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November 7, 2011

Sunday Aigbe
Chief, Regulatory Products Division
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Ave., NW, Suite 5012
Washington, DC 20529-2020

Submitted via www.regulations.gov

Re: Special Immigrant Juvenile Petitions Proposed Rule
76 Fed. Reg. 54978 (Sept. 6, 2011)
Docket No.: USCIS–2009–2004

Dear Chief Aigbe:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the proposed rule, "Special Immigrant Juvenile Petitions."

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed Special Immigrant Juvenile rules and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

Introduction

AILA appreciates the opportunity to comment on the proposed rules regarding Special Immigrant Juvenile (SIJ) petitions, 76 Fed. Reg. 54978 (Sept. 6, 2011) (when finalized, to be codified at 8 CFR Parts 204, 205 and 245). We applaud USCIS for issuing these long-awaited rules and providing the public the opportunity to comment. We hope that the final rules, when promulgated, will help ensure that SIJ petitions are properly and fairly adjudicated and will further the agency's stated purpose, as set forth in the supplementary information,

"to establish a nonthreatening interview environment that would promote an open, productive discussion about the SIJ petition," given that "[j]uveniles seeking SIJ classification, unlike other juveniles, are under specific pressures and hardships relating to the loss of parental support and to juvenile court proceedings." [1] Further, we appreciate the recognition that "[g]enerally, in the context of the SIJ interview, it is not necessary to interview a juvenile (whether alone or accompanied) about the facts regarding the abuse, neglect, or abandonment upon which the dependency order is based."[2] However, we would like to take this opportunity to point to some concerns with the supplementary information and regulatory language that appear to be contrary to the facilitation of a nonthreatening interview environment.

Proposed 8 CFR §204.11(c)(1)(i) Impermissibly Allows USCIS to Review State Court Findings

The proposed rule at 8 CFR §204.11(c)(1)(i) permits USCIS to review the underlying State court dependency order to determine whether it was "sought to obtain relief from abuse, neglect, abandonment, or other similar basis."[3] In effect, this language permits "appellate review" of the State court adjudication and shifts the process from the hands of experienced family court judges to USCIS interviewing officers. Both legacy Immigration and Naturalization Service (INS) and USCIS have emphasized over the years that State courts, not federal immigration agencies, have the required expertise when it comes to issues of child welfare and that court findings related to these issues must not be second-guessed or readjudicated by USCIS.[4]

In addition, Congress declared its intent that State court findings not be readjudicated by USCIS when it amended the SIJ statute in 2008 to remove the requirement that the Attorney General "expressly consent to the dependency order."[5] The 2008 amendment and current statute provide for SIJ eligibility when the "Secretary of Homeland Security consents to the grant of" such status.[6] This indicates Congress's intent that only State courts may make evidentiary determinations on dependency, abandonment, abuse, neglect, and the best interests of the juvenile. Thus, upon USCIS receipt of the State court order and proof of the petitioner's age, a legal presumption that the SIJ petition is *bona fide* is appropriate and requests for further evidence are generally superfluous, unless: (1) the State court does not make a finding of abuse, neglect, or abandonment and instead

[1] 76 Fed. Reg. at 54982.
[2] *Id*.
[3] 76 Fed. Reg. at 54982, 54985.
[4] *See* "Special Immigrant Status; Adjustment of Status," 58 Fed. Reg. 42842, 42847 (Aug. 12, 1993) ("it would be both impractical and inappropriate for the [INS] to routinely readjudicate judicial ... administrative determinations as to the juvenile's best interest."); USCIS Memorandum, W. Yates, "Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions," (May 27, 2004), *published on* AILA InfoNet at Doc. No. 04062168 (*posted* June 21, 2004) (adjudicators "generally should not second-guess the [State] court's ruling or question whether the court's order was properly issued").
[5] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044.
[6] INA §101(a)(27)(J)(iii).

makes a finding on the fourth ground, "similar basis under State law;" or (2) the order is facially inconsistent.

