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# PRACTICE ALERT

## SIJS POLICY UPDATES AND PROPOSED REGULATIONS<sup>1</sup>

U.S. Citizenship and Immigration Services (USCIS) adopted three Administrative Appeals Office (AAO) decisions on October 11, 2019 “clarifying” the requirements for Special Immigrant Juvenile Status (SIJS) petitions. The decisions establish policy guidance that applies to all USCIS adjudications of pending and future SIJS petitions.<sup>2</sup> [USCIS Acting Director Ken Cuccinelli stated](#) that the adopted decisions’ purpose was to “better protect deserving juvenile immigrants while also promoting integrity and upholding our laws,” and added that “Congress needs to address loopholes in the SIJ program. . . .”

At the same time that USCIS adopted the AAO decisions, the agency also announced that it was reopening the comment period for [proposed SIJS regulations that the Department of Homeland Security \(DHS\) originally published in 2011](#). DHS never finalized the regulations after the original comment period closed in 2011. The agency is again accepting comments regarding the proposed SIJS regulations for a period of 30 days, **ending on November 15, 2019**. In explaining the reopened comment period, the [USCIS website](#) asserts: “In recent years, the SIJ classification has increasingly been sought by juvenile and young adult immigrants solely for the purposes of obtaining lawful immigration status and not due to abuse, neglect or abandonment by their parents.” It states that the rulemaking is intended “to realign the SIJ classification with congressional intent, implement statutorily mandated changes and address shortcomings in the regulations that threaten the integrity of the SIJ program.”

These most recent policy changes and the forthcoming final regulations are no doubt intended to further restrict immigrant children’s access to SIJS. At the same time, some of the adopted policy changes are things that we have already seen USCIS implementing for years in individual case adjudications. This practice alert highlights the key take-aways from the three AAO decisions and the most important elements of the proposed regulations for advocates to challenge through comments, and contains an Appendix with case summaries of the AAO decisions.

<sup>1</sup> For questions about this practice alert, please contact Rachel Prandini, Special Projects Attorney at the Immigrant Legal Resource Center (ILRC), at [rprandini@ilrc.org](mailto:rprandini@ilrc.org) or Rebecca Scholtz, Defending Vulnerable Populations Program Senior Attorney, Catholic Legal Immigration Network, Inc. (CLINIC), at [rscholtz@cliniclegal.org](mailto:rscholtz@cliniclegal.org). The authors wish to thank the following advocates for their helpful review and input on this practice alert: Ashley Turner Harrington, Children’s Program Managing Attorney, Rocky Mountain Immigrant Advocacy Network; Kristen Jackson, Senior Staff Attorney, Public Counsel; Beth A.T. Krause, Supervising Attorney, The Immigration Law Unit of the Legal Aid Society of New York; and Michelle Mendez, Director, Defending Vulnerable Populations Program, CLINIC. Thank you also to Elizabeth Badger, Senior Staff Attorney, PAIR Project, for sharing her expertise on Massachusetts law.

<sup>2</sup> Pursuant to the AAO Practice Manual, USCIS may “adopt” an AAO non-precedent decision “to provide policy guidance to USCIS employees in making determinations on applications and petitions for immigration benefits.” AAO Practice Manual ch. 3.15(b) (last reviewed/updated Mar. 11, 2019), <https://www.uscis.gov/tools/practice-manual/chapter-3-appeals>. Adopted decisions differ from precedential decisions, which are designated as precedent by the secretary of DHS with the attorney general’s approval, must be followed by all DHS employees, and “announce new legal interpretations or policy, or reinforce existing law or policy by demonstrating its application to the facts of a specific case.” *Id.* ch. 3.15(c); see *id.* 3.15(b) (“Unlike precedent decisions, adopted decisions do not establish policy that must be followed by personnel outside of USCIS.”).

