Citizenship and Immigration Services Ombudsman

Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications

December 11, 2015

For over 25 years, the Special Immigrant Juvenile (SIJ) visa program has provided important long-term immigration relief to certain foreign-born children who are present in this country and in need of protection. The program serves a small group of children who meet specific requirements, while other USCIS programs – including the asylum, refugee, and Central American Minors (CAM) programs – provide additional forms of relief to children fleeing persecution, violence, and other dangerous country conditions, as well as for children trying to reunite with family in the United States. I believe that now, more than ever, we should strengthen our resolve to ensure that legal protections available to vulnerable foreign children are not only administered effectively and efficiently, but with the true humanitarian spirit in which they were designed.

Since the Ombudsman's Office first issued recommendations on this topic in 2011, USCIS has made some efforts to improve SIJ adjudications. In fact, it recently accepted one of the recommendations included here – to consolidate SIJ adjudications. The agency advised it has chosen the National Benefits Center within its Field Operations Directorate for this task. If implemented with adequate training, this change stands to bring both efficiency and consistency to SIJ adjudications. However, processing petitions by a single group of officers is not enough to ameliorate the issues our office observed in reviewing this program. Among other recommendations presented here, USCIS must still issue new regulations and guidance reflective of the current state of the law, and it must stop the practice of issuing overly burdensome requests for documentation regarding underlying juvenile court dispositions.

The recommendations in this report are the result of an in-depth review of USCIS' current policies and practices in the field. I believe that, once implemented, these reforms will help achieve high quality and consistent SIJ adjudications along with a predictable and fair application process for juvenile applicants and those who serve them.

Sincerely,

Maria Odom
Citizenship and Immigration Services Ombudsman

RECOMMENDATIONS

The Ombudsman recommends that USCIS:

1) Centralize SIJ adjudications in a facility whose personnel are familiar with the sensitivities surrounding the adjudication of humanitarian benefits for vulnerable populations;

2) Take into account the best interests of the child when applying criteria for interview waivers;

3) Issue final SIJ regulations that fully incorporate all statutory amendments; and

4) Interpret the consent function consistently with the statute by according greater deference to State court findings.

REASONS FOR THE RECOMMENDATIONS

- Requests for assistance submitted to the Ombudsman show inconsistent application of the standard related to the "express" nature of the consent authority, frequently resulting in requests to review the underlying court documents that have already established the necessary findings (i.e. dependency on a court of State agency; inability to be reunited with the parents dues to abuse, neglect, abandonment or similar basis; and that it is in the best interests of the child not to be returned to the country of last residence or citizenship).
- Despite high approval rates and additional training of adjudicators, stakeholders have reported inconsistent interview techniques and focus.
- Existing regulations and guidance do not adequately reflect the latest in statutory amendments.

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The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

EXECUTIVE SUMMARY

Established through the Immigration Act of 1990, the Special Immigrant Juvenile (SIJ) program has undergone a number of legislative amendments in the past 25 years. Currently it protects those children who cannot be reunited with one or both parents due to abuse, neglect, abandonment, or a similar basis under State law.[1] These statutory modifications have had a substantial impact on the SIJ adjudicatory process and on SIJ petitioners. The Ombudsman has brought a number of concerns to the attention of USCIS over the past several years, including overreach in the exercise of its consent function; the use of age-inappropriate interviewing techniques; inconsistent application of legal standards; and petition processing delays.[2] Although training has been developed and made available to improve SIJ adjudications, it has not fully resolved ongoing problems, as reflected in continued stakeholder reports to the Ombudsman as well as in agency actions that do not consistently comport to such training.

The Ombudsman recognizes that the SIJ program presents special challenges to adjudicators who handle these complex adjudications as part of their varied portfolios. The Ombudsman has discussed with USCIS the need for centralization of the SIJ adjudication function in one location. Centralization will improve the quality and consistency in adjudications by specially trained employees dedicated to these and other petitions for protective and/or humanitarian relief. It will support a higher level of compliance with statutory processing timeframes and enhance the integrity of the product line. While USCIS has committed to consolidate the full processing of SIJ petitions, the Ombudsman recommends that SIJ petitioners be treated in a manner consistent with USCIS' treatment of other vulnerable populations, including the use of age-appropriate interviewing practices. In addition, the Ombudsman continues to see examples where USCIS reassessed underlying State court dependency orders. USCIS' statutory consent function does not appropriately extend to a *de novo* review of every underlying fact that supported the Court's findings.