In some jurisdictions, such as Nevada, minors are unable to access their family court records. Furthermore, in many jurisdictions, by asking for documents from the record, the adjudicator is essentially asking the applicant and attorney to violate State laws governing the confidentiality of juvenile court proceedings. In such jurisdictions, these requests impose an ethical burden on counsel, and impose undue delay in the adjudication of an immigration benefit for which Congress has expressly set an expedited time frame.

As currently drafted, proposed 8 CFR §204.11(c)(1)(i) limits State courts from doing what Congress has asked of them – to independently apply their expertise to make findings on the dependency and best interests of a child. Intrusion by USCIS into the decision-making of a State court must not be permitted, and a request for the production of evidence on the issue of abandonment, abuse, or neglect serves no purpose other than to second guess State court orders. To impose such a requirement effectively prevents the State court and guardian from protecting the best interests of the child, and the desire for a non-threatening interview actually becomes quite threatening.

Proposed 8 CFR §204.11(c)(1)(i) Creates Confusion Regarding the Scope of the State Court's Findings

The proposed language of 8 CFR §204.11(c)(1)(i) imposes a confusing burden on the petitioner to show "that 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."[7] However, in the majority of cases, dependency or custody issues are determined separately from SIJ issues, and a SIJ order is a separate, special order issued to facilitate immigration relief. In other words, much of the language needed for SIJ status is not included in a State court order where SIJ is inapplicable. For example, while a State court will always consider the best interests of the child, absent a specific request, the court will generally not specify that return to the country of origin is not in the child's best interest. The pursuit of immigration relief is an important goal and component of the State court's efforts to protect the child and his or her best interests. Seeking an order that conforms to the precise contours of the immigration laws should not undermine the validity of the State court decision.

USCIS Should Presumptively Waive In-Person SIJ Interviews

Proposed 8 CFR §204.11(e) states that "although an interview is not a prerequisite to the adjudication of a Special Immigrant Juvenile Petition, USCIS may nevertheless require an interview as a matter of discretion."[8] However, a SIJ petition may be approved upon the filing of a completed Form I-360, along with proof of age of the juvenile, and a State

[7] 76 Fed. Reg. at 54981, 54985.
[8] 76 Fed. Reg. at 54986.

court order making the requisite findings.[9] Where a prima facie showing of eligibility is made under 8 CFR §204.11(d), USCIS should presumptively waive the interview. With this clarification, I-360 petitions will be adjudicated expeditiously and will more easily conform to the congressionally mandated 180-day adjudication clock. Furthermore, an adjustment of status interview is waivable at the discretion of USCIS.[10] Many concurrently filed SIJ cases warrant an interview waiver and the rules should encourage such waivers. For example, a 4-year-old child was recently required to appear for an adjustment of status interview. This is a waste of USCIS resources and an unnecessary burden on all parties, including foster agency personnel and USCIS.

The Proposed Regulations Must Clarify that SIJ Petitioners Are Always Permitted to Have Counsel Present during a USCIS Interview

The proposed rule provides that USCIS "still maintains discretion to interview a child separately when necessary."[11] This language must be clarified to indicate that where it is determined that an interview is required, the child's attorney or legal representative may be present, as is permitted when USCIS conducts separate interviews for spouses when determining the bona fides of a marriage.

Questions Regarding Abandonment, Abuse, or Neglect of the SIJ Petitioner are Presumptively Inappropriate

The proposed rule provides that questions "about the facts regarding the abuse, neglect, or abandonment" underlying the applicant's dependency order are "generally ... not necessary."[12] However, we submit that such questions are presumptively inappropriate. A State court order showing the necessary findings of abuse, neglect, or abandonment should be more than sufficient. Questions that rehash what the State court has already established will only further traumatize the juvenile, and are contrary to USCIS's goal of conducting a "non-threatening interview." As described above, a USCIS officer generally lacks the experience and training necessary to sensitively address and correctly evaluate a child's testimony regarding traumatic events. Without appropriate safeguards, further damage could be done to an already vulnerable child and it is questionable whether a USCIS officer will be able to ask such sensitive questions without turning a "non-threatening" environment into a potentially damaging one. Deference must be given to the State court judge's findings, as set forth above, which are made with appropriate protections in place for the child, in addition to the due process protections that State courts provide.

