

# CONSENT IS NOT DISCRETION: THE EVOLUTION OF SIJS AND THE CONSENT FUNCTION

AMY JOSEPH\*, AMY PONT\*\*, & CRISTINA ROMERO\*\*\*

## TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	267
II.	DISCRETION AND CONSENT: TWO DISTINCT CONCEPTS . . . . .	270
	A. <i>Discretion</i> . . . . .	271
	B. <i>Consent</i> . . . . .	271
	C. <i>Application of These Concepts to Immigration Law</i> . . . . .	272
III.	ORIGINS OF SIJS: STEADY EXPANSION OF PROTECTIONS FOR VULNERABLE YOUTH . . . . .	273
	A. <i>Pre-1990: Congress Created SIJS to Provide a Path to Permanent Residence for Undocumented Minors Left out of the Immigration Reform and Control Act of 1986</i> . . . . .	274
	1. Few Options Existed for Undocumented Young People to Obtain Legal Immigration Status Before SIJS was Created . . . . .	274
	2. The Passage of the 1990 Immigration Act . . . . .	274
	3. How SIJS Functioned in the Years Immediately After the 1990 Immigration Act . . . . .	276

---

\* Amy Joseph is a third-year law student at New York University. She is very thankful to all of her clients, students, professors, and colleagues (especially those at The Door) who never cease to inspire her. With her co-authors, she would like to thank Luis Bautista, Allison Wilkinson, Michael Williams, Cynthia Lee, Kim Colón and the editors of the Georgetown Immigration Law Journal for their crucial insights and careful edits. She is also very grateful to Professors Deborah Malamud and Marty Guggenheim, who encouraged her to start researching in the first place, and to her parents, who always have faith, who are her favorite immigrants of all.

\*\* Amy Pont is a staff attorney at The Legal Aid Society in New York City, New York, where she works to advocate for the rights of immigrant communities. She would like to thank all of the immigrants who paved the way and all of the advocates in the fight for immigrants' rights. Finally, she would like to thank her family and friends for their enduring support.

\*\*\* Cristina Romero has represented immigrant youth in New York City since 2009 at The Legal Aid Society. She would like to thank everyone who works with immigrant youth, and immigrants generally. © 2020, Amy Joseph, Amy Pont, and Cristina Romero.

B.	<i>1991: The INS Issued an Interim Rule Asking Congress to Correct its Unintentional Restrictions to SIJS Benefits and Proposing Guidance for SIJS Applicants . . . . .</i>	276
1.	INS Concerns about the Inadvertent Failure of Congress to Address Barriers to Adjustment. . . . .	276
2.	The INS Interpreted the SIJS Statutory Provisions to Provide Practical Advice . . . . .	277
C.	<i>1991: Amendments Expanded SIJS Eligibility and Eliminated Many Excludability Grounds Preventing SIJS-Eligible Young People From Obtaining Lawful Permanent Residence . . . . .</i>	278
D.	<i>1993: The INS Issued its First and Only Final Rule Implementing the SIJS Statute . . . . .</i>	279
1.	The INS Explained that SIJS Eligibility Included Juveniles Who Exited the Foster Care System Through Adoption or Guardianship Proceedings and No Longer Needed the Family Court's Protection . . . . .	279
2.	The INS Clarified the Best Interest Determination in Line With Congressional Intent . . . . .	280
a.	Responding to the Concern that the Best Interest Determination Would be Made by Immigration Authorities, the INS Reserved this Determination for Juvenile Courts or Proceedings Recognized by Them . . . . .	280
b.	Responding to the Concern that Juveniles Would Migrate to the US to Apply for SIJS, the INS Responded that this Concern was Already Addressed in the SIJS Statute and Refused to Take on the Extra Role of Probing Applicants' Motives . . . . .	281
c.	The INS Acknowledged that Requiring Four Separate Documents to Prove SIJS Eligibility was Overly Burdensome and Clarified Which Evidence was Required . . . . .	282
d.	The INS' Decisions in the 1993 Rule are Instructive in the Context of Our Current Understanding of the USCIS Consent Function . . . . .	282
E.	<i>1994: Technical Corrections Further Expanded SIJS Eligibility . . . . .</i>	283
IV.	TOUGH ON CRIME ERA COINCIDES WITH CONSTRICTION OF SIJS ELIGIBILITY . . . . .	284

- A. *1995-1997: In the Two Years Before the Passage of the 1998 Appropriations Act, the INS Created Specific Consent and Informed the Public Through Letters from Their General Counsel . . . . .* 284
- B. *1998: Passed on the Heels of the 1996 Immigration Laws, the 1998 Appropriations Act Constitutes the Sole Instance When Congress Constricted Access to SIJS . . . . .* 285
- C. *1998-1999: In the Immediate Years After the 1998 Appropriations Act, the INS Issued Two Memoranda that Dramatically Expanded Their Authority . . . . .* 287
  - 1. *The INS Memoranda Incorporated the Abuse, Abandonment, and Neglect Language of the 1998 Appropriations Act . . . . .* 287
  - 2. *The INS Memoranda Clarified its Interpretation of the 1998 Appropriation Act’s Abuse, Abandonment, and Neglect and Consent Language . . . . .* 288
  - 3. *The INS Memoranda Asserted that More Applicants Would Require Specific Consent from the INS but Failed to Detail How They Could Obtain This Consent . . . . .* 288
  - 4. *The INS Memoranda Forced Applicants to Reveal Sensitive Information About Themselves, Their Parents, and Their Close Family Members . . . . .* 289
- D. *Late 1990s and Early 2000s: How SIJS Consent was Exercised in the Aftermath of the 1998 and 1999 Memoranda . . . . .* 290
  - 1. *Express Consent . . . . .* 290
  - 2. *Specific Consent . . . . .* 291
    - a. *Youth Denied Release from INS Custody Were Obligated to Obtain Specific Consent to Apply for SIJS . . . . .* 292
    - b. *Lack of Clarity About How to Obtain Specific Consent . . . . .* 293
    - c. *The Aftermath of Denials . . . . .* 294
    - d. *Consequences of the Specific Consent Regime . . . . .* 294
- E. *2002: The Homeland Security Act Dissolved the INS, and Within the Newly-Created Department of Homeland Security, USCIS Took Charge of Administering Immigration Benefits . . . . .* 295
- F. *2004: USCIS Memorandum Reined in Many of the Excesses of the 1998 and 1999 INS Memoranda, But Also Began the Transformation of Consent to Discretion . . . . .* 296

1.	The 2004 USCIS Memorandum Made Several Clarifications Lessening the Burden on SIJS Applicants . . . . .	296
2.	The 2004 Memorandum Also Made Changes that Restricted Access to SIJS . . . . .	297
V.	A FORK IN THE ROAD: CONGRESS PROTECTS AND USCIS PUNISHES . . . . .	299
A.	2005: Congress Included a Protection for SIJS Applicants in the Violence Against Women Act (VAWA) . . . . .	299
B.	January 2008: USCIS Specific Consent Function was Circumscribed by the California District Court in Perez-Olano . . . . .	299
C.	December 2008: The TVPRA Expanded Access to SIJS and Constricted the Role of USCIS . . . . .	300
1.	The 2008 TVPRA's Alteration of SIJS Eligibility Requirements Permitted More Young People to Apply . . . . .	301
2.	The 2008 TVPRA Restricted USCIS' Role in SIJS Adjudications . . . . .	301
D.	Post 2008: Practical Changes to Specific Consent . . . . .	303
E.	2009: USCIS Memorandum Inadequately Acknowledged the Changes Made by the 2008 TVPRA to SIJS and Exposed the Logical Fallacy of Equating Consent With a Primary Purpose Evaluation . . . . .	304
F.	2009: The Interim Rule Did Nothing to Align USCIS Practice with the 2008 TVPRA . . . . .	306
G.	June and July 2011: The USCIS Ombudsman Expressed Concerns about De Novo Review of Dependency Orders, and in Response, USCIS Asserted That Consent is a Discretionary Determination . . . . .	307
H.	September 2011: Proposed Rule—Never Enacted But Reopened for Comments in 2019—Revealed that USCIS Intended to Exercise not Consent, but Discretion . . . . .	308
1.	The Proposed Rule's Description of the Consent Function Revealed USCIS' Adherence to its Pre-TVPRA Conception of Consent . . . . .	309
2.	After Failing to Align its Consent Function with the 2008 TVPRA, USCIS Attempted to Convert its Authority from Consent to Discretion in the 2011 Proposed Rule . . . . .	310
a.	The 2011 Proposed Rule Contained Many References to Discretion . . . . .	310

b. This Shift to Discretion was Further Manifest in Excessive Evidentiary Requirements . . . . . 311

I. 2015: Ombudsman Report Pointed out Further Problems with SIJS Adjudications . . . . . 313

1. USCIS Policy was Out of Step with Controlling Statutory Language . . . . . 313

2. USCIS was Improperly Conducting *De Novo* Review of Dependency Orders . . . . . 313

3. The USCIS Director’s Response Evinced No Intention to Update USCIS Policies . . . . . 314

J. 2016: USCIS Policy Manual Update Partially Updated SIJS Adjudication Policies . . . . . 315

K. March 2019: Zabaleta Confirmed that USCIS was Overreaching in its Use of the Consent Function . . . . . 316

L. October 2019: USCIS Reopened the Comment Period for the 2011 Proposed Rule and Adopted Three AAO Decisions . . . . . 317

M. November 2019: USCIS Again Updated the USCIS Policy Manual Portions Pertaining to SIJS, Eschewing Notice-and-Comment Rulemaking Procedures . . . . . 318

VI. CONSENT, DEFERENCE PLUS, AND FRAUD . . . . . 319

VII. CONCLUSION . . . . . 321

I. INTRODUCTION

Special Immigrant Juvenile Status (SIJS) is a form of immigration relief for undocumented youth who cannot reunify with one or both of their parents due to abuse, abandonment, neglect, or a similar basis under state law and for whom it is not in their best interest to return to their home country.<sup>1</sup> In order

---

1. 8 U.S.C. § 1101(a)(27)(J) (2019) (defining a special immigrant juvenile as “(J) an immigrant who is present in the United States-(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence; and (iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that- (I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and (II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.”).

to qualify for SIJS, an unmarried young person under the age of twenty-one must have been the subject of a juvenile court proceeding in which the court issued the aforementioned findings in conjunction with a dependency, custody, or commitment order.<sup>2</sup> These orders support a young person's "permanency," or permanent safety, just as adoption and foster care proceedings support those goals. Once a young person receives the predicate juvenile court order(s), they can then file a petition for SIJS with United States Citizenship and Immigration Services (USCIS) and, if approved, may become eligible for lawful permanent residence status.

SIJS has not been the subject of extensive legislation. The major markers in its congressional history are its inception in 1990,<sup>3</sup> its constriction in 1998,<sup>4</sup> and its expansion in 2008.<sup>5</sup> The agencies responsible for administering this benefit—first, the now legacy Immigration and Naturalization Service (INS) and later USCIS<sup>6</sup>—have rarely promulgated rules that substantively changed eligibility for SIJS. The major administrative changes to SIJS were effectuated through a 1991 Interim Rule<sup>7</sup> and a 1993 Final Rule.<sup>8</sup> USCIS proposed a rule in 2011<sup>9</sup> and took no action on it for eight years before reopening it for comments in October of 2019.<sup>10</sup>

Despite this seemingly stable history, SIJS has undergone dramatic changes in its twenty-nine years of existence. The most significant changes affected how the INS and later USCIS have examined the predicate juvenile court orders that form the basis of SIJS petitions and which orders are considered sufficient bases for SIJS. This evolving articulation between two governmental actors situated at different levels (federal and state) and within different branches (executive and judicial) is illustrated by the federal agency's consent function in SIJS adjudications. Since 1998, the INS or

---

2. *Id.*

3. Immigration Act of 1990, Pub. L. 101-649, § 153, 104 Stat. 4978 5005-06 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1991)).

4. Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119 § 113, 111 Stat. 2440, 2460-61 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1999)).

5. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235, 122 Stat. 5044, 5079-80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)).

6. Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 101 et. seq.).

7. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Bona Fide Marriage Exemption to Marriage Fraud Amendments, 56 Fed. Reg. 23207 (proposed May 21, 1991) (to be codified at 8 C.F.R. §§ 101, 103) [hereinafter 1991 Interim Rule].

8. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245) (1993).

9. Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54978 (proposed Sep. 6, 2011) (to be codified 8 C.F.R. §§ 204-205, 245) [hereinafter 2011 Proposed Rule].

10. USCIS Clarifies Special Immigrant Juvenile Classification to Better Ensure Victims of Abuse, Neglect and Abandonment Receive Protection (Oct. 15, 2019), <https://www.uscis.gov/news/uscis-clarifies-special-immigrant-juvenile-classification-better-ensure-victims-abuse-neglect-and-abandonment-receive-protection> [hereinafter October 2019 USCIS Announcement].