In short, the Ombudsman is recommending that USCIS:

1. Centralize SIJ adjudications in a facility whose personnel are familiar with the sensitivities surrounding the adjudication of humanitarian benefits for vulnerable populations;

[1] Immigration and Nationality Act 101(a)(27)(J).
[2] Ombudsman's Annual Reports 2015, pp. 55-59; 2014, pp. 13-15; 2013, pp. 14-16; 2012, pp. 21-22; and 2011, pp. 20-21.

2. Take into account the best interests of the child when applying criteria for interview waivers;
3. Issue final SIJ regulations that fully incorporate all statutory amendments; and
4. Interpret the consent function consistently with the statute by according greater deference to State court findings.

METHODOLOGY

In conducting this review, the Ombudsman met with stakeholders nationwide and USCIS Headquarters officials representing the Field Operations Directorate, the Office of Chief Counsel, and the Office of Policy and Strategy to discuss the regulations, policies, and procedures impacting SIJ adjudications. The Ombudsman made site visits to USCIS field offices that perform SIJ adjudications. The Ombudsman also reviewed and sought to resolve stakeholder requests for case assistance submitted to our office over a period of several years. Finally, the Ombudsman requested and received information and data from the Field Operations Directorate regarding SIJ adjudications.

BACKGROUND

***Statutory and Regulatory Framework*.** By establishing the SIJ classification, Congress has provided immigration relief for children who meet certain qualifying criteria.[3] Generally, to be eligible to apply for SIJ status, a State juvenile court must have previously declared the child to be dependent on the court, or legally committed the child to the custody of a State agency or an appointed individual. In addition, the court must have found that the child cannot be reunited with one or both of the child's parents due to abuse, neglect, abandonment, or a similar basis under State law.[4] An administrative or judicial proceeding must have also determined that it would not be in the best interests of the child to be returned to the child's or parents' country of citizenship or last habitual residence.[5]

Congress has substantially modified the classification since it was created in 1990. For example, in 1997, Congress amended the SIJ definition to safeguard the process from abuse by restricting it to only those juveniles deemed eligible for long-term foster care because of abuse, neglect, or abandonment.[6] The amendment also required the Attorney General (now the Secretary of Homeland Security) to "expressly[7] consent to the dependency order serving as a precondition to the grant of [SIJ] status."[8] With this language, Congress introduced a new requirement – that the Secretary clearly indicate when a court order may serve as a pre-requisite to SIJ eligibility.

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[3] Immigration Act of 1990, Pub. L. No. 101–649 at § 153(a)(3)(J), 104 Stat 4978 (Nov. 29, 1990). Historically, U.S. government efforts to protect children resulted in a gap for immigrant children who were protected during their childhood but grew into adults with no legal immigration status. *See generally* "Regulating Consent: Protecting Undocumented Immigrant Children from their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law," Angela Lloyd, 15 B.U. Pub. Int. L.J. 237, at 1.
[4] INA § 101(a)(27)(J).
[5] *Id.*
[6] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (Nov. 26, 1997); *see Gao v. Jenifer*, 185 F.3d 548, at 552 (1999).
[7] The term "expressly" is an adverb to describe how one makes something known or indicates clearly and definitively so as to leave no doubts about the action supported by the adverb. American Heritage Dictionary, Merriam-Webster Dictionary.
[8] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (Nov. 26, 1997).