[9] *See* 8 CFR §204.11(d).
[10] 8 CFR §245.6.
[11] 76 Fed. Reg. at 54982.
[12] *Id*.

USCIS Should Clarify the Distinction between a Request for "Initial" Evidence and a Request for "Additional" Evidence for Purposes of the 180-Day Adjudication Clock

The proposed rule provides that if USCIS issues a request for initial evidence, the 180-day adjudication time period starts over from the date of receipt of the required initial evidence.[13] A SIJ petition is considered complete if it includes: (1) a completed Form I-360; (2) proof of age of the juvenile; and (3) a State juvenile court order making the requisite findings.[14] Presumably, an application which does not contain this required initial evidence would be rejected as incomplete. Where the application is accepted for filing, the 180-day clock starts and it should be assumed that all initial evidence was properly presented. Therefore, any legitimate request for documents issued after the receipt of the I-360 petition and supporting evidence must be considered a request for *additional* evidence, rather than a request for *initial* evidence.[15] Instead of stopping and restarting the adjudication clock, the issuance of a request for additional evidence temporarily stops the clock until the requested evidence is received.

Similarly, a distinction must be made between a request for evidence and a request to bring documents to a scheduled interview. The issuance of a request to bring information to an interview should not cause the 180-day clock to stop, and should only be stopped on the date of the interview if the applicant fails to present the requested documents and adjudication is therefore not possible.

USCIS Should Clarify that the 180-Day Clock Will Not be Suspended When a Request for Additional Evidence Relates Only to a Concurrently Filed Form I-485

The supplementary information states that "USCIS interprets the 180-day timeframe to apply to adjudication of the Form I–360 petition for SIJ status only, and not to the Form I–485 application for adjustment of status."[16] USCIS must clarify that the 180-day clock does not apply to the adjudication of an I-485, even when it is filed concurrently with the I-360. Therefore, the 180-day clock should not be stopped when a request for additional evidence relates only to eligibility for adjustment of status. For example, a request for arrest records relates to the petitioner's admissibility. Admissibility issues are implicated in the adjudication of the I-485 and in no way relate to the merits of the I-360. Therefore, such a request should not stop the 180-day clock.

USCIS Must Address the Deficiencies in the SIJ Adjudication Process So That All SIJ Cases Can be Adjudicated within 180 Days

The supplementary information states that "USCIS does not interpret the 180-day timeframe to mean that an unadjudicated petition at the end of the timeframe will be

[13] 76 Fed. Reg. at 54983; 8 CFR §103.2(b)(10)(i).
[14] *See* 8 CFR §204.11(d).
[15] 8 CFR §103.2(a)(7)(i).
[16] 76 Fed. Reg. at 54983.

automatically approved."[17] However, USCIS acknowledges that the "TVPRA 2008 contained a provision for expeditious adjudication of SIJ petitions within 180 days" and that it "intends to adhere to the 180-day benchmark ...."[18] We ask that USCIS take immediate steps to evaluate and address the deficiencies in the I-360 SIJ adjudication process that cause cases to languish beyond the 180-day congressionally mandated time frame, and to develop and release guidance for public comment to ensure that all SIJ cases are adjudicated fairly and quickly.

Conclusion

We believe that the implementation of the above suggestions will facilitate USCIS's goals of facilitating "a nonthreatening interview environment that would promote an open, productive discussion about the SIJ petition."[19] We appreciate the opportunity to comment on this final rule and look forward to a continuing dialogue with USCIS on these important matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[17] *Id.*
[18] *Id.*
[19] 76 Fed. Reg. at 54982.