USCIS must “consent” to the grant of SIJS.<sup>11</sup> Consent properly entails an objective assessment of whether juvenile court orders contain the requisite findings. However, since the inception of this function, the INS and USCIS have expanded this delegated authority to justify *de novo* review of state court findings<sup>12</sup> and question the juvenile’s primary purpose in obtaining dependency orders.<sup>13</sup> Finally in 2019, the district court in *Flores Zabaleta v. Nielsen* corrected the agency’s attempt to expand its consent function.<sup>14</sup>

But how did the consent function morph to the extent that it was necessary for a federal court to intervene? Tracing the transformation of the consent function, this paper argues that the agency has exceeded the bounds of its statutory mandate in empowering itself to examine the “primary purpose” of each applicant seeking protection and now renders an unauthorized discretionary review of the facts of each case.<sup>15</sup> This transformation of the consent function into a discretionary determination was enshrined in the 2011 Proposed Rule, which was reissued in 2019 at the same time that USCIS adopted three Administrative Appeals Office (AAO) decisions.<sup>16</sup> These recent events suggest that USCIS intends to continue along this trajectory of amassing increasing power, all the while departing further and further from its statutory mandate in the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA).<sup>17</sup>

This discussion begins in Section II with a clarification of the distinction between “discretion” and “consent” and how these definitions appear in immigration law generally. In Sections III - V, we then trace the history of SIJS to illustrate how USCIS’ current interpretation of its consent function contravenes its statutory mandate and congressional intent. In Section III, we explore the statutory origins of SIJS and its statutory and regulatory expansion that resulted in more comprehensive support for immigrant youth; this period serves as an example of agency action that, in many ways, was aligned with a humanitarian immigration statute. In Section IV, we analyze the passage of restrictive

---

11. Dep’t of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119 § 113, 111 Stat. 2440, 2460–61 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1999)).

12. USCIS OMBUDSMAN, ENSURING PROCESS, ENSURING PROCESS EFFICIENCY AND LEGAL SUFFICIENCY IN SPECIAL IMMIGRANT JUVENILE ADJUDICATIONS (Dec. 11, 2015), [https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015\\_2.pdf](https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015_2.pdf) [hereinafter 2015 Ombudsman Report].

13. *Id.* at 6–8.

14. *Flores Zabaleta v. Nielsen*, 367 F. Supp. 3d 208 (S.D.N.Y. 2019).

15. See, e.g., 2011 Proposed Rule, *supra* note 9, at 54985 (“In determining whether to provide consent to classification as a special immigrant juvenile as a matter of *discretion*, USCIS will consider, among other permissible *discretionary* factors, 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*; and that the evidence otherwise demonstrates that there is a bona fide basis for granting special immigrant juvenile status.”) (emphasis added).

16. Discussed *infra* in Section V(L).

17. Discussed *infra* in Section V(C).

SIJS legislation and regulations that were reflective of the tough-on-crime mentality prevalent at the time; here, the agency followed but also overstepped the more punitive congressional intent of the period. In Section V, we discuss Congress's 2008 expansion of the SIJS statute, a statute that has remained unchanged to the present day. However, USCIS has defied its congressional mandate to protect vulnerable youth in favor of ever-more-restrictive policies. Finally, in Section VI, we explain how, given this history, USCIS' interpretation of its consent function as a discretionary inquiry into juveniles' primary purpose is unwarranted under the statute.

## II. DISCRETION AND CONSENT: TWO DISTINCT CONCEPTS

In charging executive agencies with tasks, Congress empowers agencies with varying levels of decision-making authority, among them discretion<sup>18</sup> and consent.<sup>19</sup> As we explain in Section III, SIJS was initially created in 1990 without any reference to either consent or discretion.<sup>20</sup> Consent was first inscribed into the SIJS determination with the 1998 Appropriations Act<sup>21</sup> but later reined in with the 2008 TVPRA.<sup>22</sup> At no point has Congress ever empowered USCIS to apply discretion in determining SIJS eligibility, but as we explain in Section V, USCIS has attempted to claim this power for itself through guidance memoranda and proposed regulations. Given the fundamental differences between “consent” and “discretion,” this is a highly problematic move that violates congressional intent—and does so at the expense of the safety of vulnerable juveniles.

---

18. See, e.g., 8 U.S.C. § 1182(c) (“Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted *in the discretion of the Attorney General* without regard to the provisions of paragraphs (1) through (25) and paragraph (30) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise *the discretion vested in him* under Section 211(b).”) (emphasis added) (repealed by Illegal Immigration Reform & Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in various sections of the US Code)).

19. See Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119 § 113, 111 Stat. 2440, 2460–61 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1999)) (describing a special immigrant juvenile, in part, as “an immigrant who is present in the United States . . . in whose case the Attorney General expressly *consents* to the dependency order serving as a precondition to the grant of special immigrant juvenile status”) (emphasis added).

20. See Immigration Act of 1990, Pub. L. 101-649, § 153, 104 Stat. 4978 5005-06 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1991)).

21. Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119 § 113, 111 Stat. 2440, 2460–61 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1999)).

22. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235, 122 Stat. 5044, 5079–80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)) (“Section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) is amended. . . by striking ‘the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status;’ and inserting ‘the Secretary of Homeland Security consents to the grant of special immigrant juvenile status’”).



### A. *Discretion*

Discretion permits significant input and independent assessments from the decision-maker. Merriam-Webster defines discretion as an “individual *choice* or judgment” or “power of *free decision* or latitude of *choice* within certain legal bounds.”<sup>23</sup> Black’s Law Dictionary defines discretion as “[p]ower or privilege of the court to act unhampered by legal rule.”<sup>24</sup> This definition primarily refers to courts and the judiciary,<sup>25</sup> though the Dictionary also describes how discretion can be used by “public functionaries.”<sup>26</sup>

From these definitions, we can glean some principles about discretion that are prevalent in the legal and lay communities:

- a) Discretion is often associated with judges and courts.
- b) A decision-maker exercising discretion chooses many aspects of the final determination; they are actively involved in its creation.

### B. *Consent*

Whereas discretion gives the decision-maker “latitude of choice,” consent invites considerably less input from the decision-maker. Merriam-Webster defines consent as, “[T]o give assent or approval: AGREE.”<sup>27</sup> Black’s Law Dictionary affirms this conception of “consent” as a decision-maker’s final approval of a determination made by others during a deliberative process. The consenter does not actively participate in the construction of this determination themselves. The Dictionary defines “consent” as:

Voluntarily *yielding* the will to the proposition of another; acquiescence or *compliance therewith* . . . voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do *something proposed by another* . . . Every consent involves a *submission* . . . “Consent” is an active acquiescence as distinguished from “assent,” meaning a silent acquiescence . . . But the two terms [consent and assent] may be used interchangeably.<sup>28</sup>

---

23. *Discretion*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/discretion> (last visited Sept. 24, 2019) (emphasis added).

24. *Discretion*, BLACK’S LAW DICTIONARY (4th ed. 1968). The idea of discretion as “unhampered by legal rule” does not seem to be consistent with the rest of the definition, as the Dictionary also defines discretion as “exercise of judicial judgment, based on facts and guided by law” and “to see what would be just according to the laws in the premises.”

25. *See, e.g., id.* (including a subsection entitled “Judicial Discretion, Legal Discretion.”).

26. *Id.* (“When applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. This discretion undoubtedly is to some extent regulated by usage, or, if the term is preferred, by fixed principles.”).

27. *Consent*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/consent> (last visited Sept. 24, 2019).

28. *Consent*, BLACK’S LAW DICTIONARY (4th ed. 1968) (emphasis added).

To be sure, consent is not complete deference; consent involves “reason,” and the option to *not* consent is certainly available. From these definitions, we can glean some principles about consent that are prevalent in the legal and lay communities:

- a) Consent assumes the deliberation of other actors who have reached the ultimate decision to be considered by the consenter.
- b) A decision-maker exercising consent only participates at the end of this process to extend or withhold their agreement.

### C. *Application of These Concepts to Immigration Law*

In general immigration law practice, these concepts can be seen on a spectrum: complete deference to another decision-maker at one end, discretion at the other.<sup>29</sup> For example, immigration adjudicators defer to determinations made by criminal courts when deciding whether a non-citizen’s convictions make them deportable or inadmissible.<sup>30</sup> Becoming a lawful permanent resident through adjustment of status, in contrast, involves a discretionary determination by an immigration judge or a USCIS adjudications officer.<sup>31</sup>

USCIS consent in the SIJS context is much closer to deference than discretion. The structure of the statutory definition of a Special Immigrant Juvenile is instructive. The statute first lists determinations that must be made by a juvenile court<sup>32</sup> and then indicates that the Secretary of Homeland Security through USCIS must consent to the status, thus aligning with Webster and Black Law’s definitions of consent described *supra* in subsection (B).<sup>33</sup> Moreover, USCIS itself claims it defers to state courts findings.<sup>34</sup> Given,

---

29. There is no Black’s Law Dictionary definition for “deference” and the Merriam-Webster definition is not quite on point (“respect and esteem due a superior or an elder”). *Deference*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/deference> (last visited Sept. 24, 2019). Two of the synonyms provided by Merriam-Webster, “obedience” and “compliance,” are more helpful to our discussion here. *Synonyms & Antonyms for Deference*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/deference#synonyms> (last visited Sept. 24, 2019).

30. *See Sui v. INS*, 250 F.3d 105, 119 (2d Cir. 2001) (“The INS asks us to assume the position of fact-finder, looking behind the statute of conviction and the indictment . . . This is an inappropriate role for a reviewing court or for the BIA to undertake, and we decline the invitation to piece together an underlying . . . conviction by weighing evidence and drawing conclusions in a manner appropriate only for a criminal jury.”).

31. *See* 8 U.S.C. § 1255(a)(2009) (“The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, *in his discretion and under such regulations as he may prescribe*, to that of an alien lawfully admitted for permanent residence.”) (emphasis added).

32. 8 U.S.C. § 1101(a)(27)J(i)–(ii) (2009).

33. *Id.* § 1101(a)(27)J(iii).

34. USCIS POLICY MANUAL VOL. 6, Pt. J.2 (Nov. 19, 2019), <https://www.uscis.gov/policy-manual/volume-6-part-j> (“USCIS generally *defers* to the court on matters of state law and does not go behind the juvenile court order to reweigh evidence and make independent determinations about the best interest of the juvenile and abuse, neglect, or abandonment, or a similar basis under state law.”) (emphasis added). *See also id.* at J.2(C)(3) (“USCIS *defers* to the juvenile court in making this determination and as such

however, that the agency's Policy Manual includes strict requirements for how juvenile courts must issue their findings and requires that submissions satisfy a "reasonable factual basis" standard, perhaps "deference plus" is a more accurate description of USCIS' interpretation of the consent function. "In order to exercise the statutorily mandated [Department of Homeland Security] consent function, USCIS requires that the juvenile court order or other supporting evidence contain or provide a reasonable factual basis for each of the determinations necessary for SIJ classification."<sup>35</sup>

This appears to be a reasonable interpretation of the agency's delegated authority: the officers adjudicating SIJS submissions must ensure that all elements of the SIJS statute, on its face, are satisfied. This would mean that a state court order which contains all of the requisite factual findings, as specifically articulated in the statute, should be deemed sufficient. If an element is missing—for example, if there is no best interest determination—USCIS may request evidence from the juvenile to support the petition. However, consent, or "deference plus," does not permit denial of a SIJS petition where all statutory SIJS elements have been met through the state court submission but the agency's extra-statutory interrogation of an applicant's primary purpose yields, in its opinion, an unacceptable motive.<sup>36</sup> The allowance of a primary purpose inquiry opens the door for USCIS to re-consider the determinations properly made by the state court and would enable USCIS to move from consent to "unfettered discretion."<sup>37</sup>

### III. ORIGINS OF SIJS: STEADY EXPANSION OF PROTECTIONS FOR VULNERABLE YOUTH

From the time Congress created SIJS in 1990 until the technical corrections it made in 1994, both Congress and the INS worked in concert to ensure a path to stability for vulnerable youth who lacked parental support and any chance at lawful permanent status in the country.

---

does not require the court to conduct any analysis other than what is required under state law.") (emphasis added).

35. *Id.* at J.2(D). Notably, the USCIS Policy Manual formerly contained the following language after language almost identical to the statement quoted above: "The evidence needed does not have to be overly detailed but must confirm that the juvenile court made an informed decision in order to be considered 'reasonable.' USCIS generally consents to the grant of SIJ classification when the order includes or is supplemented by a reasonable factual basis for all of the required findings." USCIS POLICY MANUAL VOL. 6., Pt. J.2(D)(5) (May 23, 2018) (on file with authors). This language was taken out in the November 2019 update to the Policy Manual, discussed *infra* in Section V(m)).

36. *Cf., e.g., Matter of A-O-C*, Adopted Decision 2019-03 (AAO Oct. 11, 2019) (discussed *infra* at Section V(l)) ("SIJ classification may only be granted upon the consent of the Secretary of Homeland Security, through USCIS, when a juvenile meets all other eligibility requirements *and* establishes that the juvenile court order was sought to obtain relief from parental abuse, neglect, abandonment, or a similar basis under state law and not primarily to obtain an immigration benefit.") (emphasis added).

37. INS General Counsel Opinion 95-11, CO 215.2 and 232.1 (June 30, 1995) [hereinafter 1995 INS Opinion Letter].

A. *Pre-1990: Congress Created SIJS to Provide a Path to Permanent Residence for Undocumented Minors Left out of the Immigration Reform and Control Act of 1986*

In response to the needs of undocumented foster youth (subsection 1), Congress created the SIJS statute (subsection 2). In the years following the creation of SIJS, young people were able to navigate the application process with appropriate support (subsection 3).