Congress modified the statute in this way to limit eligibility by requiring the Secretary "to determine that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining [immigration] status … rather than for the purpose of obtaining relief from abuse or neglect."[9] At the same time, Congress expressed the clear delineation between the State court and the Federal immigration adjudicator, stating that "the involvement of the [Secretary] is for the purposes of determining special immigrant juvenile status and not for making determinations of dependency status."[10]

INS (the predecessor of USCIS for this function) issued two policy memoranda in 1998 and 1999, instructing adjudicators to request information to enable them to make independent findings regarding abuse, abandonment, neglect and best interests.[11] This was in stark contrast to SIJ final regulations published in 1993, which recognized that it "would be both impractical and inappropriate for the Service to routinely re-adjudicate judicial or social service agency administrative determinations…."[12]

In 2004, USCIS issued a third policy memorandum, employing a new term of art to describe when the agency takes action to permit a State court order to serve as a pre-requisite for SIJ:

> *Express consent* means that the Secretary… has 'determine[d] that neither the dependency order nor the administrative or judicial determination … was sought primarily for the purpose of obtaining … status … rather than for the purpose of obtaining relief from abuse or neglect [or abandonment].'[citation omitted] In other words, express consent is an acknowledgement that the request for SIJ classification is bona fide.[13]

The 2004 memorandum also instructed adjudicators to examine State court orders for independent assurance that courts acted in an "informed" way.[14] At the same time, it instructed adjudicators not to "second-guess" findings made by State courts because "express consent is limited to the purpose of determining [SIJ] status, and not for making determinations of dependency status."[15] However,

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[9] H.R. Conf. Rep. 105-405, at 130 (Nov. 13, 1997).
[10] *Id*.
[11] INS Memorandum, "Interim Field Guidance relating to Public Law 105-119 (Sec. 113) amending Section 101(a)(27)(J) of the INA – Special Immigrant Juveniles" (Aug. 7, 1998); INS Memorandum, "Special Immigrant Juveniles - Memorandum #2: Clarification of Interim Field Guidance" (Jul. 9, 1999); http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_2_Special_Immigrant_Juvenile_Status/5_4_2_3_Published_Decisions_and_Memoranda/Cook_Thomas_SpecialImmigrantJuvenilesMemorandum.pdf (accessed Jun. 1, 2015).
[12] "Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Final Rule," 58 Fed. Reg. 42843-51, 42847 (Aug. 12, 1993).
[13] USCIS Interoffice Memorandum, "Memorandum #3 -- Field Guidance on Special Immigrant Juvenile Status Petitions" (May 27, 2004); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (accessed August 3, 2015).
[14] USCIS Interoffice Memorandum, "Memorandum #3 -- Field Guidance on Special Immigrant Juvenile Status Petitions" (May 27, 2004); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (accessed August 3, 2015).
[15] *Id*.

in that memorandum, USCIS instructed adjudicators to give "express consent" only if the adjudicator was aware of the facts that formed the basis for the juvenile court's rulings. This direct instruction led to adjudicators reassessing the facts underlying the juvenile court's findings, contradicting the agency's instruction not to "second-guess" findings made by State courts. Overall, the 2004 memorandum constructed a consent concept that disproportionately amplified the use of "express consent" when trying to clarify which types of orders would serve as a precondition of SIJ status.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) contained substantial amendments to the SIJ classification. Among its amendments, TVPRA 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.[16] The previous statutory language had provided no definition of how USCIS could "expressly consent." This contributed to the confusion over whether USCIS should examine the findings of the State court for independent assurance that the court acted in an informed way.[17] By eliminating the "express" nature of the consent requirement, TVPRA recognized State court authority and "presumptive competence"[18] over determinations of dependency, abuse, neglect, abandonment, reunification, and the best interests of children.

SIJ Adjudication Training. SIJ is a complex benefit adjudication, which has undergone substantial legislative changes that supersede existing regulations and written policy guidance. Accordingly, training is essential to ensure that adjudicators have the necessary resources to apply the law correctly and consistently. In early 2014, USCIS held a training session for regional representatives who then provided training and materials to USCIS adjudicators in the field.[19] The new training module includes instruction on when USCIS may consent to grant SIJ, and directs adjudicators to accept court orders containing or supplemented by specific findings of fact. Although the training offers a sample court order that represents the type and extent of factual findings required in a juvenile State court order, it does not clarify what qualifies as a "specific finding of fact." The written training allows adjudicators to issue a Request for Evidence (RFE) "if the record does not reflect that there was a ***sufficient*** factual basis for the court's findings" (emphasis added). In practice, such instruction has led to requests for information that call for exhaustive factual findings instead of verifying whether a State court has made the requisite SIJ findings – even in cases where the State court order provides more information than that offered in the USCIS training sample order.