## KEY TAKE-AWAYS FROM THE ADOPTED AAO DECISIONS ON SIJS REQUIREMENTS

The three AAO decisions adopt as policy certain eligibility requirements that the AAO had already been imposing. Two decisions—*A-O-C-* and *E-A-L-O-*—involved orders issued by a Massachusetts court about a child over the age of 18.<sup>3</sup> The third decision—*D-Y-S-C-*—involved a Texas dependency proceeding for a child under the age of 18. The list below highlights some of the key points from the three decisions. For more information about each of the three decisions, please see the case summaries in the Appendix.

- Many of the “requirements” specified in the AAO decisions are not found in the statute or regulations and could be subject to challenge, including through litigation. However, in many cases, it may be in the client’s interest to follow these requirements from the outset to ensure the best chance of obtaining USCIS approval of the SIJS petition.
- The SIJS order should contain all three findings—dependency or custody, parental reunification, and best interest—explicitly. In the SIJS order itself, or through other evidence, petitioners should provide evidence of the factual basis for each of the three required SIJS findings.
- The SIJS order must cite state law for each of the three SIJS findings—dependency or custody, parental reunification, and best interest.
- USCIS may recognize *nunc pro tunc* orders that remedy initial deficiencies if they are issued pursuant to the particular state’s *nunc pro tunc* requirements.<sup>4</sup> Thus, orders issued *nunc pro tunc* should cite to the state law or procedure that permits such orders.
- Depending on the circumstances, USCIS may consider juvenile court orders entered after the SIJS petition is filed, in addition to the initial order submitted with the SIJS petition.<sup>5</sup>
- USCIS may recognize orders issued after age 18 if the state court has jurisdiction under state law to make judicial determinations about the child’s dependency and/or custody and care as a juvenile.<sup>6</sup> USCIS will rely on state law definitions of the term “juvenile” or its equivalent, so it is important that state law definitions of “juvenile” or its equivalent include youth ages 18 to 20 who are seeking state court protection and SIJS findings.
- USCIS is no longer requiring that the juvenile court had jurisdiction to place the child in the custody of the unfit parent as part of the parental reunification requirement.<sup>7</sup> This should be helpful in cases where the state court issued the SIJS findings after the child turned 18 and may lack authority to order return to a parent.
- The AAO decisions direct that in exercising consent, USCIS looks to the “nature and purpose” of the state court proceedings and requires that the court have granted relief from parental

<sup>3</sup> As noted in the case summaries in the Appendix, *A-O-C-* resolved in favor of the petitioner, while *E-A-L-O-* did not. The differing fates of the *A-O-C-* and *E-A-L-O-* decisions appear to come down to a difference in the contents of the state court order, with the order in *E-A-L-O-* lacking the dependency or custody finding. Note that in June of 2019, Massachusetts advocates filed a lawsuit challenging USCIS’s refusal to recognize Massachusetts orders issued to children over 18 but under 21 years of age. That litigation remains pending. See Complaint, *Doe v. Cowan*, No. 19-11269 (D. Mass. filed June 7, 2019).

<sup>4</sup> See *Matter of A-O-C-*, Adopted Decision 2019-03, at 5 n.3 & accompanying text (AAO Oct. 11, 2019).

<sup>5</sup> See *Matter of D-Y-S-C-*, Adopted Decision 2019-02, at 5 (AAO Oct. 11, 2019) (“The subsequent 2016 Juvenile Court Order, Final SAPCR, and the 2017 Amended Order all show that the juvenile court retained the Petitioner in DFPS custody pursuant to the child protection provisions of Chapter 262 of the Texas Family Code and then legally committed her to the permanent managing conservatorship of DFPS under section 153.371 of the Texas Family Code.”).

<sup>6</sup> See *Matter of A-O-C-*, Adopted Decision 2019-03, at 4 n.2 & accompanying text (AAO Oct. 11, 2019) (citing INA § 101(a)(27)(J)(i) and *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019)). This interpretation of “juvenile court” differs from the regulatory definition found at 8 CFR § 204.11(a), because it does not require that the court have authority to adjudicate custody if it has authority to adjudicate dependency. See 365 F. Supp. 3d at 378 (regulatory definition of juvenile court “is contrary to the plain language of the SIJ statute”).