1. *Few Options Existed for Undocumented Young People to Obtain Legal Immigration Status Before SIJS was Created*

Prior to 1990, social workers struggled to support undocumented youth without appropriate parental caretakers in the United States.<sup>38</sup> “States, through their respective family laws, could remove these children from harmful caregivers, place them in appropriate foster homes, and even free them for and facilitate their adoption.”<sup>39</sup> However, once these young people turned eighteen, they were unable to legally work or safely remain permanently in the United States.<sup>40</sup> After already suffering so much, these youth then ran the risk of deportation.<sup>41</sup>

At the time, existing avenues to regularize immigration status were not viable options for these juveniles. Although certain types of relief were available through the Immigration Reform and Control Act of 1986 (IRCA),<sup>42</sup> applicants for these forms of relief had to have been present in the US since 1982 and filed their applications within 180 days of IRCA’s effective date.<sup>43</sup> Thus, the law lacked any form of permanent relief for vulnerable youth who did not meet those narrow and exact criteria.

2. *The Passage of the 1990 Immigration Act*

The 1990 Immigration Act created a pathway for these vulnerable youth to seek protection from deportation. The Act’s definition of a Special Immigrant Juvenile was short:

(J) an immigrant (i) who has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long-term foster care, and (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in

---

38. Angela Lloyd, *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*, 15 B.U. PUB. INT. L.J. 237, 238 (2006).

39. *Id.*

40. *Id.*

41. Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINX L. REV. 33, 45–46 (2016).

42. Pub. L. No. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of U.S.C.); 8 U.S.C. § 1255a (2000).

43. Lloyd, *supra* note 38, 240–41, n.18.

the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; except that no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.<sup>44</sup>

This was "Congress' answer to a moral crisis involving undocumented children suffering. . . at the hands of those closest to them - their family."<sup>45</sup> According to the INS, SIJS "alleviate[d] hardships experienced by some dependents of the United States juvenile courts by providing qualified aliens with the opportunity to apply for . . . lawful permanent resident status, with the possibility of becoming citizens of the United States in the future."<sup>46</sup> Reflective of this intent, Congress included Section 153(b) of the Act, entitled "Waiver of Grounds for Deportation," providing that certain specified deportation grounds "shall not apply to a special immigrant described in section 101(a)(27)(J) based upon circumstances that exist[ed] before the date the alien was provided such special immigrant status."<sup>47</sup>

To guard against the possibility of parents sending a child unaccompanied to the US to obtain SIJS and subsequently petition for legal status for an abusive, absent or neglectful parent,<sup>48</sup> Congress added one limitation to the statute: "[N]o natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act."<sup>49</sup> Thus, the law's sole limitation sought to protect these young people rather than place them in a position to be further exploited.

SIJS, at its inception, was not a controversial measure.<sup>50</sup> Although lawmakers debated "numerical limits as to the worldwide level of immigration, limits for family-based immigration, and limits for employment-based immigrants,"<sup>51</sup> Congress set no numerical limits for SIJS at the time it was

44. Immigration Act of 1990, Pub. L. 101-649, § 153, 104 Stat. 4978 5005-06 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1991)).

45. My Xuan T. Mai, Note, *Children Under the Radar: The Unique Plight of Special Immigrant Juveniles*, 12 BARRY L. REV. 241, 244 (2009) (citing Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L. Q. 597, 605 (2000)).

46. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 42843 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245) (1993).

47. Immigration Act of 1990, Pub. L. 101-649, § 153, 104 Stat. 4978 5005-06 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1991)).

48. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245) (1993).

49. Immigration Act of 1990, Pub. L. 101-649, § 153(a)(3), 104 Stat. 4978 5005-06 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1991)).

50. Equally, there seems to have been no controversy even after SIJS eligibility was clarified through the 1993 Rule, discussed *infra* in Section III(D).

51. Lloyd, *supra* note 38, at 241, n.21.

passed.<sup>52</sup> Indeed, “history does not reflect *any* particular controversy over the special immigrant juvenile status.”<sup>53</sup>

### 3. *How SIJS Functioned in the Years Immediately After the 1990 Immigration Act*

Obtaining SIJS was a fairly straightforward process in the years following the passage of the 1990 Immigration Act. “The undocumented alien child had to obtain three things from a state court with competent jurisdiction: a dependency order, a finding that the applicant is deemed eligible for long-term foster care, and a ruling that it is not in the child’s best interest to be returned to the home country.”<sup>54</sup> This was then submitted to the INS with a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360), and an application for adjustment of status (Form I-485).<sup>55</sup> The local INS office would review the submitted documents and conduct short interviews before approving applications; denials were rare.<sup>56</sup> Thus, from its earliest years, SIJS functioned as an accessible pathway to lawful permanent residence—and therefore, stability – for some of our nation’s most vulnerable young people. The INS, however, identified one major obstacle.

#### B. *1991: The INS Issued an Interim Rule Asking Congress to Correct its Unintentional Restrictions to SIJS Benefits and Proposing Guidance for SIJS Applicants*

Less than a year after the creation of SIJS, the INS issued an “Interim rule with request for comments” on May 21, 1991.<sup>57</sup> This Rule identified certain errors in the statute that, contrary to Congress’ intentions, restricted SIJS benefits. The Interim Rule sought congressional correction for these errors (subsection 1) and provided instructions on how juveniles could apply for SIJS (subsection 2).

##### 1. *INS Concerns about the Inadvertent Failure of Congress to Address Barriers to Adjustment.*

In its 1991 Interim Rule, the INS evinced concern that SIJS was not reaching the youth it was created to benefit. In this Rule, the INS asserted that because Congress did not waive certain grounds<sup>58</sup> of excludability for SIJS

---

52. Katherine Porter, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 444 (2001).

53. Lloyd, *supra* note 38, at 241, n.21 (emphasis added) (citing SELECTED LEGISLATIVE HISTORY OF THE IMMIGRATION ACT OF 1990 (American Immigr. Law. Assoc. 1991); 101 CIS Legis. Hist. P.L. 694 (1990) (LEXIS); 101 Bill Tracking S. 358 (1990) (LEXIS)).

54. Porter, *supra* note 52, at 444.

55. *Id.*

56. *Id.*

57. 1991 Interim Rule, *supra* note 7.

58. The Rule does not specify which grounds of excludability it is referring to.

recipients as they had waived certain deportability grounds,<sup>59</sup> many young people would not be able to adjust status to lawful permanent residency and reap the immigration benefit Congress had intended for them.<sup>60</sup> Given this barrier to adjustment to lawful permanent residency status and the desire to protect vulnerable youth, the INS requested a “technical correction.”<sup>61</sup>

## 2. *The INS Interpreted the SIJS Statutory Provisions to Provide Practical Advice*

The 1990 Immigration Act provided petitioners with the bare bones of what the application process entailed; the 1991 Interim Rule proposed actual instructions in 8 C.F.R. § 101.6 (since relocated to 8 C.F.R. § 204.11), which included the following provisions that are relevant for the purposes of this article:

- 1) §101.6(a): Defined the term “long-term foster care” found in the 1990 Immigration Act to be “foster care that is of indefinite duration,” and therefore further stipulated that a minor who is “eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority.”<sup>62</sup> This would change significantly in the 1993 Rule, discussed *infra* at subsection (D)(1) of this section, which extended SIJS to young people who had exited the foster care system through adoption or guardianship proceedings.
- 2) §101.6(d): Identified a limited number of documents required to be submitted with a SIJS petition and explained what each document served to show:

---

59. Previously, immigration law distinguished between those who had not entered the US and those who were present in the U.S., regardless of whether or not they entered legally. *Poveda v. US Att’y Gen.*, 692 F.3d 1168, 1174 (11th Cir. 2012). The former group was subject to exclusion proceedings and the latter to deportation. But since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, “[t]he distinction now turns on status rather than location. All aliens are subject to removal proceedings . . . but an alien in the United States who has been admitted is subject to deportability grounds . . . while an alien who has not, regardless of his or her location, is subject to inadmissibility grounds.” *Assa’ad v. U.S. Att’y Gen.*, 332 F.3d 1321, 1326, n.10 (11th Cir. 2003).

60. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 42843 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245) (1993) (“No method existed for most court-dependent juvenile aliens to regularize their immigration status and become lawful permanent residents of this country . . . -Section 153 of IMMACT 90 provides that certain aliens who have been declared dependent on juvenile courts located in the United States may be eligible for special immigrant classification. Aliens who are classifiable as special immigrants may apply for immigrant visa issuance abroad or adjustment of status to that of a lawful permanent resident within the United States. After adjustment of status or admission with an immigrant visa, they may live and work in the United States indefinitely and may apply to become United States citizens in the future.”).

61. Keyes, *supra* note 41, at 47, n.38 (citing *INS Implements Special Immigrant Status for Juveniles, Bona Fide Marriage Appeal Process* 68 No. 20 INTERPRETER RELEASES 635 (1991)).

62. 8 C.F.R. § 101.6(a)(1992).

- The SIJS petition itself;<sup>63</sup>
- A juvenile court order showing that the minor was found dependent on that court;<sup>64</sup>
- A juvenile court order showing that the minor was found eligible for long-term foster care;<sup>65</sup> and
- Evidence that a court or agency authorized by law to make such decisions decided it would not be in the minor's best interest to return to their country of nationality, or the country where they or their parents last habitually resided.<sup>66</sup>

This Interim Rule exemplifies the agency's good faith execution of congressional intent as expressed in the statute. The INS pointed out inadvertent omissions and properly requested that Congress address these issues, clarified key language for the benefit of petitioners, and detailed important procedures for seeking an agency determination. Additionally, the Rule reflected the value the INS placed on administrative efficiency. The agency both alerted Congress of certain bureaucratic lapses soon after the Act's passage and affirmatively expressed a preference that petitioners apply for SIJS "early"<sup>67</sup> to allow eligible youth "to immediately obtain special immigrant status and apply for . . . adjustment of status to that of a lawful permanent resident" and also to allow those whose applications were denied to appeal.<sup>68</sup>

C. *1991: Amendments Expanded SIJS Eligibility and Eliminated Many Excludability Grounds Preventing SIJS-Eligible Young People From Obtaining Lawful Permanent Residence*

Congress promptly responded to the significant excludability obstacles keeping SIJS from fulfilling its purpose of permitting SIJS-eligible youth to "translate such a grant into legal permanent resident status."<sup>69</sup> The Miscellaneous and Technical Immigration and Nationality Amendments of 1991 exempted certain grounds of excludability for SIJS applicants<sup>70</sup> and allowed other grounds of excludability to be waived "for humanitarian purposes, family unity, or when it is otherwise in the public interest."<sup>71</sup> The exceptions to this included several criminal and security grounds.<sup>72</sup>

---

63. 8 C.F.R. § 101.6(d)(1992). ("A petition to classify an alien as a special immigrant under section 101(a)(27)(J) of the Act").

64. 8 C.F.R. § 101.6(d)(1)(1992).

65. 8 C.F.R. § 101.6(d)(2)(1992).

66. 8 C.F.R. § 101.6(d)(3)(1992).

67. 1991 Interim Rule, *supra* note 7, at 23208.

68. *Id.*

69. Lloyd, *supra* note 38, at 242.

70. Pub. L. 102-232 § 302(d)(2)(B)(2)(A), 105 Stat. 1773 (1991). ("[P]aragraphs (4), (5)(A), and (7) (A) of section 212(a) shall not apply.").

71. *Id.* § 302(d)(2)(B)(2)(B).

72. *Id.* ("[T]he Attorney General may waive other paragraphs of section 212(a) (other than paragraphs (2)(A), (2)(B), (2)(C) (except for so much of such paragraph as related to a single offense of simple possession of 30 grams or less of marijuana), (3)(A), (3)(B), (3)(C), or (3)(E)).").



Additionally, the 1991 Amendments allowed for SIJS recipients to be deemed paroled into the US.<sup>73</sup>

D. *1993: The INS Issued its First and Only Final Rule Implementing the SIJS Statute*

After receiving comments regarding the 1991 Interim Rule, the INS issued the 1993 Rule, which implemented the 1991 Amendments and clarified eligibility criteria for SIJS.<sup>74</sup> Under the 1993 Rule, in order to be eligible for SIJS, a young person must have been under twenty-one years old; unmarried; declared dependent on a US juvenile court in accordance with state dependency laws and jurisdiction; eligible for long-term foster care; and the subject of a determination that it would not be in the young person's best interests to be returned to their country of origin or that of their parents.<sup>75</sup> A key recurring feature of the Rule was its emphasis on deference to state law. We see this in the INS' expansion of SIJS eligibility up to age twenty-one to accommodate for varying state definitions of juveniles<sup>76</sup> and its tying of dependency determinations to respective state laws.<sup>77</sup> Additionally and more relevant to this article, the Rule clarified that SIJS eligibility extended to young people who had once but no longer needed the intervention of a juvenile court, as discussed in subsection 1, and clarified the best interest determination to align it with congressional intent, as discussed in subsection 2.