Approval and Denial Rates. In spite of a growing trend to issue overreaching and overly burdensome requests for additional information, the agency currently approves most SIJ petitions (Figure 1). As discussed in the Ombudsman's 2014 and 2015 Annual Reports to Congress, burdensome RFEs in particular reflect "overly expansive search[es] for records supporting the

[16] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(d)(1), Pub. L. 110-457, 122 Stat. 5044 (2008).
[17] Consent is defined as acquiescence or agreement, or "the act or result of coming into harmony or accord." Express consent, by contrast, implies a higher standard as "positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning." Black's Law Dictionary (Fifth Ed.).
[18] *Gao v. Jenifer*, 185 F.3d 548 (1999) at 556, *citing Holmes Fin. Assocs. v. Resolution Trust Corp.*, 33 F.3d 561, 565 (6th Cir. 1994).
[19] *See generally* Ombudsman's Annual Report 2014, pp. 13-15.

factual findings of State courts, including full court transcripts, and, in some cases, any and all evidence submitted in the underlying proceedings."[20] While these RFEs rarely lead to denials, they do have an adverse impact on juvenile petitioners and their representatives who must obtain and release potentially protected information. They also have an adverse impact on legal service providers who must expend limited resources to respond to such inquiries, which impedes the provision of *pro bono* legal services to others, especially to children.

Figure 1. Special Immigrant Juvenile Status — Receipts, Approvals, RFEs, Notices of Intent to Deny (NOIDs), Denials, FY14 – FY15[21]

FISCAL YEAR	RECEIPTS	APPROVALS	RFEs	NOIDs	DENIALS
2014 Totals	5,817	4,606	171	89	247
2015 Totals	6,334	5,115	332	109	195

ONGOING CONCERNS REGARDING THE ADJUDICATION OF SIJ PETITIONS AND USCIS EXERCISE OF CONSENT

The Ombudsman continues to observe inconsistencies in USCIS' adjudication of SIJ petitions, its application of legal principles, and the factual evaluations that are conducted under its consent authority. Adjudicators continue to seek evidence underlying State court dependency orders, which is inconsistent with the statutory scheme and USCIS' own training materials.

Consenting to SIJ. Congress eliminated both the express nature of USCIS consent, and the need for the order to serve as a precondition to the grant of status. USCIS policy, however, did not keep up with those very significant revisions, relying instead on language that had disappeared from the statute. As a result, RFEs and NOIDs continue to rely on outdated analytical tools. While RFEs and NOIDs often state that USCIS is not reviewing the State court process, the practical effect is a *de novo* review of the State court's process and determinations pertaining to the abuse, neglect, or abandonment of the child. Congress, through statute, did not charge USCIS with determining a child's best interests; whether a child has been abused, abandoned or neglected; or whether reunification with one of more parents is viable. By statute, that is the role of the State court. Yet, in its adjudications, USCIS has asked for documentation to assess those findings, has reviewed and second-guessed those findings, and has sought to determine whether the court exercised its dependency jurisdiction in accordance with State law.

Consent is not defined in the statute. Through policy, USCIS exercises its consent authority by verifying whether SIJ petitions are *bona fide*[22] and whether immigration benefits were the primary

[20] Ombudsman's Annual Report 2014, pp. 14-15.

[21] Data set: Form I-360 Petition for Special Immigrant Juveniles; http://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-360-petition-special-immigrant-juveniles (Aug. 28, 2015).

[22] USCIS Memorandum, HQOPS 70/8.5 "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions" (Mar. 24, 2009); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf (accessed Jun. 1, 2015)("[T]he consent determination … is an acknowledgement that the request for SIJ classification is bona fide.")

purpose for pursuing the State court order.[23] In cases reviewed by the Ombudsman, USCIS has looked at whether the State court made an "informed decision," properly exercised its jurisdiction as a juvenile court, acted "in accordance with State law," or had a "factual basis" for its findings.[24] This has resulted in requests for documentation that are overly burdensome and intrusive, and some to which a response is difficult – if not impossible – owing to the protected nature of the court documentation.