<sup>7</sup> *Matter of D-Y-S-C-*, Adopted Decision 2019-02, at 6 n.4 (AAO Oct. 11, 2019) (citing *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 382 (S.D.N.Y. 2019); *J.L. v. Cissna*, 341 F. Supp. 3d 1048 (N.D. Cal. 2018); *Moreno-Galvez v. Cissna*, 387 F. Supp. 3d 1208 (W.D. Wash. July 17, 2019); *W.A.O. v. Cissna*, No. 19-11696, 2019 WL 3549898 (D.N.J. July 3, 2019)).

maltreatment, rather than merely SIJS findings. However, this “relief” can look different in different states and types of state court proceedings. For example, in *A-O-C-*, the AAO found that the court granted relief from parental maltreatment where the order “explained that its findings were made due to the neglect and abandonment of the Petitioner’s father, to provide for the Petitioner’s safety and well-being, to establish his residence for the purposes of health care eligibility, and to protect the Petitioner from future harm, in accordance with Massachusetts law.”<sup>8</sup> Under this framework, it is important that the SIJS order clearly lay out the state law guiding the court’s decision in declaring a child dependent on the court or placing them in the custody of an individual or agency, as well as in making the reunification and best interest findings, and highlight how the state court proceedings protect the petitioner from parental mistreatment.

## THE PROPOSED REGULATIONS – COMMENTS DUE NOVEMBER 15, 2019

USCIS has reopened the comment period for the proposed regulations initially issued in 2011 for 30 days. USCIS will accept comments through **November 15, 2019**. The current regulations, primarily found at 8 CFR § 204.11, are inconsistent with the statutory provisions governing SIJS as they have not been amended following significant changes made in 2008 by the Trafficking Victims Protection Reauthorization Act. CLINIC and ILRC urge advocates to submit comments to the proposed regulations.<sup>9</sup> For sample comments, see the comments originally submitted by advocates in 2011, including by ILRC and CLINIC (as a signer of the Immigrant Children Lawyers Network’s comment), [here](#). The Federal Register announcement states that “DHS will consider comments received during the entire public comment period in its development of a final rule.”<sup>10</sup> Accordingly, organizations that submitted comments in 2011 may wish to submit a short comment letter affirming or striking their original comments and including any additional points.

Below we outline some of the potentially problematic elements of the proposed regulations that we encourage advocates to raise in their comments:

- **“Juvenile Court” Definition:** The proposed regulation’s definition of “juvenile court” is not consistent with the current statute. The regulation defines “juvenile court” as “any court located in the United States having jurisdiction to make judicial determinations about the custody and care of juveniles.” Proposed 8 CFR § 204.11(a). As the U.S. District Court for the Southern District of New York concluded in *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 377 (S.D.N.Y. 2019), “The agency’s requirement — that to be a juvenile court the state court must have jurisdiction to make custody determinations — is inconsistent with the SIJ statute’s plain language, which requires that a juvenile be declared dependent on a juvenile court or placed in a qualifying custody arrangement.” In other words, a court can be a juvenile court even if it only has jurisdiction to make dependency determinations but not order custody. See also *Matter of A-O-C-*, Adopted Decision 2019-03, at 4 n.2 (AAO Oct. 11, 2019) (noting that a “juvenile court” is “a court located in the United States having jurisdiction under state law to make judicial determinations about the dependency *and/or* custody and care of juveniles” (emphasis added)).
- **Continuing jurisdiction:** Proposed 8 CFR § 204.11(b)(iv) requires that the petitioner remain dependent on the juvenile court at the time of filing and through the adjudication, unless the petitioner ages out. There is no such continuing jurisdiction requirement in the statute. See INA

<sup>8</sup> *Matter of A-O-C-*, Adopted Decision 2019-03, at 8 (AAO Oct. 11, 2019).

<sup>9</sup> In 2011, DHS received only 58 comments to the proposed regulations, so it is crucial that advocates continue to submit comments.