1. *The INS Explained that SIJS Eligibility Included Juveniles Who Exited the Foster Care System Through Adoption or Guardianship Proceedings and No Longer Needed the Family Court's Protection*

Both the 1991 Interim Rule Rule and the 1993 Rule limited SIJS eligibility to minors who were "deemed eligible by the juvenile court for long-term foster care" in accordance with the statutory language.<sup>78</sup> However, while the Interim Rule defined "long-term foster" care as "foster care of indefinite

---

73. *Id.* Notably, there was only one SIJS-related limitation in the 1991 Amendments: "Nothing in this subsection or section 101(a)(27)(J) shall be construed as authorizing an alien to apply for admission or be admitted to the United States in order to obtain special immigrant status described in such section." *Id.* § 302(d)(2)(B). SIJS, then, could not function as a visa, that would allow for an application from abroad or application at a port of entry.

74. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245) (1993).

75. *Id.* at 42850.

76. *Id.* at 42846 ("[I]n order to minimize confusion caused by dissimilar state laws, the Service has removed the requirement that the beneficiary be a juvenile under state law and replaced it with a requirement that the beneficiary be under twenty-one years of age.").

77. *Id.* at 42850 ("An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien... [h]as been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency.") (emphasis added).

78. See 1991 Interim Rule, *supra* note 7, at 23208; Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42850 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245) (1993) (detailing 8 C.F.R. § 204.11(c)(4)).

duration,<sup>79</sup> the final 1993 Rule instead considered minors eligible for long-term foster care when parental reunification was no longer a viable option for the minor.<sup>80</sup> This definition included minors who were no longer dependent on the juvenile court because they had been placed with an adoptive parent or guardian.<sup>81</sup> In taking this action, the INS recognized the importance of “permanency” for youth.<sup>82</sup>

## 2. *The INS Clarified the Best Interest Determination in Line With Congressional Intent*

In the 1993 Rule, the INS responded to concerns about then-8 C.F.R. § 101.6, which described SIJS eligibility. Specifically, commenters raised concerns about which court or agency could make the best interest determination (subsection (a)), the potential that youth might be motivated by the SIJS benefit to migrate to the US (subsection (b)), and the evidentiary burden on petitioners (subsection (c)). The INS’ decisions at this time, issued after notice-and-comment rulemaking, are instructive from the vantage point of current debates around SIJS (subsection (d)).

### *a. Responding to the Concern that the Best Interest Determination Would be Made by Immigration Authorities, the INS Reserved this Determination for Juvenile Courts or Proceedings Recognized by Them*

Two commenters were concerned that because the 1991 Interim Rule allowed for the statutorily required best interest determination to be made in administrative proceedings, the INS would make this determination in deportation hearings, also considered administrative hearings.<sup>83</sup> In the Supplementary Information to the 1993 Rule, the INS addressed this concern:

“[T]he decision regarding the beneficiary’s best interest must be made by a juvenile court of competent jurisdiction or in administrative proceedings recognized by the juvenile court having jurisdiction over the

---

79. 1991 Interim Rule, *supra* note 7, at 23208 (detailing 8 C.F.R. § 101.6(a), the definitional section of the proposed regulation language).

80. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 42850 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245) (1993) (detailing 8 C.F.R. § 204.11(a)).

81. *Id.* (“For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in guardianship situation [sic] after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care.”).

82. Permanency is a concept in child welfare law that refers to juveniles achieving the goal of a safe home, whether through the foster care system, adoption or guardianship. U.S. DEP’T OF HEALTH AND HUM. SERVICES, Children’s Bureau, *Achieving and Maintaining Permanency*, Child Welfare Information Gateway, <https://www.childwelfare.gov/topics/permanency/> (last visited Nov. 3, 2019).

83. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245) (1993).

beneficiary . . . The Service does not intend to make determinations in the course of deportation proceedings regarding the ‘best interest’ of a child for the purpose of establishing eligibility for special immigrant juvenile classification.”<sup>84</sup>

*b. Responding to the Concern that Juveniles Would Migrate to the US to Apply for SIJS, the INS Responded that this Concern was Already Addressed in the SIJS Statute and Refused to Take on the Extra Role of Probing Applicants’ Motives*

Another commenter was concerned about “possible abuse of” the SIJS benefit and offered a three-pronged solution.<sup>85</sup> He proposed that the INS “narrowly [define] the elements which could be considered in determining the best interest of the alien child”; add to the eligibility criteria a bar on youth who had been brought or sent to the US to “take advantage” of SIJS; and require that juvenile courts “request and obtain a report from the Service prior to declaring an alien child dependent upon the court.”<sup>86</sup>

The INS dismissed the commenter’s concern and explained that any such issues had already been addressed by the statute,

Abuse of this provision is of concern both to Congress, as shown by the statutory restriction on the grant of future immigration benefits for the juvenile’s parent(s) based upon the relationship, and to the Service. However, the Service believes that a child in need of the care and protection of the juvenile court should not be precluded from obtaining special immigrant status because of the actions of an irresponsible parent or other adult.<sup>87</sup>

The INS then explicitly rejected all three of the solutions the commenter proposed to the problem they had perceived. Regarding the commenter’s first two suggestions, the INS both refused to restrict the factors that could be considered in making the best interest determination and refused the policing role the commenter had proposed: “The Service believes that it would be both impractical and inappropriate for the Service to routinely re-adjudicate judicial or social service agency administrative determinations as to the juvenile’s best interest.”<sup>88</sup> As to the commenter’s third suggestion, the INS responded that it was unwise to further burden juvenile courts with a requirement that the courts obtain any reports from the INS, as this “could possibly delay action urgently needed to ensure proper care for dependent children.”<sup>89</sup>

84. *Id.* at 42847–48.

85. *Id.* at 42847.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

Significantly, this refusal of all three of the commenter's concerns came at a time when the agency adjudicating SIJS petitions was the same agency prosecuting deportations, and it still chose to prioritize the best interests of juveniles in this instance.<sup>90</sup> The INS reasoned that such an invasive inquiry was neither necessary nor appropriate, especially given the safeguards Congress had already put in place.

*c. The INS Acknowledged that Requiring Four Separate Documents to Prove SIJS Eligibility was Overly Burdensome and Clarified Which Evidence was Required*

Commenters lastly challenged the evidentiary requirements set out by 8 C.F.R. 204.11(d)<sup>91</sup> as excessive. The INS, however, added a requirement that young people prove their age<sup>92</sup> and listed in 8 C.F.R. 204.11(d) “[i]nitial” documents that had to accompany the petition, which would prove both their age and the required juvenile court findings.<sup>93</sup> Nevertheless, in the agency's stipulation in 8 C.F.R. 204.11(d)(2) that evidence of the required findings could be provided in one document, we see the INS finding a practical solution rather than placing too onerous an evidentiary burden on youth and their advocates.

In its 1993 Rule (just like in the 1991 Interim Rule), the INS sought documentation that proved: (1) that the juvenile was dependent on a court of competent jurisdiction located in the US; (2) that a court of competent jurisdiction in the US found the juvenile eligible for long-term foster care (i.e., no longer able to reunify with their parents); and (3) that the juvenile court (or other court or agency recognized by the juvenile court) had made a best interest determination for the young person.<sup>94</sup> The Rule did not mention any further evidence required to reveal young people's motivations with respect to seeking SIJS or initiating juvenile court proceedings.

*d. The INS' Decisions in the 1993 Rule are Instructive in the Context of Our Current Understanding of the USCIS Consent Function*

The 1993 Rule was important for practitioners at the time and also for practitioners today who are looking to understand the USCIS consent function.

First, in contrast with USCIS' current intense suspicion of young people's primary purpose in seeking a juvenile court order,<sup>95</sup> the INS in the 1993 Rule eschewed any examination of young people's motivations. The INS focused not on why youth had approached juvenile courts, but rather that these youth

---

90. See Keyes, *supra* note 41, at 70.

91. “Initial documents which must be submitted in support of the petition.”

92. 8 C.F.R. § 204.11(d)(1) (2009).

93. 8 C.F.R. § 204.11(d) (2009).

94. *Id.*

95. USCIS POLICY MANUAL VOL. 6, *supra* note 34, at Pt. J.3(A)(3) (explaining the “burden” on petitioners to demonstrate their motivation for seeking the dependency order).

had, at some point, needed the courts' protection. Consequently, the INS in 1993 explained that SIJS was not just for youth currently in foster care, but also for youth who, having gone through guardianship or adoption proceedings, no longer depended on the juvenile courts in the way youth in foster care do. Second, the INS in 1993 also refused to make the SIJS application process more invasive because they believed that Congress had headed off any fraud concerns that might justify a more invasive posture. Tellingly, the INS at the time even refused to interrogate the motivations of parents who sent their children to the US in recognition of Congress' overarching intent in creating SIJS to protect vulnerable youth.<sup>96</sup> Third, in contrast with USCIS' current insistence that applicants submit extensive materials in support of their SIJS petitions,<sup>97</sup> the INS in 1993 acknowledged that forcing juveniles to submit four official documents to obtain SIJS was overly burdensome. Finally, in contrast with USCIS' challenge to the best interest determination of a juvenile court in *Zabaleta v. Nielsen* (see, *infra*, Section V(K)), the INS in 1993 explicitly refused to make its own best interest determination for applicants.

Critically, the 1993 Rule is the last word we have from the INS or its successor on substantive SIJS issues that passed through the proper notice-and-comment period. Therefore, the 1993 Rule remains the regulation that USCIS must comply with on SIJS matters to the extent that the Rule does not conflict with the 2008 TVPRA.<sup>98</sup>

#### E. 1994: Technical Corrections Further Expanded SIJS Eligibility

Following the 1993 Rule, the Immigration and Nationality Technical Corrections Act of 1994 further expanded SIJS eligibility from simply those youth who had been declared dependent on a juvenile court (and deemed eligible for long-term foster care) to those "whom such a court has legally committed to, or placed under the custody of, an agency or department of a State" (and deemed eligible for long-term foster care).<sup>99</sup>

96. Admittedly, this is a separate concern than SIJS advocates face currently as USCIS now says that it questions young people's primary purpose in seeking the juvenile court orders, not their caretakers' primary purpose in sending them to the US. However, both issues stem from a similar anxiety: that SIJS benefits are not simply landing serendipitously on vulnerable young people, that people are modifying their behaviors to become eligible for SIJS, and that they would not make these same modifications in the absence of SIJS. Those worried about young people's primary purposes today should look to the INS' forceful rebuttal – resulting from notice-and comment rulemaking – to these same concerns.

97. See USCIS POLICY MANUAL VOL. 6, *supra* note 34, at Pt. J.3(A)(3). ("Examples of documents that a petitioner may submit to USCIS that may support the factual basis for the court order include: Any supporting documents submitted to the juvenile court, if available; The petition for dependency or complaint for custody or other documents which initiated the juvenile court proceedings; Court transcripts; Affidavits summarizing the evidence presented to the court and records from the judicial proceedings; and Affidavits or records that are consistent with the determinations made by the court.").

98. As discussed *infra* in Section V(I), USCIS has reopened the comment period for the 2011 Proposed Rule, see 2011 Proposed Rule, *supra* note 9, at 54985. But as of the writing of this article, this Proposed Rule is not in effect and so the 1993 Rule continues to control USCIS adjudications.

99. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, 108 Stat. 4305 (1994).

## IV. TOUGH ON CRIME ERA COINCIDES WITH CONSTRICTION OF SIJS ELIGIBILITY

A. *1995-1997: In the Two Years Before the Passage of the 1998 Appropriations Act, the INS Created Specific Consent and Informed the Public Through Letters from Their General Counsel*

The period from 1995 to 1997 was marked by inconsistencies and confusion regarding SIJS policies. Because of a federal regulation that governed the detention of minors in deportation and exclusion proceedings,<sup>100</sup> the INS made efforts to place detained youth in foster care instead of in detention centers.<sup>101</sup> If these juveniles then obtained a dependency order and a best interest determination, they became SIJS-eligible. The INS expressed frustration after learning this for two reasons. First, because the juveniles were in INS custody and therefore subject to the Attorney General's "unfettered discretion," the INS felt entitled to notification that these youth were seeking dependency orders and also believed that "the juveniles [were] not in need of care and protection from the state because [they were] in custody and INS provide[d] for their needs."<sup>102</sup> Second, they believed that the state courts issuing these orders were not aware that the juveniles were in deportation proceedings,<sup>103</sup> a consideration the INS apparently saw as relevant. Whether the INS' frustration was warranted or not, some courts agreed with this logic. One court went so far as to acknowledge:

If Plaintiff had not previously been arrested and taken into custody of the INS, it appears that he would meet the special immigrant juvenile provisions. However, because Plaintiff was arrested, detained, and in the legal custody of the INS at the time of the probate court proceedings, the state probate court had no jurisdiction over him.<sup>104</sup>

However, the INS later clarified that "juveniles who are paroled by the Attorney General into the custody of a social services agency can petition the juvenile court to issue a dependency order."<sup>105</sup> Given the confusion among courts and within the INS itself, the INS requested guidance from Congress,<sup>106</sup> which came in the form of the 1998 Appropriations Act.

---

100. Detention and Release of Juveniles, 53 Fed. Reg. 17449 (May 17, 1988).

101. 1995 INS Opinion Letter, *supra* note 37.

102. *Id.*

103. *Id.*

104. Porter, *supra* note 52, at 447 (citing *Gao v. Jennifer*, 991 F. Supp. 887, 890 (W.D. Mich. 1997), *rev'd*, 185 F.3d 548 (6th Cir. 1999)).

105. *Id.* at 447 (citing Memorandum from Office of the General Counsel to Jack Penca, EROCOU, 74 INTERPRETER RELEASES 978 (Dec. 21, 1995)).