The Ombudsman has reviewed cases where RFEs and NOIDs requested all court-related filings, evidence, transcripts, and even confidential, sealed hearing documents. These RFEs and NOIDs often result in an overly expansive review of the petitioner's intentions for seeking a dependency court order and may call into question the necessity of protection and the court's exercise of dependency upon applicable State law. The State court orders must provide specific findings of fact to enable USCIS to provide the necessary consent; those findings have been spelled out in the trainings as well as applicable guidance. However, to provide consent, the agency need not request corroboration of every underlying fact that supported those findings, nor should it substitute its application of State law for that of the court's exercise of dependency.

Evaluating the Primary Purpose of Court Orders. As a whole, provisions in the TVPRA were enacted to enhance protections for at-risk children,[25] which was a shift from the 1997 amendments that sought to address problems and limit beneficiaries.[26] When Congress changed the statutory language for SIJ in 2008, it removed an entire clause that relied upon the limitations enacted in 1997 and replaced it with a simpler function. USCIS policy should reflect these statutory changes. Rather than retain the elements of "express consent" derived from the 1997 amendments, a proper implementation of the TVPRA language requires that USCIS verify whether State court orders contain the necessary factual findings and whether the State court has articulated the foundation for such findings (i.e., based upon testimony of parties, evidence submitted into the record, and/or statutory citations). USCIS does not need to evaluate intent for initiating dependency court

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[23] USCIS Interoffice Memorandum, "Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions" (May 27, 2004); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (accessed May 27, 2015). "Express consent means that the Secretary … has "determine[d] that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence." USCIS Memorandum, HQOPS 70/8.5 "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions" (Mar. 24, 2009) ("The consent determination by the Secretary … is an acknowledgement that the request for SIJ classification is bona fide. This means that the SIJ benefit was 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'" (citing H.R. Rep. No. 105-405).)

[24] Information provided through requests for case assistance.

[25] The TVPRA was enacted "to enhance measures to combat trafficking in persons, and other purposes." The section of the TVPRA in which SIJ language is modified is titled "Permanent Protection for Certain At-Risk Children." It is included in a larger section titled "Enhancing Efforts to Combat the Trafficking of Children," which contains sub-sections titled "Combating Child Trafficking at the Border and Ports of Entry into the United States," "Combatting Child Trafficking and Exploitation in the United States," and "Providing Safe and Secure Placements for Children." The 1997 amendments, by contrast, were incorporated into an appropriations bill "to address several problems encountered in the implementation of the special immigrant juvenile provision…and limit the beneficiaries of this provision." See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235, Pub. L. 110-457, 122 Stat. 5044 (2008) and H.R. Rep. No. 105-405, at 130 (1997).

[26] *Id.*

proceedings nor weigh evidence or State laws to determine whether it believes the court made proper findings.

Continuing to apply the "express consent" requirement by requiring "an acknowledgement that [requests are] bona fide,"[27] may lead to a presumption by USCIS that the primary purpose for obtaining a State court order was to obtain an immigration benefit, unless the officer has the ability to review and assess all the underlying facts of the State case. This primary purpose inquiry relies on a false dichotomy that suggests it is possible that a State court action may only focus on *either* protections against future harm *or* securing immigration benefits, when almost always, the court protections inevitably provide both in tandem. Securing stability in the form of status in the United States is irrevocably a key aspect of protecting a child from future harm. As a consequence of the "bona fide" review, "express consent" continues unaltered and USCIS adjudicators have in practice nullified the clause amended by Congress in the TVPRA.

Stakeholders have reported USCIS frequently requires petitioners to be under a continuing jurisdiction of a State court at the time of filing an SIJ petition.[28] Historically, after having been found dependent on a court, petitioners continued to remain eligible for SIJ status.[29] The INA requires that an SIJ petitioner must be a person who "has been declared dependent" on a court or "legally committed to" the custody of a State agency or an individual appointed by the court. A plain language interpretation of "has been declared…or legally committed to [the custody of an agency or individual]" does not require continued active administration by the court – rather, it allows for determinations by the court that continue into the present as well as determinations made during an unspecified period of time prior to filing an SIJ petition. Congress had, but did not exercise, the ability to restrict and limit eligibility to a person who "is dependent" upon a court within a specified time frame, including "at the time of filing."

