



*Protecting Immigrant  
Women and Girls  
Fleeing Violence*

November 15, 2019

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U.S. Department of Homeland Security  
Citizenship and Immigration Services  
Office of Policy and Strategy  
Samantha Deshommnes, Chief  
Regulatory Coordination Division

**Re: Comments in Response to Proposed Rule: Special Immigrant Juvenile (SIJ) Petitions, 76 FR 54978; DHS Docket No. USCIS–2009–0004**

Dear Chief Deshommnes:

The Tahirih Justice Center (Tahirih) is pleased to submit the following comments in response to USCIS' Proposed Rule: Special Immigrant Juvenile Petitions, **Docket No. USCIS–2009–0004** published in the Federal Register on October 16, 2019.

**I. Introduction**

Tahirih is a national, nonpartisan policy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence (GBV) over the past twenty-one years. Our clients endure horrific abuses such as human trafficking, domestic violence, rape, sexual assault, child abuse and incest, and other crimes. We provide *pro bono* representation by staff with expertise in immigration and family law, and through a network of outside attorneys that Tahirih trains and mentors. Tahirih addresses clients' needs holistically, through full-time social services staff. In addition to serving clients directly in our various locations throughout the country, Tahirih engages in national public policy advocacy to promote policies and practices that maximize the safety and protection of survivors including children.

In light of our expertise working with petitioners for SIJ classification, we commend USCIS for codifying the protections enshrined in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). However, implementation of the proposed rule in its current form will result in wrongful return of vulnerable children to harm, in violation of the will of Congress. We oppose several provisions in the proposed rule for the reasons outlined below.

**II. Petitioners Should Remain Eligible for SIJ Classification Even if their Predicate State Court Orders Lapse Before Final Adjudication by USCIS**

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Proposed 8 C.F.R. § 204.11(b)(1)(iv) impermissibly mandates an *ultra vires* requirement—that the state court order remain in effect throughout adjudication, unless age prevents the continuation of the order. This language is at odds with the plain language of the Immigration & Nationality Act (INA or the statute). The statute simply requires that a child “has been” declared dependent on or “has been” legally committed to the custody of a US state court, without requiring that the dependency, commitment, or custody continue throughout the petitioning and adjudication processes. The proposed regulatory language should not go further than the statutory language.

The Commentary in Section 3 of the proposed rule further imposes an arbitrary presumption without explanation and in direct contradiction to USCIS’ own policy manual,<sup>i</sup> that state court orders issued on behalf of a petitioner who relocates to a different state are no longer valid upon relocation:

When an SIJ petitioner relocates to another State, the initial juvenile court dependency order will no longer be in effect because the juvenile will no longer be under the initial court’s jurisdiction. The petitioner must therefore obtain a new dependency order.

The premise that a state court order automatically lapses upon relocation is false. Binding federal statutes enacted in almost every State, such as the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) and Interstate Compact on the Placement of Children (ICPC) specifically prescribe a process by which transfer of jurisdiction between states is secured. The process includes obtaining authorization from the State court entering the initial order. Most importantly, the initial State typically *does* retain jurisdiction over the matter and the juvenile. The requirement for SIJ petitioners to obtain a new State court order therefore contravenes the intent of the ICPC and the UCCJEA which specifically address the issue of jurisdiction transfers. Requiring new dependency orders would also impose unnecessary confusion, delay, and inefficiencies on all parties, including the petitioner, service providers, the state court, and USCIS. For some petitioners, requiring a new order will prove to be an insurmountable barrier and will result in avoidable return to horrific abuse.

Requiring petitioners to secure new state court orders upon relocation also creates additional hurdles for those seeking federal long-term foster care through the Unaccompanied Refugee Minor’s (URM) program. The URM program only accepts children up to the age of 18, and often requires relocation to different states. The delays caused by the process of obtaining new state court orders would render certain children ineligible for the URM program who, but for this arbitrary requirement, would have been otherwise eligible.