106. *Id.* ("As demonstrated by the varying results and legal interpretations of the SIJ provision during the period 1995-1997, whether a child in deportation proceedings could take advantage of the SIJ law depended entirely on whether or not he had been arrested by INS and on how aggressively the local INS office interpreted the SIJ law. The differing interpretations of the SIJ provision for children in deportation proceedings led to the INS's request for clarification from Congress.")

B. *1998: Passed on the Heels of the 1996 Immigration Laws, the 1998 Appropriations Act Constitutes the Sole Instance When Congress Constricted Access to SIJS*

Very few people received SIJ status in the mid-to-late 1990s. As some indication, in 1994, 501 people adjusted their status through SIJS.<sup>107</sup> In 1995, this number dropped to 478,<sup>108</sup> and by 1997, the number had decreased to 430.<sup>109</sup> Despite these low numbers, the 1998 Appropriations Act – passed shortly after the “1996 laws”<sup>110</sup>—created a new step in the SIJS application process. All juveniles now needed the express consent of the Attorney General (AG) to “the dependency order serving as a precondition to the grant of special immigrant juvenile status,” and juveniles in the “actual or constructive custody of the Attorney General” needed the AG’s “specific” consent before a juvenile court could even exercise jurisdiction over them.

These terms were not defined in the statute, but the accompanying Appropriations Committee Conference Report asserted:

The language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General 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 the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.<sup>111</sup>

Though USCIS now traces its invasive interrogation into SIJS petitioners’ motivations to this statement, this reliance is overstated (and would have been so even if the TVPRA in 2008 had not transformed the consent function, as discussed *infra* in Section V(C)). Apparently, this Conference Report language stemmed from the concerns of Senator Pete Domenici, who claimed to have identified cases where immigrants on student visas lied in order to

---

107. U.S. DEP’T OF JUST., 1994 STAT. Y.B. OF THE IMMIGR. AND NATURALIZATION SERV. 37 (1996), <https://babel.hathitrust.org/cgi/pt?id=coo.31924071744613;view=1up;seq=2>.

108. U.S. DEP’T OF JUST., 1995 STAT. Y.B. OF THE IMMIGR. AND NATURALIZATION SERV. 39 (1997), <https://babel.hathitrust.org/cgi/pt?id=umn.31951d01481440a;view=1up;seq=43>.

109. U.S. DEP’T OF JUST., 1997 STAT. Y.B. OF THE IMMIGR. AND NATURALIZATION SERV. 36 (1999), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015051518358;view=1up;seq=40>.

110. This term commonly refers to two immigration laws passed in 1996: the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in various sections of the U.S. Code); and the Illegal Immigration Reform & Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in various sections of the U.S. Code). Together, these laws made the immigration system more punitive by increasing the grounds for deportability and expanding the groups of people subject to mandatory detention. *See* NYU SCH. OF LAW IMMIGRANT RIGHTS CLINIC, DISMANTLE, DON’T EXPAND: THE 1996 IMMIGRATION LAWS (2017), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/1996Laws\\_FINAL\\_Report\\_4.28.17.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/1996Laws_FINAL_Report_4.28.17.pdf).

111. H.R. Rep. No. 105-405, at 130 (1997) (Conf. Rep.).

obtain SIJS.<sup>112</sup> This concern, whether valid or not, was redressed by the 1998 Act, which now required that SIJS petitioners be “deemed eligible by [a qualifying juvenile court] court for long-term foster care due to abuse, neglect, or abandonment.”<sup>113</sup> The previous version of the SIJS statute failed to tie eligibility of long-term foster care to findings of abandonment, abuse or neglect, creating the possibility that children could be declared dependent on a juvenile court without having suffered parental mistreatment.<sup>114</sup> Given the now revised statutory language, only if a juvenile was deemed abandoned, abused, or neglected could the AG expressly consent to the grant.

Notably, the 1997 Conference Report’s primary purpose inquiry language was not adopted into the statutory language of the 1998 Act. Moreover, the plain language of this statute was directed to the *juvenile court*, which was tasked with determining the juvenile’s eligibility for long-term foster care on the enumerated bases. Nothing in the plain language of the statute tied SIJS eligibility to the *child’s* motivation in seeking the dependency order. Instead, per the statutory language, a youth who had in fact endured abuse, abandonment or neglect and thereafter sought the juvenile court order would be eligible for SIJS. The primary motivation of child survivors of neglect and abuse needing safety and protection was not questioned by Congress.

Curiously, the 1997 Conference Report that carried no force in law remains the only purported support for the USCIS claim that consent must hinge on a primary purpose determination. And even assuming the primary purpose inquiry was a valid one after the passage of the 1998 Appropriations Act, this highly dubious assumption lost any validity when Congress altered the consent function and directed the AG to exercise “consent” (not express consent).<sup>115</sup> Additionally, moving USCIS’ gaze away from the state court order and the best interest finding reflected Congress’s intent that USCIS defer to the state court’s determinations.

---

112. Rodrigo Bacus, *Defending One-Parent SIJS*, 42 FORDHAM URB. L.J. 921, 930 (2015) (“Senator Pete Domenici spearheaded the 1997 changes because he identified some instances of students who he claimed had fraudulently obtained SIJS status, where the students did not experience abuse, neglect, or abandonment.”). See also *Yeobah v. U.S. Dept. of Justice*, 345 F.3d 216, 221 (3d Cir. 2003) (“[T]his is a giant loophole . . . every visiting student from overseas can have a petition filed in a state court . . . declaring that they’re a ward and in need of foster care, . . . [and] they’re granting them.”) (quoting *Attorney General Reviewing Potential Abuse of Immigration Law: Hearings on the FY ’98 Budget Request of the Justice Department Before the Appropriations Subcommittee on Commerce, Justice, State and the Judiciary of the Senate Appropriations Comm.*, 105th Cong. (1997) (Statement of Pete Domenici, U.S. Senator)).

113. Dep’t of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119 § 113, 111 Stat. 2460 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1999)).

114. Porter, *supra* note 52, at 448.

115. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235, 122 Stat. 5044, 5079–80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)).



C. *1998-1999: In the Immediate Years After the 1998 Appropriations Act, the INS Issued Two Memoranda that Dramatically Expanded Their Authority*

In the immediate aftermath of the 1998 Appropriations Act, the INS issued two Field Memoranda, one in 1998<sup>116</sup> and one in 1999.<sup>117</sup> The Memoranda incorporated the language of the 1998 Appropriations Act (subsection 1) and clarified the INS' interpretation of the origin of the abuse, neglect, and abandonment and consent language in the 1998 Appropriation's Act (subsection 2). However, the INS failed to adequately explain critical aspects of the specific consent function (subsection 3) and made the SIJS application process much more invasive (subsection 4). Critically, nowhere in either of these Memoranda – issued by the INS in the years immediately following the 1998 Appropriations Act – is the 1997 Conference Report's primary purpose inquiry even mentioned, making USCIS' current insistence on this inquiry even more suspect.

1. *The INS Memoranda Incorporated the Abuse, Abandonment, and Neglect Language of the 1998 Appropriations Act*

In a section entitled “Supporting Documentation for SIJ Petition,” the 1999 Memorandum specified: “Evidence that a dependency order was issued on account of abuse, neglect, or abandonment, and that it would not be in the juvenile's best interest to be removed from the United States is crucial to obtaining the Attorney General's consent to the dependency order.”<sup>118</sup> This language tied the statutory express consent function<sup>119</sup> to both the best interest determination<sup>120</sup> and the requirement that the juvenile court deem the juvenile eligible for long-term foster care due to abuse, abandonment, or neglect.<sup>121</sup> (Notably, ever since Congress tied the consent function to “the grant of special immigrant juvenile status” itself in the 2008 TVPRA,<sup>122</sup> USCIS has lacked justification for grounding its consent function in scrutiny

116. Memorandum from Thomas E. Cook, Acting Asst. Comm'r., Adjudications Div., Immigration and Naturalization Serv., U.S. Dep't. of Justice (Aug. 7, 1998) (on file with authors) [hereinafter 1998 Memo].

117. Memorandum from Thomas E. Cook, Acting Asst. Comm'r., Adjudications Div., Immigration and Naturalization Serv., U.S. Dep't. of Justice (Jul. 9, 1999), <https://www.aila.org/infonet/ins-advises-on-special-immigrant-juveniles> [hereinafter 1999 Memo].

118. *Id.*

119. Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119 § 113, 111 Stat. 2460 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1999)) (“(iii) in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status”).

120. *Id.* (“(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence”).

121. *Id.* (“(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment”).

122. Discussed *infra* Section V(C).

of dependency orders.<sup>123</sup> Its current inquiry into state dependency orders, then, flouts its congressional mandate.)

2. *The INS Memoranda Clarified its Interpretation of the 1998 Appropriation Act's Abuse, Abandonment, and Neglect and Consent Language*

The 1998 INS Memorandum clarified its interpretation of the 1998 Appropriation Act's abuse, abandonment, and neglect and consent language:

The insertion of this new language makes clear the intent of Congress that relief is reserved for children who are victims of those particular circumstances and conditions. In the past, individuals who did not suffer abuse, abandonment, or neglect were known to have sought the court's protection merely to avail themselves of legal permanent resident status. This amendment ensures that this will no longer be possible . . . To request the Attorney General's consent, the court, state agency, or other party acting on behalf of the juvenile must provide the Service with documentation which establishes abuse, neglect or abandonment as the underlying cause for the court's dependency order.<sup>124</sup>

Thus, the INS reiterated the true concern that inspired the 1998 Appropriation Act's changes to SIJS eligibility, fraudulent SIJS applicants, and emphasized that youth who had suffered parental mistreatment—regardless of their motives in applying for SIJS—were the intended beneficiaries of this form of relief. This sheds light on the outer extremes of what the consent function could have consisted of before the function was reined in by the 2008 TVPRA, further demonstrating that USCIS' current interpretation of the consent function far exceeds its statutory mandate and its own previous interpretation of the 1998 Appropriation Act's consent function.

3. *The INS Memoranda Asserted that More Applicants Would Require Specific Consent from the INS but Failed to Detail How They Could Obtain This Consent*

Finally, the 1998 Memorandum declared that youth in the “actual or constructive” custody of the INS would require specific consent before a state court could exercise jurisdiction over them.<sup>125</sup> As the 1995 Opinion Letter from the INS General Counsel explained, the INS would sometimes place

---

123. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235, 122 Stat. 5044, 5079-80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)).

124. 1998 Memo, *supra* note 116, at 1-2.

125. 1998 Memo, *supra* note 116, at 2 (“Furthermore, the revision of the statute clarifies that state courts do not have jurisdiction to consider the status of an alien in the actual or constructive custody (foster care) of the Service unless the Attorney General specifically consents to such jurisdiction. Juveniles in foster care are still in the legal custody of INS despite the delegation of physical custody to social services

detained juveniles in foster care settings (called “shelter care”) and because the INS was “financially responsible” for minors in this “foster care detention,” INS consent was required before these young people could seek to be declared dependent on the state.<sup>126</sup> Although the 1999 Memorandum included a paragraph about the specific consent process, as described in subsection (D)(2) below, the 1999 Memorandum did not intimate just how arduous this consent process would be in practice. Additionally, the 1999 Memorandum hinged specific consent on the INS Director’s opinion about both the young person’s likelihood of establishing SIJS eligibility and whether it would be in their best interest to get a dependency order, but the Memoranda lacked any criteria to guide INS decision-making.<sup>127</sup>

#### 4. *The INS Memoranda Forced Applicants to Reveal Sensitive Information About Themselves, Their Parents, and Their Close Family Members*

The 1998 and 1999 INS Memoranda made obtaining SIJS a much more invasive process. The Memoranda specified that among other documents, SIJS applicants were required to submit “[i]nformation regarding the whereabouts and immigration status of the juvenile’s parents and other close family members,”<sup>128</sup> “evidence of abuse, neglect, or abandonment of the juvenile,”<sup>129</sup> “[e]vidence of the juvenile’s current immigration status,”<sup>130</sup> and “[e]vidence of the juvenile’s date and manner of entry into the United States.”<sup>131</sup>

Requiring this information presented several obstacles. First, the whereabouts of close family members and the immigration statuses of parents and family were both wholly irrelevant to the eligibility criteria set out in 8 U.S.C. § 1101(a)(27)(J) and 8 C.F.R. § 240.11, and a strong deterrent to applicants at a time when, as described in Section IV(B), the number of applicants was low. Second, it is unclear why the INS would require applicants to disclose evidence of their own immigration status and date and manner of entry when the INS already had entry information on those admitted or apprehended.<sup>132</sup>

Additionally, in requiring evidence that had been presented at the juvenile court proceedings, the INS placed itself above the confidentiality concerns of state juvenile courts. Even after acknowledging that “in many States[,] documents submitted to or issued by the juvenile court in dependency proceedings

---

agencies who can better accommodate their needs. Any dependency order issued by a state court regarding such a juvenile would be considered invalid without the Attorney General’s consent.”)

126. 1995 INS Opinion Letter, *supra* note 37.

127. Porter, *supra* note 52, at 450 (“However, the field Memorandum failed to establish a formal mechanism for obtaining consent or any guidelines for INS officers to use in determining whether to grant consent.”)

128. 1998 Memo at 2–3.