USCIS has also interpreted its consent function to include an analysis of whether a court's exercise of dependency is valid.[30] The Ombudsman has reviewed RFEs and NOIDs that ask applicants to "provide evidence that the court order is valid under State law…"[31] This implies that a court order is not sufficient "evidence" to demonstrate that a court is issuing a valid order under State laws; or that courts knowingly issue invalid orders, or are otherwise prone to misapply State laws such that USCIS needs to probe the validity of their final product. By using its own analysis of State law,

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[27] "[T]he consent determination … is an acknowledgement that the request for SIJ classification is bona fide. This means that the SIJ benefit was 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." USCIS Memorandum, HQOPS 70/8.5 "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions" (Mar. 24, 2009) *citing* H.R. Rep. No. 105-405, at 130 (1997); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf (accessed Jun. 1, 2015).

[28] According to stakeholder reports, USCIS has requested final orders to demonstrate continuing jurisdiction as well as new orders when children are transferred to guardians in other states.

[29] 8 CFR 204.11(a) ("[A] child who has been adopted or placed in guardianship [sic] situation after having been found dependent upon a juvenile court … will continue to be considered to be eligible for long-term foster care.")

[30] In recent denials USCIS has stated that "since the Petitioner was over the age of 18 at the time the SIJ order was issued, the court did not have continuing, exclusive jurisdiction pursuant to [State law]… USCIS cannot recognize the [court] order as a valid order," and petitioners "have failed to show that [the] dependency order is valid under [] state law."

[31] Information provided through requests for case assistance.

USCIS has now extended its review beyond the factual basis of abuse, abandonment, and neglect, to now include an assessment of the legal basis of a court's action, contrary to the delineation of duties between State court and Federal immigration adjudicators expressed by Congress,[32] and historic policy.[33] By examining a court's jurisdiction and delineating whether the jurisdiction of the court will be considered valid "for immigration purposes,"[34] USCIS is in effect reviving, in a novel way, the pre-TVPRA requirement to "specifically consent" to a court's exercise of jurisdiction.[35]

***Interviewing practices that are not age-appropriate*.** Through stakeholder engagements and requests for assistance, the Ombudsman has been made aware that some field office adjudicators have engaged in concerning interviewing practices. These include reliance on U.S. Customs and Border Protection Form I-213, *Record of Deportable/Inadmissible Alien* to question credibility,[36] prolonged interrogation-style interviewing, and inappropriately questioning some applicants on details about family members and abuse, abandonment, or neglect.

USCIS treats inconsistencies between the interview statements and information on the Form I-213 as fraud indicators, resulting in RFEs, NOIDs, and denials of SIJ petitions.[37] RFEs should only be issued when a petitioner fails to demonstrate "it is more likely than not that each of the required elements has been met."[38] This preponderance of the evidence standard is generally met when court orders make findings on all of the SIJ-required elements. Based on the interview process used to produce Form I-213, an RFE should be considered only if a statement entered into a Form I-213 by border officials overcomes the standard of proof that is met through a complete State court order.[39] Stakeholders report that interviews were previously 20 minutes in duration three years ago

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[32] "[T]he involvement of the [Secretary] is for the purposes of determining special immigrant juvenile status and not for making determinations of dependency status." H.R. Conf. Rep. 105-405, at 130 (Nov. 13, 1997).

[33] "[E]xpress consent is limited to the purpose of determining [SIJ] status, and not for making determinations of dependency status" USCIS Interoffice Memorandum, "Memorandum #3 -- Field Guidance on Special Immigrant Juvenile Status Petitions" (May 27, 2004); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (accessed August 3, 2015).

[34] Decisions received by the Ombudsman's Office have included variations of the following language: "USCIS cannot recognize the [Court Order] as a valid order for immigration purposes."

[35] "[N]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction" Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (Nov. 26, 1997).

[36] The Record of Deportable/Inadmissible Alien (Form I-213) is a form that is completed by Customs and Border Protection officials at the time a petitioner is apprehended at the U.S. border.

[37] However, "[an] officer should generally limit reliance on records containing statements made by juveniles at the time of initial apprehension by immigration or law enforcement. Oftentimes juveniles do not share personal accounts of their family life with an unknown adult until they have had the opportunity to form a trusting relationship with that adult. Additionally, the juvenile court may make child welfare placement, custody and best interests decisions that differ from the juvenile's stated intentions at the time of apprehension." USCIS Policy Manual, Volume 6: Immigrants, Part H – Special Immigrant Juveniles, at 8.