<sup>10</sup> Special Immigrant Juvenile Petitions, 82 Fed. Reg. 55250 (Oct. 16, 2019).

§ 101(a)(27)(J)(i) (defining a special immigrant juvenile as someone “who *has been* declared dependent . . .” (emphasis added)).

- **“Similar Basis”:** The commentary to the proposed regulations states that in order to establish SIJS eligibility based on “similar basis,” the petitioner has the burden of proof to establish that the basis is similar, *i.e.*, the “nature and elements of the State law must be similar to the nature and elements of abuse, abandonment, or neglect.” 76 Fed. Reg. 54981. The commentary lists a variety of types of evidence that a petitioner may submit to make this showing, including state laws and evidence about the facts. This burdensome inquiry ignores the state court’s expertise in determining whether a particular state law ground is a “similar basis” to abuse, neglect, or abandonment.
- **Consent function:** The proposed regulation and the commentary to the regulation provide for the impermissible review and re-adjudication of state court findings by USCIS, requiring adjudicators to determine “whether the alien has established, based on the evidence of record, 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.” Proposed 8 CFR § 204.11(c)(1)(i). This definition of the consent function is *ultra vires* and based on legislative history from a prior version of the statute. See 76 Fed. Reg. 54981 (citing legislative history from 1997). Further, the proposed regulation imposes a discretionary element to the SIJS eligibility requirements that is not present in the statute, see proposed 8 CFR § 204.11(c)(1)(i) & (ii), and the commentary suggests that USCIS may request or obtain sensitive juvenile court and other records. 76 Fed. Reg. 54981-82. This invites impermissible re-examination of the evidence of abuse, neglect, or abandonment, does not honor state court expertise, and ignores that production of these documents may violate state confidentiality provisions.
- **Interview Procedures:** The proposed regulation states that USCIS “may require an interview as a matter of discretion.” Proposed 8 CFR § 204.11(e). The commentary indicates that USCIS in its discretion can interview a child separately from the child’s chosen trusted adult or legal representative and has “discretion” to interview a child about the facts regarding the abuse, neglect, or abandonment. 76 Fed. Reg. 54982. USCIS should recognize that an interview is unnecessary in most SIJS cases and that it is never appropriate to question a child about the details of abuse, neglect, or abandonment, or to question the child apart from their legal representative.
- **180-Day Adjudication Deadline:** The commentary to the proposed regulations refers to the 180-day statutorily mandated adjudication deadline as a “benchmark” to which USCIS “intends to adhere,” 76 Fed. Reg. 54983, and the proposed regulations permit USCIS to restart the 180-day clock in certain circumstances and pause it in other circumstances. Proposed 8 CFR § 204.11(h). The statute contains no exceptions to the 180-day mandate. See 8 U.S.C. § 1232(d)(2) (requiring that an SIJS petition “shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed”).
- **Grounds of inadmissibility:** The proposed regulations state that certain inadmissibility grounds, such as INA § 212(a)(2)(A), “may not be waived.” Proposed 8 CFR § 245.1(e)(3). While these provisions cannot be waived under the generous waiver standard for SIJS-based adjustment applicants found at INA § 245(h)(2)(B), they may be waived under other provisions of the INA if the child otherwise qualifies, such as INA § 212(h).

## APPENDIX

### Matter of A-O-C-, Adopted Decision 2019-03 (AAO Oct. 11, 2019)

#### Procedural Summary

- The petitioner filed an SIJS petition after obtaining an order from a Massachusetts court when he was 20 years old that made the three required SIJS findings but did not cite state law.<sup>11</sup> The petitioner later obtained and submitted two amended *nunc pro tunc* orders that did cite state law.
- USCIS denied the SIJS petition because the petitioner was over 18 years old when the Massachusetts court issued the order, and thus, in the agency's view, the court did not have jurisdiction over the petitioner as a juvenile, citing a Massachusetts law defining "child" as under 18 years old.
- The petitioner appealed to the AAO. While the appeal was pending, the Massachusetts legislature passed a law that applies retroactively in certain cases, including petitioner's. That law, Massachusetts General Laws chapter 119, section 39M (hereinafter Section 39M), relates to SIJS findings. The AAO sustained the appeal, granting the petition for SIJS.