**Recommendation: 8 C.F.R. § 204.11(b)(1)(iv) Should be Stricken from the Proposed Rule**

**III. The Requirement that a Petitioner Show that she Sought a State Court Order Primarily for Protection and not to Obtain Immigration Status Should be Eliminated**

Under proposed 8 C.F.R. § 204.11(c)(1)(i), petitioners must prove that they sought a state court order primarily for protection from abuse, as opposed to for securing immigration status. The requirement falsely presumes an “either-or” scenario. Often, a state court order is obtained for

multiple, intersecting purposes that include preventing future abuse, securing State law protections and services, and supporting an immigration petition which will ultimately prevent abuse as well. Obtaining protection for a child through a State court order prevents future abuse, neglect and abandonment, regardless of the purpose for which it is sought. Findings related to child protection are best made by State courts that deliberately implement laws and practices to prevent re-traumatization.

Indeed, Congress did not intend to endow USCIS with the authority to reject a State court finding of what is in a child's best interest, simply because, in its estimation, the child failed to demonstrate her primary purpose in seeking the State court order. The "consent" function within the Immigration & Nationality Act's SIJ provisions was designed to close a historical loophole which allowed juveniles to petition without having to prove abuse, abandonment, or neglect. The loophole was being exploited by international students in the US who were applying for adjustment of status without having to establish parental abuse.<sup>ii</sup> The loophole has since been closed in the statute, and regulatory language regarding "consent" is therefore obsolete.

Finally, proposed 8 C.F.R. § 204.11(c)(1)(i) adopts the term "*bona fide*," which implies that USCIS adjudicators should be questioning the child's veracity as to the abuse, abandonment, and/or neglect. Adjudicators may not be attorneys and even if so, are unlikely to be licensed in the specific State with jurisdiction over the petitioner. As such, they are not competent to evaluate the circumstances, merits, legitimacy, or substance of state court proceedings. These proceedings are conducted by judges in accordance with state law and state court rules of procedure. The State court process should suffice to alleviate concerns about fraud or motivations for pursuing relief, given the extensive, specialized expertise of State courts as to family law matters.

**Recommendation: 8 C.F.R. § 204.11(c)(1)(i) Should be Stricken from the Proposed Rule**

**IV. SIJ Petitioners Should Not be Required to Provide Specific Findings of Fact to USCIS Regarding Abuse, Abandonment, or Neglect**

Proposed 8 C.F.R. § 204.11(d)(3)(ii) requires SIJ petitioners to submit further, duplicative proof beyond what is contained in the State court order regarding abuse, abandonment, or neglect. This provision is contrary to Congress' intent in requiring a State court order as part of the petitioning process. The adjudicator should fully defer to the State court order's findings. It is wholly inappropriate for USCIS to re-visit the State court judge's findings, as USCIS adjudicators are not versed nor trained in the specifics of State laws regarding child abuse. USCIS' policy manual itself emphasizes deference to state laws and processes with regard to the validity of the order: "There is nothing in USCIS guidance that should be construed as instructing juvenile courts on how to apply their own state law."<sup>iii</sup> Yet, requiring specific findings of fact does just that.

Further, implementation of this provision would re-traumatize the child, forcing her to unnecessarily recount excruciating details of abuse. This can be particularly damaging for a child survivor of sexual violence. At the State court level, numerous precautions are taken to avoid such re-traumatization, including shielding children from recounting details in an open courtroom during their own hearing.

Finally, the term “other relevant evidence” within this provision is overly broad and open to significant variations in interpretation. USCIS adjudicators should not have unfettered discretion to determine what additional evidence is necessary to establish the basis for a finding that reunification is not viable. This determination is fully vested with the state courts, as it should be.

**Recommendation: Proposed 8 C.F.R. § 204.11(d)(3)(ii) Should Be Stricken from the Proposed Rule**

**V. Reunification with a parent should not be a basis for revocation of SIJ classification**

Proposed 8 C.F.R. § 205.1(a)(3)(iv)(B) provides for automatic revocation of SIJ classification “upon reunification of the beneficiary with one or both parents by virtue of a juvenile court order, where a juvenile court previously deemed reunification with that parent, or both parents, not viable due to abuse, neglect or abandonment.” This language is unclear, unnecessary, and overly burdensome, and is likely to confuse State court judges who might hesitate to make certain findings if they think that they will foreclose future reunification for the petitioner as a result. The statute does not require that reunification never be an option, and the juvenile dependency system is designed to rehabilitate parents and reunite families when possible. This additional legal requirement is contrary to Congressional intent to protect the best interests of children.