[38] USCIS Policy Memorandum PM-602-0085, "Requests for Evidence and Notices of Intent to Deny" (Jun. 3, 2013).

[39] "Requiring evidentiary detail from an airport interview not only ignores the reality of the interview process, but would, in effect, create an unprecedented pre-asylum application process." Singh v. INS, 292 F.3d 1017, 1021 (9th Cir. Cal. 2002); "We hesitate to view statements given during airport interviews as valuable **impeachment** sources because of the conditions under which they are taken and because a newly-arriving alien cannot be expected to divulge every

and some may now exceed an hour.[40]

In asylum interviews, another context where a minor is interviewed as a principal applicant for protective benefits, officers are encouraged to regard applicants as children first and applicants second. Key guidelines from the Asylum Officers' Basic Training Course were incorporated into the 2014 SIJ Training and should be guiding interview practices. Of particular importance is guidance that an "officer may encounter gaps or inconsistencies in the child's testimony … [t]he child may be unable to present testimony concerning every fact in support of the claim, not because of a lack of credibility, but owing to age, gender, cultural background, or other circumstances."[41] USCIS should maintain consistent interview practices for all children applying for immigration benefits.

RECOMMENDATIONS

The Ombudsman recommends that USCIS:

1. Centralize SIJ Adjudications in a Facility Whose Personnel are Familiar with the Sensitivities Surrounding the Adjudication of Humanitarian Benefits for Vulnerable Populations

The Ombudsman has observed, and stakeholders report, varying interpretation and adjudicatory practices across field offices who receive the cases from the National Benefits Center. Interview practices also vary among field offices,[42] as do the rates, quality and content of RFEs and NOIDs; the detail of decisions; and timelines for adjudication. Similar case facts can lead to different outcomes depending on the office with jurisdiction over the petition.

Centralizing SIJ adjudications with specifically trained adjudicators who are familiar with the sensitivities involved in adjudicating humanitarian benefits for vulnerable populations will address a number of these issues and promote USCIS goals of efficiency and uniformity in adjudications. Extending the specialization found in USCIS product lines such as VAWA, T and U visas will ensure those deserving are approved, and those in which fraud is present are properly denied. In addition, a specialized SIJ team will be better able to protect the integrity of the SIJ program by being able to identify patterns, irregularities and fraud while making well-informed adjudications based upon SIJ-specific knowledge.

Centralizing SIJ adjudications would also help USCIS adhere to the statutorily-required adjudication timeline of 180 days. Much like other forms of adjudications, SIJ petitions have the potential for paper-based adjudications because an independent fact-finder establishes the crux of SIJ relief rather than an interview. Ensuring a centralized adjudication process will address varied

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detail of the persecution he or she sustained." Li v. Ashcroft, 378 F.3d 959, 963 (9th Cir. 2004)(emphasis in original); "A number of federal courts have cautioned adjudicators to keep in mind the circumstances under which an alien's statement to an inspector is taken when considering whether an applicant's later testimony is consistent with the earlier statement." *Credible Fear*, USCIS Asylum Officer Basic Training Course (Revised April 14, 2006), at 19.

[40] Information provided to the Ombudsman during stakeholder meetings.

[41] *Guidelines for Children's Asylum Claims*, USCIS Asylum Officer Basic Training Course (Sept. 1, 2009), at 33.

[42] Some field offices exercise interview waivers when appropriate in accordance with training guidelines, while other offices do not.

interview practices across field offices and incorporate a process parallel to other humanitarian forms of relief.

In its 2014 and 2015 Annual Reports, the Ombudsman urged USCIS to centralize SIJ adjudications. In recent communications, USCIS indicated it is working on new procedures to centralize adjudications at a service center facility. The Ombudsman recognizes this effort and will monitor the implementation of this important change, including the training of staff and the development of interview waiver criteria discussed below.