#### AAO's Decision

1. The AAO concluded that the Massachusetts court acted as a "juvenile court," because the court exercised its jurisdiction over the petitioner as a "child" as that term is defined under the new Massachusetts law, which defines "child" as an "unmarried person under the age of 21," and which applied retroactively to the petitioner's case. USCIS also noted that the state statute deemed the court "competent to make decisions concerning the protection, well-being, care and custody of a child."<sup>12</sup> The decision recognized the validity of the two amended orders issued after the petitioner had turned 21, because they were issued *nunc pro tunc* to the date of the initial order.
2. The AAO concluded that the Massachusetts order contained a qualifying dependency declaration where it was based on a specific state dependency law which defined "dependent on the court" as "subject to the jurisdiction of a court competent to make decisions concerning the protection, well-being, care and custody of a child, for findings, orders or referrals to support the health, safety and welfare of a child or to remedy the effects on a child of abuse, neglect, abandonment or similar circumstances . . . ." Section 39M(a).
3. The AAO found that the parental reunification and best interest determinations were adequate because the amended order cited state law definitions and provided factual details supporting the two findings.
4. The AAO consented to the SIJS request. The AAO articulated the consent standard as requiring the petitioner to show that the SIJS findings were "sought primarily to gain relief from parental abuse, neglect, abandonment, or a similar basis under state law, and not primarily to obtain an immigration benefit."<sup>13</sup> According to the AAO, this requires an examination into the "nature and purpose of the juvenile court proceedings" to determine if the findings "were sought in proceedings granting relief from parental maltreatment."<sup>14</sup> Here, the juvenile

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<sup>11</sup> The petitioner in *A-O-C-* filed his SIJS petition with USCIS in January 2017, just months after USCIS released the Policy Manual chapter on SIJS, and during the time that practitioners were still becoming familiar with USCIS's requirement to include citations to state law. The petitioners in *A-O-C-* and *D-Y-S-C-* each obtained their initial state court orders in 2016.

<sup>12</sup> *Matter of A-O-C-*, Adopted Decision 2019-03, at 5 (AAO Oct. 11, 2019).

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 8.

court “explained that its findings were made due to the neglect and abandonment of the Petitioner’s father, to provide for the Petitioner’s safety and well-being, to establish his residence for the purposes of health care eligibility, and to protect the Petitioner from future harm, in accordance with Massachusetts law.”<sup>15</sup>

## **Matter of E-A-L-O-, Adopted Decision 2019-04 (AAO Oct. 11, 2019)**

### **Procedural Summary**

- The petitioner filed an SIJS petition after obtaining an order from a Massachusetts court when he was 20 years old that made a best interest and parental reunification finding but did not make an explicit dependency or custody finding.
- USCIS denied the SIJS petition because the petitioner was over 18 years old (and thus, in the agency’s view, not a juvenile under Massachusetts law) when the court issued the order.
- The petitioner appealed to the AAO. Despite finding that Section 39M applied retroactively to the petitioner’s case, the AAO dismissed the appeal, upholding USCIS’s denial of the SIJS petition.