Additionally, it is unclear how USCIS would enforce this provision. At a minimum, it would require USCIS to repeatedly inquire as to reunification throughout different stages of a child’s immigration and/or naturalization process. The requirement is overly burdensome both for petitioners and USCIS, and does not address fraud concerns. Such concerns are already addressed by the current statutory mandate that no parent obtain immigration benefits through a child granted SIJ classification and related adjustment of status.

**Recommendation: 8 C.F.R. § 205.1(a)(3)(iv)(B) Should be Stricken from the Proposed Rule**

**VI. The New Requirements the Proposed Rule Imposes on State Courts Are Contrary to the INA**

The proposed rule is inconsistent with governing law in at least two ways. Under the proposed rule, predicate state-court orders must cite “applicable State law” showing both that (i) “it would not be in the juvenile’s best interest to be returned to the country of nationality or last habitual residence,” and (ii) “reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under State law.” 76 Fed. Reg. at 54,985. The plain text of the INA cannot support either requirement.

As to the feasibility of return, Congress has required only a determination “in administrative or judicial proceedings” that return would not be in the juvenile’s “best interest.” 8 U.S.C. § 1101(a)(27)(J)(ii). The statute makes no mention of state law in connection with this requirement. That silence is entirely sensible, given that questions of removability typically implicate federal law rather than state law.

The INA also precludes any requirement that a finding of abuse, abandonment, or neglect be tied to a specific state law. The statutory requirement is only that “reunification with 1 or both of the [juvenile’s] parents” not be “viable due to abuse, neglect, abandonment, or a similar basis found under State law.” 8 U.S.C. § 1101(a)(27)(J)(i). To be sure, this provision includes the phrase “found under State law.” In context, however, that phrase modifies only “a similar basis.” *E.g., Jama v. ICE*, 543 U.S. 335, 343 (2005) (“a limiting clause or phrase \* \* \* should ordinarily be read as modifying only the noun or phrase that it immediately follows”) (internal quotation marks omitted). The proposed rule itself implicitly concedes as much. The proposed rule notes that, under § 1101(a)(27)(J)(i), “the petitioner must establish that” an unlisted “State law basis is similar to a finding of abuse, neglect, or abandonment.” 76 Fed. Reg. at 54,981. Further, proposed 8 C.F.R. § 204.11(b)(1)(v) does not track the language of the INA. Instead, it adds a second reference to state law, to the effect that there must be a determination “under applicable State law[ ] that reunification \* \* \* is not viable.” 76 Fed. Reg. at 54,985. The reference to “state law” in § 1101(a)(27)(J)(i) therefore requires, at most, a citation to state law where it provides some basis other than abuse, neglect, or abandonment for finding reunification not viable. And there is no statutory basis for the proposed rule’s further requirement that a state law be cited in every case, no matter the basis for the finding.

#### **VII. The Proposed Rule Should Clarify that Petitioners Are Permitted Access to Counsel At all Times**

The Commentary at 76 Fed. Reg. 54982 states that USCIS “maintains discretion to interview a child separately when necessary.” The commentary does not make explicit, however, whether a child is still permitted to have counsel present if interviewed “separately.” Children should always be granted access to counsel during interviews with USCIS.

#### **Recommendation: The Commentary in the Proposed Rule Should Explicitly Say that Children are Always Permitted to Have Counsel Present During All USCIS Interviews**

#### **VIII. Conclusion**

We urge USCIS to incorporate our specific recommendations above into the proposed rule to maximize vulnerable children’s access to the critical safeguards that Congress intended for them. We appreciate this opportunity to provide feedback and we look forward to your detailed response. Please contact me at [irenas@tahirih.org](mailto:irenas@tahirih.org) or 571-282-6180 for additional information.

Respectfully,



Irena Sullivan

Senior Immigration Policy Counsel

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<sup>i</sup> <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2>, see D.4

<sup>ii</sup> Attorney General Reviewing Potential Abuse of Immigration Law: Hearing Before a Subcomm. of the Comm. on Appropriations, 105<sup>th</sup> Cong. 1 (1998).

<sup>iii</sup> <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-3>