2. Take into Account the Best Interests of the Child when Applying Criteria for Interview Waivers

In a meeting with the Ombudsman on June 30, 2015, USCIS noted that centralizing adjudications would include waiving certain interviews. The Ombudsman believes this to be the correct course of action for various reasons, including the size, age and sensitivities of the population. However, the criteria for assessing which interviews shall be waived should not be created primarily based on the priority interests of the USCIS Fraud Detection and National Security Division (FDNS). Offices adjudicating and addressing humanitarian concerns, such as the Office of the Chief Counsel, the Office of Policy & Strategy, and the Vermont Service Center should be equally involved. While fraud factors have an undeniable role to play to protect both the American people and the integrity of this program, substantial input from those in the agency responsible for humanitarian benefits will help ensure balanced factors for waiving interviews and development of criteria that include the best interests of vulnerable child petitioners.

3. Issue Final SIJ Regulations that Fully Incorporate All Statutory Amendments

The three policy memoranda, consolidated into the 2004 memorandum, have contributed to inconsistent adjudication regarding the extent of USCIS' consent function.[43] The SIJ regulations, which have not been updated since 1993, no longer comport with statutory language. DHS published a Notice of Proposed Rulemaking in September 2011,[44] but no final rules have been published.[45] To fully comply with the notice and comment requirements of the Administrative Procedure Act, as well as relieve confusion, USCIS must finalize updates to the 1993 regulations through the completion of notice and comment rulemaking. Addressing the meaningful comments of the regulated community in the issuance of a final rule as soon as possible would help clarify many of the currently problematic adjudicatory practices and clarify some of the issues arising from changes in law, gaps in outdated regulations, and memoranda.

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[43] "USCIS is using non-legislative rules to muddle through in an extremely technical and sensitive context. USCIS guidance documents leave individual[s]… on shaky ground[.]" Administrative Law through the Lens of Immigration Law, Jill Family, 64 Admin. L. Rev. 565, at 616 (Summer 2012).
[44] 76 Fed. Reg. 54978.
[45] A final rule is now projected for April 2016. *See* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1615-AB81.

4. Interpret the Consent Function Consistently with the Statute by According Greater Deference to State Court Findings

In the SIJ context, Congress determined that the State court is the finder of fact on specific issues and those judgments should be given due deference. The factual findings made by State courts should not be revisited by USCIS, and should be given deference except where there is cause to believe that they are deficient or otherwise in conflict with INA requirements. In other contexts, such as court orders of custody in family petitions, USCIS has not routinely engaged in a review of whether a court was adequately informed, properly applied State law, and properly exercised jurisdiction.[46] USCIS should presume regularity of the State court decisions rather than challenge them, and seek information regarding the consistency of the process or the courts' findings only where there is cause to believe the criteria have not been met. While it is true that in the last two fiscal years the overwhelming majority of petitions have been approved,[47] this same figure could have been achieved without burdensome RFEs, saving the time of adjudicators as well as petitions and the practitioners representing them. Instead, the low rate of denials indicates the overwhelming majority of petitioners in possession of State court orders are eligible and qualified for the status they are ultimately accorded.

CONCLUSION

Stakeholders report and the Ombudsman has observed adjudication inconsistencies regarding USCIS' exercise of consent, age-inappropriate interviewing techniques, and delayed processing times for SIJ adjudications. USCIS continues to seek evidence underlying State court dependency orders. The Ombudsman continues to receive reports from stakeholders experiencing difficulties with pending or recently adjudicated petitions. For these reasons, the Ombudsman recommends that USCIS: (1) centralize SIJ adjudication to improve the quality and consistency of decisions; (2) take into account the best interests of the child by applying a generous interview waiver policy; (3) issue updated regulations to incorporate the statute fully, clarify policy guidance and articulate the limitations of USCIS' consent authority; and (4) interpret the consent function fully and consistently with the statute as it now exists. These steps would substantially improve adjudications and end the agency's current practice of seeking evidence underlying State court dependency orders.

[46] SIJ orders are similar to criminal orders and court rulings for victims of crime. "The agency must give full faith and credit to the final court decisions just as they do criminal court convictions." 15 B.U. Pub. Int. L.J. 237 at 261.
[47] Testimony of Joseph Langlois, Associate Director, Refugee, Asylum and International Operations, USCIS, before the Homeland Security and Governmental Affairs Committee, July 7, 2015.