### **AAO’s Decision**

1. The AAO concluded that the Massachusetts court acted as a “juvenile court,” applying the same reasoning as in *A-O-C-*, above.
2. The AAO determined that the order lacked a dependency order or custodial placement, because it did not contain any finding regarding dependency or custody.
3. The AAO found that the petitioner did not establish the state law basis for the court’s parental reunification determination. The order made a finding of fact that the petitioner’s reunification with his mother was not viable due to abandonment but did not cite state law. The underlying motion cited the Immigration and Nationality Act but did not cite any Massachusetts law on abandonment.
4. The AAO concluded that USCIS’s consent was not warranted because USCIS requires that the state court proceedings must grant relief from parental maltreatment and cannot merely issue an order with “factual findings to enable an individual to file a petition for SIJ classification.” Without a showing that the court granted relief from parental maltreatment, “a juvenile court dependency declaration alone is not sufficient to warrant USCIS’s consent to SIJ classification”<sup>16</sup> according to the AAO.<sup>17</sup> Here, the court did not declare the petitioner dependent on the court and issue orders or referrals to support his health, safety, and welfare, nor did the court provide any other protective or remedial relief under Massachusetts law. The only relief the petitioner requested from the court was “declaratory relief” in the form of SIJS findings. According to the AAO, other evidence in the record also showed that the petitioner’s “primary motive” was to obtain an immigration benefit, as the petition noted the petitioner’s potential eligibility for SIJS. The AAO noted that some immigration-related motive is acceptable in seeking a juvenile court order, but the state court proceedings must grant some relief or remedy from parental maltreatment under state law rather than just factual findings for SIJS purposes.

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<sup>15</sup> *Id.*

<sup>16</sup> *Matter of E-A-L-O-*, Adopted Decision 2019-04, at 7 (AAO Oct. 11, 2019).

<sup>17</sup> *Id.*

## ***Matter of D-Y-S-C-, Adopted Decision 2019-02 (AAO Oct. 11, 2019)***

### **Procedural Summary**

- The petitioner filed an SIJS petition after obtaining an order from a Texas dependency court when she was under 18 years old with findings that she had been legally committed to or placed under the custody of the Department of Family and Protective Services (DFPS), that reunification was not viable with one or both parents due to abuse, neglect, abandonment, or a similar state law basis, and that it was not in her best interest to return to her country of origin. The order did not specify which parent she could not reunify with, or upon what basis reunification was not viable.
- USCIS issued a Notice of Intent to Deny (NOID) and then denied the petition after the petitioner did not timely respond to the NOID. The NOID stated that the SIJS order did not demonstrate which parent reunification was not viable with or the basis, did not establish dependency or custody, and did not include the factual basis for the findings. The petitioner then filed an untimely motion to reopen with additional evidence, including the original petition for protection filed by the state and two orders issued by the juvenile court subsequent to the petitioner filing for SIJS with USCIS. USCIS dismissed the motion because it was untimely but also stated that the additional juvenile court orders did not demonstrate eligibility because they were issued after the petitioner filed her SIJS petition.
- The petitioner appealed to the AAO. The AAO sustained the appeal, granting the petition for SIJS.

### **AAO's Decision**

1. The AAO found that the totality of the evidence presented established both a qualifying dependency declaration and custodial placement, where the order stated that DFPS had been appointed managing conservator of the petitioner under the state child protection statute.
2. The AAO also found that the evidence presented demonstrated that the court determined that reunification was not viable with the father due to abuse, and with the mother due to neglect and abandonment, under Texas law. The AAO considered the juvenile court orders in the aggregate (including the orders obtained after the petitioner filed for SIJS) and found that during the child welfare proceedings, the Texas court repeatedly determined that the petitioner could not reunify with either parent.
3. The AAO found that USCIS consent was warranted because the evidence demonstrated that the court exercised jurisdiction over the petitioner with the purpose of protecting her from abuse, neglect, and abandonment and implementing a permanency plan. In applying the consent function, the AAO stated that the "nature and purpose of the juvenile court proceedings"<sup>18</sup> is central to whether USCIS's consent is warranted. The AAO explained that USCIS must consider whether the SIJS findings were sought in proceedings that granted "relief from parental abuse, neglect, abandonment, or a similar basis under state law, beyond an order enabling an individual to file an SIJ petition with USCIS."<sup>19</sup> The AAO also held that USCIS should have consented because of the reasonable factual basis that the petitioner provided for each of the state court's findings.

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<sup>18</sup> *Matter of D-Y-S-C-, Adopted Decision 2019-02*, at 7 (AAO Oct. 11, 2019).

<sup>19</sup> *Id.*