129. *Id.* at 3.

130. 1998 Memo at 2–3; *see also* 1999 Memo.

131. 1998 Memo at 2–3.; *see also* 1999 Memo.

132. For any child whom the INS had been unaware of, the natural conclusion was that these youth had entered the United States without inspection.

may be subject to privacy restrictions,” the INS still required at least “a statement summarizing the evidence presented to the juvenile court during the dependency proceeding and the court’s findings” from youth seeking the protection of SIJS.<sup>133</sup> While an emphasis on identifying false claims to SIJS eligibility fit with Senator Domenici’s concern about fraud, discussed in Section IV(B), we would expect Congress to give a clearer directive if it intended the INS to contravene state confidentiality laws on juvenile records. The INS’ disregard for confidentiality laws, therefore, was unwarranted. Furthermore, these heightened requirements by the INS disregarded the fact that state juvenile court proceedings are conducted under penalty of perjury, and the INS-proposed in-depth inquiry into the family court proceedings duplicated the work of the state juvenile court.

D. *Late 1990s and Early 2000s: How SIJS Consent was Exercised in the Aftermath of the 1998 and 1999 Memoranda*

Apart from involving the INS in a process reserved for family courts,<sup>134</sup> the 1998 and 1999 Memoranda created many practical problems for undocumented juveniles and their advocates, introducing heavy evidentiary burdens and extensive delays during which many applicants aged out.<sup>135</sup> The process of securing the AG’s consent, both express (subsection 1) and especially specific (subsection 2), made the process much more complex.

1. *Express Consent*

As stated in the 1998 Appropriations Act, express consent required the AG’s consent to the dependency order, which applicants needed to obtain before the INS would approve their SIJS application. What the AG needed in order to decide whether to grant consent seemed straightforward enough:

First, a juvenile court must have deemed the juvenile eligible for long-term foster care due to abuse [sic] neglect [sic] and abandonment. Second, it must have been determined in administrative or judicial proceedings that it would not be in the juvenile’s best interest to be

---

133. 1999 Memo, *supra* note 117.

134. Lloyd, *supra* note 38, at 246 (“The overriding problem with each of the first two field memoranda was that each required the Service to make independent determinations regarding a juvenile applicant’s dependency status; thereby contradicting the Service’s own decision in 1993 that ‘it would be both impractical and inappropriate for the Service to routinely re-adjudicate judicial or social service agency administrative determinations.’”) (citing Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245)) (1993).

135. “Aging out” occurred because, even if petitioners had filed their petitions while still juveniles, their SIJS petitions would only be approved if they remained juveniles at the time of adjudication. See Porter, *supra* note 52, at 452 (“The most unfortunate consequence of this delay is that while waiting for the INS’s consent, a number of children ‘age out’ of eligibility for SIJ because they are no longer juveniles under the INA definition.”).

returned to the juvenile's or parent's previous country of nationality or country of last habitual residence.<sup>136</sup>

This seemingly required adjudicators simply to verify the contents of the juvenile court orders, an impression that is further solidified by the black-and-white nature of the consent denials or grants: "If both elements are established, consent to the order serving as a precondition must be granted. If either element is not established, consent must be refused."<sup>137</sup>

However, the evidence requested in the Memoranda suggested that adjudicators could re-evaluate each applicant's case and re-examine the underlying facts. For example, the 1998 Memorandum required petitioners to submit "documentation which establishes abuse, neglect or abandonment as the underlying cause for the court's dependency order."<sup>138</sup> Thus, how one demonstrated that they merited a grant of express consent was unclear.

The 1999 Memorandum did explain how the consent grants or denials would be "expressly" communicated. The approval of the SIJS application implied that express consent had been granted. However, if the SIJS petition were denied after consent had been granted, the INS was required to inform the petitioner that consent had been granted, along with the reasons for the denial of the SIJS application. If consent itself were denied, then the SIJS application was not adjudicated, and instead, the petitioner was informed of the denial of consent.<sup>139</sup>

In response to the 1998 Memorandum, advocates began requesting that juvenile courts modify their dependency orders to specify that the juvenile's eligibility for long-term foster care was due to abuse, neglect or abandonment.<sup>140</sup> But according to one scholar, the INS' interpretation of the express consent function in its 1999 Memorandum

effectively reverts to the pre-amendment situation, where if the other elements of the SIJ statute are met, the INS must give its consent and then must grant the petition for SIJ status unless there is an ineligibility factor. Consent in this context, therefore, is only a requirement to make sure that the other two provisions of the statute are met, *i.e.*, that the orders of the juvenile court satisfy the statutory language.<sup>141</sup>

## 2. *Specific Consent*

The 1999 INS Memorandum stated that the AG's specific consent to the juvenile court's jurisdiction was required *before* dependency proceedings

136. 1999 Memo, *supra* note 117.

137. *Id.*

138. Porter, *supra* note 52, at 449, citing 1998 Memo, *supra* note 116.

139. 1999 Memo, *supra* note 117.

140. Porter, *supra* note 52, at 449.

141. *Id.* at 448-49.

began, and that if specific consent was granted after the issuance of a juvenile court dependency order, the order was not valid. The Memorandum also described two lines of invasive inquiry for a district director to conduct for the purpose of making a specific consent decision: 1) whether it appeared that the applicant would be eligible for SIJS if they obtained a dependency order; and 2) if, *in the district director's judgment*, the dependency proceeding would be in the applicant's best interest.<sup>142</sup> Such inquiries were in practice highly discretionary – an outcome exacerbated by the Memorandum's failure to enumerate any criteria to guide the district director's evaluation. Worse, these conclusions were not subject to oversight by juvenile court judges who had juvenile welfare expertise.

Obtaining specific consent was thus unduly complicated. This opaque process consisted of identifying which SIJS applicants needed specific consent (subsection (a)), obtaining specific consent (subsection (b)), and appealing denials (subsection (c)). Often enough, the result was lengthy, convoluted legal battles and other difficulties for SIJS applicants (subsection (d)).

*a. Youth Denied Release from INS Custody Were Obligated to Obtain Specific Consent to Apply for SIJS*

The first set of complications regarding specific consent stemmed from the need to discern which juveniles were in INS “actual or constructive custody.” The Flores Settlement Agreement provided that children be placed in the least restrictive setting possible,<sup>143</sup> which should have meant that young people were released to family members or “responsible entities.”<sup>144</sup> However, the INS refused to release juveniles to family members as late as 2003.<sup>145</sup> Because they were not released, these youth still needed the INS' specific consent to apply for SIJS.

Federal courts differed in their responses to the requirement of specific consent. In one instance, a federal judge ordered the INS to return to foster care a juvenile who was not initially detained and had been deemed SIJS-eligible; that juvenile was subsequently put into deportation proceedings and detained by the INS—only to have the INS subsequently refuse the judge's order.<sup>146</sup> In another instance, a Florida state court ruled that it lacked

---

142. 1999 Memo, *supra* note 117.

143. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV85- 4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), [https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement\\_011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement_011797.pdf).

144. Keyes, *supra* note 41, at 49 (citing The Unaccompanied Alien Child Protection Act: Hearing on S.121 Before the Subcomm. on Immigr., Border Security, and Citizenship of the Senate Judiciary Comm., 107th Cong. (2002) (Statement of Wendy Young, Women's Refugee Commission)).

145. *Id.* at 49 (citing Aryah Somers, Pedro Herrera & Lucia Rodriguez, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 337–39 (2010)).

146. *Id.* at 49–50 (citing Gregory Zhong Tian Chen, *Eliau or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 602 (2000)).

jurisdiction over juveniles without the AG's consent simply because they were in removal proceedings.<sup>147</sup>

*b. Lack of Clarity About How to Obtain Specific Consent*

In the midst of this confusion, the INS failed to issue any official guidance as to how detained youth could request specific consent. What information practitioners had was highly case-specific,<sup>148</sup> sometimes derived from individual queries to agency personnel.<sup>149</sup>

Although the 1999 INS Memorandum detailed the two considerations that factored into adjudicators' decision to grant or deny specific consent,<sup>150</sup> "[h]ow, when, and if, the INS should subjugate this duty to give consent to juvenile court jurisdiction and SIJ status was left unspecified and within the INS's discretion."<sup>151</sup> What was clear was that the process of obtaining specific consent required considerable time (one lawyer's efforts to obtain specific consent took him a year and a half).<sup>152</sup> Additionally, the process sometimes involved the trauma of untrained agency adjudicators interviewing juveniles about the specifics of the abuse, abandonment, or neglect they had experienced.<sup>153</sup>

Unfortunately, after this arduous process many applicants were still denied the specific consent needed to seek protection from juvenile courts for arbitrary reasons. Professor David Thronson describes a seventeen-year-old who had survived physical abuse by her mother, sexual assault, and forced labor. Because she was detained, she had to request specific consent before she could obtain a dependency order.<sup>154</sup> However, the INS denied consent without conducting any hearing about the abuse the girl had suffered or her relationship with her mother because she had made eight phone calls to her mother during the six-month period she was in detention (eighty-three

147. *Id.* at 51–52 (citing *P.G. v. Dep't of Children & Family Servs.*, 867 So. 2d 1248 (Fla. Dist. Ct. App. 2004)).

148. National Immigrant Justice Center, *Special Immigrant Juvenile Status in Illinois: A Guide for Pro Bono Attorneys* 9 (June 2007), <http://www.f2f.ca.gov/res/pdf/SpecialImmigrantJuvenile.pdf> [<http://perma.cc/5AA3-4E8E>] (stating that youth with final removal orders or youth in criminal proceedings for whom the Department of Homeland Security (DHS) has issued a detainer were in constructive custody, and then cautioning readers, "It is important to consult with an immigration practitioner to determine whether child is in federal custody.").

149. See Wendi Adelson, *The Case of the Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT'L L. & POL'Y 65, 78–79 (2008) (citing Letter (redacted) from John J. Pogash, Chief of the Nat'l Juvenile Coordination Unit, Office of Detention & Removal Operations, US Immigration & Customs Enforcement, to counsel Mr. X (Feb. 13, 2007)).

150. 1999 Memo, *supra* note 117 ("The district director, in consultation with the district counsel, should consent to the juvenile court's jurisdiction if: 1) it appears that the juvenile would be eligible for SIJ status if a dependency order is issued; and 2) in the judgement of the district director, the dependency proceeding would be in the best interest of the juvenile.").

151. Porter, *supra* note 52, at 450.

152. *Id.* at 451 (citing Interview with Halim Morris, Immigration Attorney with Greater Boston Legal Services, in Boston, Mass. (Nov. 30, 1999)).

153. Lloyd, *supra* note 38, at 246.

154. David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1010–11 (2002).

minutes total).<sup>155</sup> Describing her contact with her mother as “constant,” the INS ruled that it had insufficient evidence that the girl had been abused, neglected or abandoned.<sup>156</sup>

### *c. The Aftermath of Denials*

Specific consent denials often resulted in “long legal battles” that could involve “mountainous correspondence with the District Director”<sup>157</sup> or an administrative appeal. Overturning an administrative appeal decision proved difficult because the agency’s decision was reviewed under § 706(2)(A) of the Administrative Procedure Act for abuse of discretion.<sup>158</sup> One scholar explained that “because no standard for granting consent [was] promulgated, courts [were] left with little guidance for determining when the Secretary’s action [constituted] an abuse of discretion.”<sup>159</sup>

### *d. Consequences of the Specific Consent Regime*

Compounding these issues, advocates identified six-month<sup>160</sup> delays during which applicants “aged out” of the INA definition of “juvenile” while waiting for the agency’s specific consent determination.<sup>161</sup> For example, in *Perez-Olano v. Gonzalez*, plaintiffs alleged that “hundreds of individuals that sought specific consent, [sic] had [Immigration and Customs Enforcement] deny or fail to decide those requests by the time the individual turned 18 years old.”<sup>162</sup> Furthermore, the delay made obtaining SIJS more expensive for an already economically marginalized group<sup>163</sup> and many juvenile court judges hesitated to issue dependency orders for immigrant youth out of fear of being later “chastised” by the INS for assuming jurisdiction.<sup>164</sup>

Eventually, “because of concern that the Department of Homeland Security’s grants of specific consent were convoluted, inconsistent, and detrimental to the legal rights of unaccompanied juveniles,” the 2008 TVPRA transferred control over this function to the Secretary of Health and Human Services.<sup>165</sup>

---

155. *Id.*

156. *Id.*

157. Porter, *supra* note 52, at 452.

158. Lloyd, *supra* note 38, at 257.

159. *Id.*

160. Maura M. Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 890 (2011).

161. Porter, *supra* note 52, at 452.

162. *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 256 (C.D. Cal. 2008).

163. Porter, *supra* note 52, at 452.

164. *Id.* at 451.

165. 3 Immigration Law and Procedure § 35.09(4)(b) (2018) (citing William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457 § 235(b)(1), 122 Stat. 5044, 5079–80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)); Deborah Lee et al., Practice Advisory, Update on Legal Relief Options for Unaccompanied Alien Children Following Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, at 7 (Feb. 19, 2009), [http://www.ilrc.org/files/235\\_tvpra\\_practice\\_advisory.infonet.pdf](http://www.ilrc.org/files/235_tvpra_practice_advisory.infonet.pdf) (last visited Mar. 20, 2018)).



