completely unpredictable circumstances of an unlawfully present juvenile's illegal entry or unauthorized subsequent movements in the interior.

In the final version of proposed 8 C.F.R. § 204.11(b)(1), USCIS should seriously consider adopting an appropriate version of the modified categorical approach approved by the U.S. Supreme Court for assessing state criminal laws with immigration consequences applicable to adults. The immigration courts, as well as federal district courts have found a modified categorical approach to be the most consistent and objective when translating or comparing state judicial actions and federal immigration standards. Implementing a similar standardized process for the categorization of the findings of fifty-plus state juvenile courts into federal categories for abuse, neglect, and abandonment would ensure that determinations by USCIS, that evidence of whether a petition was "bona fide" per proposed 8 C.F.R. § 204.11(c)(1)(i), would on a nationwide basis be as uniform as possible.

4. Determination of "Best Interest"

IRLI directs the agency's attention to the required determination that it would not be in the best interest of the child to be returned to his or her country of nationality or last habitual residence. 8 U.S.C. §1101(a)(27)(J)(ii). The language of the INA provision notably does *not* include any requirement that this determination be made in *state*—as opposed to federal—judicial or administrative proceedings. Without adequate justification, DHS delegated exclusive jurisdiction over this quintessentially international determination to the states through regulation. *See* existing 8 C.F.R. § 204.11(c)(6); proposed 8 C.F.R. § 204.11(b)(1)(vi). By contrast, the issue of whether reunification with the juvenile's parent is "not viable" must be determined "under state law." 8 U.S.C. §1101(a)(27)(J)(i).

When the original regulations were published in 1993, the former INS admitted concerns regarding potential malfeasance:

> Abuse of this provision is of concern both to Congress, as shown by the statutory restriction on the grant of future immigration benefits for the juvenile's parent(s) based upon the relationship, and to the Service. However, the Service believes that a child in need of the care and protection of the juvenile court should not be precluded from obtaining special immigrant status because of the actions of an irresponsible parent or other adult. The Service also believes it would be impractical and inappropriate to impose consultation requirements upon the juvenile courts or the social service system …

58 Fed. Reg. 42843, 42847 (Aug. 12, 1993). However, the statutory "best interest" determination considered by the former INS in 1993 was the parental unification determination under current 8 U.S.C. §1101(a)(27)(J)(i), *not* the repatriation determination under current clause (27)(J)(ii), which was added to the INA by the Wilberforce (TVPA) Act, P.L. 110-457 (Dec. 23, 2008).

Beyond the absence of express statutory authorization, there are compelling reasons not to retain this outdated administrative delegation of the repatriation determination to any tribunal "recognized by the [state] juvenile court," as proposed with only the most superficial analysis by the 2011 NPRM. *See* 76 Fed. Reg. 54981. Repatriation under 8 U.S.C. §1101(a)(27)(J)(ii) presupposes that the juvenile is removable, as evidenced by the extensive waivers of removability available to aliens in SIJS status under 8 U.S.C. § 1227(c) (Waiver of grounds for deportation) and 8 U.S.C. § 1255(h) (Application with respect to special immigrants.) There is no question that any move by a state tribunal to determine removability, or eligibility for relief therefrom, would be preempted on field or conflict grounds. Similarly, throughout the INA, the determination of whether conditions in a foreign state merit the exercise of humanitarian discretion, or are grounds for a finding of hardship, are almost always reserved to the discretion of DHS.

Given the lack of express or implied delegation of repatriation decisions by Congress to the states, it would be arbitrary and capricious for the agency to continue to administratively delegate this immigration function to a diverse multitude of state "juvenile courts." The final rule should be amended to provide that section §1101(a)(27)(J)(ii) repatriation determinations are made

by USCIS, as part of its statutory consent function. USCIS may also want to consider providing for USCIS to consult on country or local conditions affecting reunification with the Department of State, which has closely related experience in determining whether conditions for repatriation of juveniles is warranted in other contexts, for example Hague Convention custody determinations.

5. Burden of Proof in Consent Determinations

IRLI strongly agrees with USCIS that "the petitioner bears the burden" of proving that the state court order was not sought primarily for any other reason than obtaining relief from abuse, neglect, obtaining relief from abuse, neglect, abandonment, or some similar state law basis, with particular scrutiny of petitions whose primary motivation is obtaining an immigration benefit. 76 Fed. Reg. 54981, citing proposed 8 C.F.R. §§ 204.11(c)(1)(i) and (ii). IRLI would strongly oppose any attempt to weaken this burden of proof.

6. Petition Procedures

IRLI is concerned that the non-adversarial character of SIJS proceedings, and the incentives for many SIJS petitioners, parents, and even U.S. custodians to distort or misrepresent the motives and actions of these parties has—as the former INS itself noted back in 1993—created a climate conducive to identity fraud.

To minimize the potential for fraud, IRLI recommends changes to two clauses of proposed 8 C.F.R. § 204.11(d). In addition to documentary evidence of the petitioner's age, USCIS should collect DNA samples as part of its biodata procedures, or else confirm that a sample has already been collected and added to the FBI's CODIS database. DNA samples are state-of-the-art evidence of personal identity, and federal law mandates their collection from all non-U.S. persons who have been civilly detained under the authority of the United States. 42 U.S.C. §14135a(a)(1)(A). The juvenile's identity and any prior contacts with law enforcement agencies can be more accurately and expeditiously verified by USCIS using the CODIS database.

In addition, USCIS should require the petitioner to provide evidence of the residence or location of the alien's parents or legal guardians if they are non-U.S. persons present in the United States. That contact information should be provided to an appropriate USCIS or ICE district office, which in turn should be required to contact such persons and seek to obtain a DNA sample from them. This change would not require any direct contact between a petitioner and an alleged abuser.

Until collection of these DNA samples is confirmed, the petition should not be deemed to be properly filed, as required by 8 C.F.R. § 204.11(h), thus tolling the 180 day adjudication deadline.

Alternatively, that regulation should allow USCIS, in its discretion, to waive the DNA sample collection requirement if the petitioner establishes, to the satisfaction of USCIS, that the parent is (1) deceased, (2) not present in the United States, or (3) a fugitive or absconder at large under any state or federal criminal or immigration statute.

7. No Parental Rights

The reopened NPRM correctly observes that Congress did not intend to permit even a non-abusive parent to gain any right, privilege or status under the INA by virtue of the parental relationship. 76 Fed. Reg. 54983, citing 8 U.S.C. § 1101(a)(27)(J)(iii)(I) and proposed 8 C.F.R. § 204.11(g).

IRLI believes that USCIS should take additional steps to ensure that parents who have been found by a state juvenile court in an SIJS proceeding to be abusive are routinely referred to ICE for additional screening for removability based on that abuse. For example, ICE should routinely determine whether the parent's abusive or neglectful conduct constituted an aggravated felony, excludable moral turpitude, or excludable abuse under the Adam Walsh Act, and if probable cause is found, routinely file a Notice to Appear with the appropriate immigration court. Alien parents who have lost custody of their children, due to abuse or neglect of children who become dependents of a state juvenile court, should not be allowed to accrue continuous presence in-country or take advantage or any other oversight that could qualify them for relief from removal.

Respectfully submitted,

Immigration Reform Law Institute

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