E. *2002: The Homeland Security Act Dissolved the INS, and Within the Newly-Created Department of Homeland Security, USCIS Took Charge of Administering Immigration Benefits*

The Homeland Security Act of 2002 changed the existing structure of the administration of immigration benefits and the enforcement of immigration laws by creating separate entities for each of those functions: USCIS for the former, and Immigration and Customs Enforcement for the latter.<sup>166</sup> While this reorganization posed some challenges for SIJS applicants, it also partially resolved a longstanding problem with the dual role of the INS as both prosecutor and adjudicator, a conflict articulated in a concurring opinion from the Minnesota Court of Appeals:

The INS puts itself in a truly anomalous position. They argue that Y.W. [the child] cannot really be a CHIPS [child in need of protection or services], because a real CHIPS has no “guardian” and the INS points out that it is his “guardian.” The question cries out for an answer. What kind of guardian is the INS where “the guardian” wants to deport Y.W. . . .? . . . I am not comfortable with the INS holding itself out as Y.W.’s guardian, while at the same time they vigorously line up a case to deport him.<sup>167</sup>

Professor Thronson agreed with this concern regarding the conflict of the INS both conducting deportations and adjudicating the immigration benefits of juveniles:

Merely inserting the phrase “best interest of the child” into the statute is not sufficient to move these decision makers away from deeply ingrained notions of children and children’s rights that are daily reinforced by other aspects of their work with immigration law. . . The dominant law enforcement role, with its emphasis on authority and control, reinforces the INS’s dominant mode of thinking about children as objects. The role conflict thus inhibits the INS from hearing children’s voices and stands as a significant barrier to the adoption of a child-centered approach in reaching immigration benefit decisions.<sup>168</sup>

With the naming of the Office of Refugee Resettlement (under the Department of Health and Human Services) as the granter of specific consent

---

166. See Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135 (codified at 6 U.S.C. § 101 et. seq.).

167. Porter, *supra* note 52, at 460, citing *In re Welfare of Y.W.*, 1996 WL 665937, at \*5 (Minn. Ct. App. Nov. 19, 1996) (Randall, J., concurring).

168. Thronson, *supra* note 154, at 1011, 1013.

for detained juveniles,<sup>169</sup> the dissolution of the INS, and the formation of the Department of Homeland Security (DHS) as a separate prosecutorial body, Congress attempted to address this conflict.<sup>170</sup>

F. *2004: USCIS Memorandum Reined in Many of the Excesses of the 1998 and 1999 INS Memoranda, But Also Began the Transformation of Consent to Discretion*

Five years after the 1999 Memorandum and nearly six years after the 1998 Appropriations Act, USCIS issued the third Memorandum related to SIJS.<sup>171</sup> Though not a rule promulgated after notice-and-comment procedures, the 2004 Memorandum made a number of important clarifications and changes to the SIJS process. While several of the Memorandum's clarifications lightened the burden on SIJS applicants (subsection 1), the Memorandum also effectuated several changes that restricted access to SIJS (subsection 2).

1. *The 2004 USCIS Memorandum Made Several Clarifications Lessening the Burden on SIJS Applicants*

First, in superseding the 1998 and 1999 Memoranda,<sup>172</sup> USCIS reduced documentation requirements for SIJS applicants. For example, notably absent from the section entitled "Documentation Requirements for SIJS Petitions" were the 1998 and 1999 requirements, discussed in Section IV(C)(4), of evidence about an applicant's immigration status, their date and manner of entry, and evidence about the whereabouts and immigration status of their parents and close family members.<sup>173</sup> Second, the 2004 Memorandum finally addressed the statutory language that had changed since the promulgation of 8 C.F.R. § 204.11 in the 1993 Rule. For example, when USCIS described the dependency order required with SIJS applications in its 2004 Memorandum, it incorporated the language from the 1994 Amendments allowing for the dependency order to establish that a young person had been placed under "the

---

169. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235(d)(1)(B)(ii), 122 Stat. 5044, 5079-80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)) (modifying 8 U.S.C. § 1101(a)(27)(J) "by striking 'in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction;' and inserting 'in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction'").

170. Though the question remains how far the formation of DHS went towards resolving the conflict identified by Professor Thronson, as USCIS is both charged with its traditional gatekeeper role as an agency within DHS and with protecting vulnerable juveniles as the agency charged with implementing the 2008 TVPRA, discussed *infra* Section V(c). William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235, 122 Stat. 5044, 5079-80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)).

171. Memorandum from William R. Yates, Asst. Director for Operations, USCIS, Memorandum #3 - Field Guidance on Special Immigrant Juvenile Status Petitions (May 27 2004), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2004/sijs\\_memo\\_052704.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sijs_memo_052704.pdf) [hereinafter 2004 Memorandum].

172. *Id.* at 1.

173. *Id.* at 3.

custody of an agency or department of a State,”<sup>174</sup> instead of referring exclusively to the regulation language requiring the applicant to have been found dependent on the juvenile court.<sup>175</sup> In its 2004 Memorandum, USCIS likewise clarified that eligibility for SIJS partly hinged on a juvenile court determination that the young person was eligible for long-term foster care<sup>176</sup> on account of abuse, neglect or abandonment.<sup>177</sup> Third, under the 2004 Memorandum, youth who had submitted I-485 Applications to Register Permanent Residence or Adjust Status could receive work authorization.<sup>178</sup> Fourth, somewhat closely anticipating Section (d)(6) of the 2008 TVPRA,<sup>179</sup> USCIS in its 2004 Memorandum specifically urged its officers to accommodate youth who might turn twenty-one before their applications were adjudicated.<sup>180</sup>

## 2. *The 2004 Memorandum Also Made Changes that Restricted Access to SIJS*

In its 2004 Memorandum, USCIS also made several changes that complicated the SIJS application process and signaled the transformation of consent to discretion. Most importantly, it is the first time USCIS referenced discretion while describing the SIJS consent function:

The District Director, in his or her *discretion*, shall expressly consent to dependency orders that establish – or are supported by appropriate evidence that establishes – that the juvenile was deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and that it is in the juvenile’s best interest not to be returned to his/her home country.<sup>181</sup>

The Memorandum also constituted the first time USCIS connected the (express) consent function with the “primary purpose” language from the

174. *Id.* at 3.

175. *See* 8 C.F.R. § 204.11(d)(2)(i). Helpfully, the 2011 Proposed Rule, *supra* note 9, finally adds this updated language to the regulations themselves. This updated language is found in proposed 8 C.F.R. § 204.11(d)(3)(i).

176. Which, per 8 C.F.R. § 204.11(a), meant that the applicants were no longer able to reunify with their parents.

177. 2004 Memorandum, *supra* note 171, at 3.

178. *Id.* at 2.

179. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457 § 235(d)(6), 122 Stat. 5044, 5079–80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)). This is the “Transition Rule,” which ensured that after the enactment date of the TVPRA, a child could not be denied SIJS based on their age if they had been a child on the date they applied for SIJS.

180. 2004 Memorandum, *supra* note 171, at 6. (“District Offices should assess new applications to avoid the risk of SIJ age out, and . . . [p]rovide for expedited processing of cases at risk of aging out. . . Officers are also reminded that, in many circumstances, Section 424 of the USA PATRIOT Act provides SIJ beneficiaries limited age-out protection by extending benefits eligibility for 45 days beyond the 21st birthday.”)

181. *Id.* at 4 (emphasis added).

1997 Appropriations Committee Conference Report.<sup>182</sup> USCIS likewise introduced a new interpretation of the consent function: “In other words, express consent is an acknowledgement that the request for SIJ classification is bona fide.”<sup>183</sup> This language suggested that despite satisfying all eligibility criteria, a petition might not be “bona fide” if USCIS determined that an applicant’s primary purpose in seeking the order was to obtain the SIJS immigration benefit.

USCIS then buttressed this expanded interpretation of the consent function with the assertion that it could conduct a more searching interrogation of the facts underlying the state court order:

[E]xpress consent should be given only if the adjudicator is aware of the facts that formed the basis for the juvenile court’s rulings on dependency (or state custody), eligibility for long-term foster care based on abuse, neglect, or abandonment, and non-viability of family reunification, or the adjudicator determines that a reasonable basis in fact exists for these rulings.<sup>184</sup>

This departure from past practice is followed by a conflicting reassurance, “The adjudicator *generally* should not second-guess the court rulings or question whether the court’s order was properly issued.”<sup>185</sup> The Memorandum continued, “Orders that include or are supplemented by specific findings of fact as to the above-listed rulings will *usually* be sufficient to establish eligibility for consent.”<sup>186</sup> The use of qualifiers like “usually” and “generally” problematically suggest undefined exceptions to these instructions.

Thus, USCIS began to morph consent into discretion and assume the role of fact-finder: “If an order (or order supplemented with findings of fact, as described above) is not sufficient to establish a reasonable basis for consent, the adjudicator *must* review additional evidence to determine whether a reasonable factual basis exists for the court’s rulings.”<sup>187</sup> In its close scrutiny of the evidence and evaluation of the reasonableness of the juvenile court’s rulings, USCIS sets itself up as an appellate body over the juvenile courts — a role it was not invited to play by Congress. As the Ombudsman summarized in 2015, “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.”<sup>188</sup>

---

182. *Id.* at 2. (“Express consent means that the Secretary, through the CIS District Director, 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, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.]’” (quoting H.R. Rep. No. 105-405, at 130 (1997))).

183. *Id.*

184. *Id.* at 4.

185. *Id.* at 4–5 (emphasis added).

186. *Id.* at 5 (emphasis added).

187. *Id.* (emphasis added).

188. 2015 Ombudsman Report, *supra* note 12, at 5 (quotations omitted).

## V. A FORK IN THE ROAD: CONGRESS PROTECTS AND USCIS PUNISHES

The last two congressional acts concerning SIJS – VAWA in 2005, section (A), and the TVPRA in 2008, section (C), —signaled Congress’ return to a profound concern for vulnerable immigrant youth. In contravention of this clear intent, USCIS published two memoranda—the 2009 Memorandum, section (E) and the 2011 Memorandum, section (G)—that continued to restrict access to SIJS. It further attempted to narrow SIJS eligibility through its 2011 Proposed Rule, section (H), and updates to its Policy Manual in 2016, section (J), and 2019, section (M). Furthermore, USCIS failed to bring its policies in line with two Ombudsman Reports – one in 2011, section (G), and one in 2015, section (I). Additionally, despite its admonishment from the district court in the 2019 *Zabaleta* decision, section (K), USCIS’ refusal to respect the limits of its consent function was made clear through the 2019 reopening of the 2011 Proposed Rule, section (L). The common theme across these USCIS actions is that with its ever-increasing insistence on the primary purpose inquiry, the agency continues to violate the mandates of the 2008 TVPRA and exercise discretion instead of consent.

### A. 2005: Congress Included a Protection for SIJS Applicants in the Violence Against Women Act (VAWA)

In 2005, Congress reauthorized VAWA,<sup>189</sup> a law that included specific measures to protect “women, children, and youth.”<sup>190</sup> Included in this law was a prohibition against compelling SIJS petitioners to contact their alleged abuser or family member of the abuser, “at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 101(a)(27)(J)(iii)(I) of such Act.”<sup>191</sup> This signaled two important points: 1) Congress saw fit to group SIJS applicants in with a similarly situated vulnerable population in need of special legal safeguards (i.e. domestic violence survivors); and 2) Congress expressly limited the extent of USCIS’ consent function in SIJS through a limitation on the inquiry into underlying parental mistreatment.

### B. January 2008: USCIS Specific Consent Function was Circumscribed by the California District Court in *Perez-Olano*

In 2008, the District Court for the Central District of California decided *Perez-Olano v. Gonzalez*,<sup>192</sup> in which it granted, in relevant part, class action certification and summary adjudication for SIJS applicants who had been subject to USCIS’ specific consent requirement: those in the “actual or

189. The Violence Against Women Act, Pub.L. 109–162, 119 Stat. 2960 (2005).

190. *Id.* § 41302.

191. *Id.* § 826.

192. *Perez-Olano*, 248 F.R.D. at 256.

constructive custody of the Attorney General.”<sup>193</sup> The “specific consent subclass” argued, *inter alia*, that USCIS could not demand specific consent where a state court order would not change their “custody status or placement.”<sup>194</sup> The Court agreed and concluded that because

a state court’s SIJ-predicate order – that includes findings of dependency, abuse, neglect, and abandonment, and the child’s best interests – *does not* alter a minor’s custody status or placement, *unless* the state court additionally seeks to alter a particular child custody arrangement, assigns the child to a foster home, or takes some similar action,<sup>195</sup>

specific consent was not required for orders that did not effect the enumerated changes. Thus, the District Court reined in USCIS’ claim to broad discretion over these young people.

### C. *December 2008: The TVPRA Expanded Access to SIJS and Constricted the Role of USCIS*

As in 2005 with VAWA, Congress again chose to address SIJS within a wider measure that protected vulnerable members of the population.<sup>196</sup> The 2008 TVPRA codified provisions of the Stipulated Flores Agreement,<sup>197</sup> which had expanded the rights of youth in detention by securing them access to legal assistance,<sup>198</sup> healthcare,<sup>199</sup> privacy,<sup>200</sup> and education.<sup>201</sup> The 2008 TVPRA additionally established key protections for immigrant youth designated as unaccompanied minors, including mandating that asylum officers, as opposed to immigration judges, have initial jurisdiction over their asylum applications.<sup>202</sup> The SIJS provisions, located within subsection (d), “Permanent

193. 8 U.S.C. § 1101(a)(27)(J)(iii)(I) (1999) (“no 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”).

194. *Perez-Olano*, 248 F.R.D. at 257.

195. *Id.* at 264 (emphasis in original).

196. More generally, Congress seems to have inhabited a different mindset during this time than it did in 1998. For example, the Omnibus Appropriations Act, Pub L. 111–8, 123 Stat. 524 (2009) (passed just three months after the 2008 TVPRA) did not include any of the references in the 1997 Conference Report accompanying the 1998 Appropriations Act to adult prosecution of minors or “controll[ing]... serious juvenile offenders.” H.R. Rep. No. 105-405, at 117–18 (1997) (Conf. Rep.). In contrast, the 2009 Omnibus Appropriations Act included initiatives such as juvenile offender reentry programs (Omnibus Appropriations Act at 583), alternative education options for youth (*id.* at 788–89), and Tribal Youth Programs (*id.* at 582).

197. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), [https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement\\_011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement_011797.pdf).

198. *Id.* at Exhibit 1, Minimum Standards for Licensed Programs, (A)(9).

199. *Id.* at (A)(2).

200. *Id.* at (A)(12).

201. *Id.* at (A)(4).

202. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457 § 235(d)(7), 122 Stat. 5044, 5079–80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)) (“An asylum officer (as defined in section 235(b)(1)(E)) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child.”).

Protection for Certain At-Risk Children,” expanded eligibility for SIJS in several ways (subsection 1) and limited USCIS’ consent function (subsection 2).<sup>203</sup>

1. *The 2008 TVPRA’s Alteration of SIJS Eligibility Requirements Permitted More Young People to Apply*

In alignment with its overarching concern for protection of vulnerable populations, Congress greatly expanded access to SIJS in the 2008 TVPRA. First, it permitted dependency to be established not simply for youth “legally committed to, or placed under the custody of, an agency or department of a State”<sup>204</sup> but also for youth so committed or within the custody of “an individual or entity appointed by a State or juvenile court located in the United States.”<sup>205</sup> Thus, juveniles in guardianship or custody arrangements could meet this requirement. Second, Congress removed the term “long-term foster care” and instead hinged SIJS on non-viability of reunification with a parent. Third, it removed the requirement that the young person not be able to reunify with *both* parents; rather, non-viability with one parent was sufficient. Fourth, the 2008 TVPRA extended SIJS eligibility to include minors whose “stor[ies] did not neatly fit into the state law definitions of abuse, abandonment or neglect”<sup>206</sup> by including those who could establish “a similar basis found under State law.”<sup>207</sup>

2. *The 2008 TVPRA Restricted USCIS’ Role in SIJS Adjudications*

Congress revised key language from the 1998 Appropriations Act related to the role of the Attorney General (AG), and thus USCIS, in SIJS adjudications.

First, the 2008 TVPRA stated that it was changing the SIJS statute “by striking ‘. . .who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;’ and inserting . . . ‘whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.’”<sup>208</sup> Thus, where the 1998 Act focused on whether the underlying dependency order had been issued on account of qualifying parental mistreatment, the 2008 TVPRA focused on whether the mistreatment precluded parental reunification. Thus, even assuming Congress in the 1998 Act had called for an inquiry into applicants’ primary purpose in securing the juvenile court order (which

203. *Id.* § 235(d)(1).

204. Language added to the SIJS statute, 8 U.S.C. § 1101(a)(27)(J)(i), by the Dep’t of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119 § 113, 111 Stat. 2440, 2460–61 (codified at 8 U.S.C.A. § 1101(a)(27)(J) (1999)).

205. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235(d)(1)(A), 122 Stat. 5044, 5079-80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)).

206. Keyes, *supra* note 41, at 56.

207. 8 U.S.C. § 1101(a)(27)(J)(i).

208. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235(d)(1)(A), 122 Stat. 5044, 5079-80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)).

it did not),<sup>209</sup> the TVPRA made such an inquiry untenable by directing an adjudicator's attention to whether a juvenile court had determined that a young person had suffered abuse, abandonment or neglect and consequently, could no longer reunify with one or both of their parents.

Second, the 2008 TVPRA limited USCIS' role in the SIJS application process by only requiring the Secretary of Homeland Security to "consent" to a grant of SIJS.<sup>210</sup> In contrast, the 1998 Appropriations Act had required the "express" consent of the AG for SIJS applications.<sup>211</sup> Furthermore, the 1998 distinction of "actual or constructive custody" was entirely removed, and the specific consent function was delegated to the Department of Health and Human Services (HHS),<sup>212</sup> as will be discussed *infra* in subsection (D).

Third, the 2008 TVPRA made clear that applicants who were under the age of twenty-one at the time of filing a SIJS application but who turned twenty-one by the time their applications were adjudicated could no longer be denied because they had "aged out".<sup>213</sup> This provision preserved the SIJS eligibility of youth who had obtained a dependency order but were only able to apply for SIJS close to their twenty-first birthdays or whose SIJS applications USCIS took an unexpectedly long time to adjudicate. But importantly, the group also included youth who learned about SIJS close enough to their twenty-first birthdays that they were under the age of twenty-one at the time of applying for SIJS but over twenty-one by the time their petitions were adjudicated. The inclusion of these youth – especially without a corresponding directive for USCIS to interrogate their primary purpose in seeking a juvenile court order – suggests, again, that Congress's central concern was whether these young people were vulnerable because of abandonment, abuse or neglect by a parent (as determined by a juvenile court) and *not* whether they had the "correct" intentions in obtaining a dependency order.

Notably, the 2008 TVPRA containing this significantly altered version of the SIJS statute was unanimously approved without objection by the House and without amendment by unanimous consent in the Senate.<sup>214</sup> It was signed

---

209. We could also assume that the INS and USCIS had exercised its delegated consent function in a way that Congress had never intended, and once made aware of this divergence, Congress revised the statute to realign USCIS' actions with this original – and never altered—intent.

210. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235(d)(1)(B)(i), 122 Stat. 5044, 5079-80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)).

211. Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119 § 113, 111 Stat. 2440, 2460-61 (codified at 8 U.S.C.A. § 1101(a)(27)(J)(iii) (1999)).

212. 8 U.S.C. § 1101(a)(27)(J)(iii)(D)(2019)).

213. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235(d)(6), 122 Stat. 5044, 5079-80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)) ("Notwithstanding any other provision of law, an alien described in section 101(a)(27)(J) of the Immigration and Nationality Act ( 8 U.S.C. § 1101(a)(27)(J)), as amended by paragraph (1), may not be denied special immigrant status under such section after the date of the enactment of this Act based on age if the alien was a child on the date on which the alien applied for such status.").

214. Actions Overview H.R.7311 — 110th Congress (2007-2008), CONGRESS.GOV, <https://www.congress.gov/bill/110th-congress/house-bill/7311/actions> (last visited Nov. 30, 2019).



into law by President George W. Bush.<sup>215</sup>

#### D. *Post 2008: Practical Changes to Specific Consent*

As detailed *supra* in section (IV)(D)(2), specific consent — for whom it was required, how to apply for it, and the length of time it took for one to receive it — presented a formidable challenge to would-be SIJS applicants after the 1998 Appropriations Act.

Fortunately, within a year of the 2008 TVPRA’s passage, HHS, which was now tasked with granting or denying specific consent, issued clear guidance on these matters.<sup>216</sup> Of note were the following improvements:

1. Specific consent was only needed for those who wanted a state court to exercise jurisdiction over their placement or custody, in accord with *Perez-Olano*.<sup>217</sup> As a result, most applicants seeking SIJS dependency orders affirming rather than altering their caretaking arrangements did not need to seek specific consent.<sup>218</sup>
2. For applicants who still needed specific consent, the HHS Guidance contained information about what forms applicants should fill out, who to mail them to, and how to mark an application as urgent.<sup>219</sup>
3. The guidance described the internal HHS process of granting or denying specific consent. This included an email acknowledgement of receipt of the request within two business days and an email decision on specific consent within thirty business days.<sup>220</sup>
4. The guidance offered criteria HHS would use in deciding whether or not to grant specific consent (“whether continued HHS custody is required to ensure a juvenile’s safety or the safety of the community, or to prevent flight”), as well as a guarantee that HHS would make no *prima facie* determination about the juvenile’s SIJS eligibility.<sup>221</sup>
5. Last, it guaranteed that if a request for specific consent was denied, HHS would provide the applicant with “any documentation reviewed in reaching its determination.”<sup>222</sup>

---

215. H.R. 7311 (110th): William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, GOVTRACK.US, <https://www.govtrack.us/congress/bills/110/hr7311> (last visited Dec. 8, 2018).

216. U.S. Dep’t of Health and Human Servs., Office of Refugee Resettlement, Specific Consent Requests Program Instruction 1–2 (Dec. 24, 2009), [https://www.acf.hhs.gov/sites/default/files/ort/special\\_immigrant\\_juvenile\\_status\\_specific\\_consent\\_program.pdf](https://www.acf.hhs.gov/sites/default/files/ort/special_immigrant_juvenile_status_specific_consent_program.pdf). [hereinafter Specific Consent Requests Program Instruction].

217. *Perez-Olano*, 248 F.R.D. at 264.

218. Jared Ryan Anderson, *Comment: Yearning to be Free: Advancing the Rights of Undocumented Children Through the Improvement of the Special Immigrant Juvenile (SIJ) Status Procedure*, 16 SCHOLAR 659, 671 (2014).

219. Specific Consent Requests Program Instruction, *supra* note 216, at 2.

220. *Id.* at 2.

221. *Id.* at 3.

222. *Id.* at 2.

E. *2009: USCIS Memorandum Inadequately Acknowledged the Changes Made by the 2008 TVPRA to SIJS and Exposed the Logical Fallacy of Equating Consent With a Primary Purpose Evaluation*

Three months after the TVPRA was passed, USCIS issued the 2009 Memorandum.<sup>223</sup> Helpfully, this Memorandum explained some of the major changes to SIJS: it now permitted dependency orders based on guardianship.<sup>224</sup> Additionally, the non-viability of reunification only needed to be established with one parent.<sup>225</sup> Last, juveniles who filed their SIJS application before they turned twenty-one remained SIJS-eligible, regardless of their age at adjudication.<sup>226</sup>

The 2009 Memorandum also confirmed the end of “express” consent by stating,

The TVPRA 2008 simplified the “express consent” requirement for an SIJ petition. *The Secretary of Homeland Security (Secretary) must consent to the grant of special immigrant juvenile status.* This consent is no longer termed “express consent” and is no longer consent to the dependency order serving as a precondition to a grant of SIJ status.<sup>227</sup>

The Memorandum acknowledged that in altering the SIJS consent function, Congress imposed *two* significant changes: what type of consent was required, and what was being consented to. However, if we compare how the 2004 and 2009 Memoranda describe the consent function, we see that USCIS in 2009 did not account for both of these changes and instead imposed a modified version of the 2004 relic:

2004 Memorandum: “Express consent means that the Secretary, through the CIS District Director, 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, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.]’ In other words, express consent is an acknowledgement that the request for SIJ classification is bona fide.”<sup>228</sup>

2009 Memorandum: “The consent determination by the Secretary, through the USCIS District Director, is an acknowledgement that the

---

223. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, USCIS, & Pearl Chang, Acting Chief, Office of Policy & Strategy, USCIS, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (Mar. 24, 2009), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVPRA\\_SIJ.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf) [hereinafter 2009 Memorandum].

224. *Id.* at 2.

225. *Id.*

226. *Id.* at 2–3.

227. *Id.* at 3 (emphasis in original).

228. 2004 Memorandum, *supra* note 171, at 2.

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.’ See H.R. Rep. No. 105-405, at 130 (1997). An approval of an SIJ petition itself shall be evidence of the Secretary’s consent.”<sup>229</sup>

In accordance with the 2008 TVPRA, USCIS acknowledged that it no longer exercised “express consent,” but merely “consent.” However, its interpretation of this change is unsatisfactory. It would be odd that in changing the very limited statutory language on SIJS, Congress would merely have intended to only effect a modification in the minutiae of agency action. Indeed, it is unclear why Congress would have passed a full statutory amendment directing the agency to explicitly inform applicants that consent had been denied or granted (and in the latter case, have the approval “itself . . . be evidence of the Secretary’s consent” as the 2009 Memo stated). This is especially so when USCIS was *already* exercising its consent function in this way and had done so since the issuance of the 1999 Memorandum. As detailed *supra* in Section IV(D)(1), the 1999 Memorandum explained that approval of a SIJS petition implied that consent had been granted. Furthermore, especially given the distinction between the punitive tone of the 1998 Appropriations Act and the humanitarian spirit of the 2008 TVPRA,<sup>230</sup> one would expect that the 110th Congress that passed the TVPRA meant to do more with the consent function when it specifically excised the word “express” and changed the thing being consented to, than simply direct USCIS to send SIJS petition approval notices when appropriate.

Moreover, although USCIS in the 2009 Memorandum targeted the object of its consent inquiry as the “SIJ benefit” instead of the dependency order or best interest determination, the agency refused to correspondingly alter the inquiry itself; instead, the inquiry continued to turn on the petitioner’s primary purpose. The result was that the inquiry lost any logical coherence. When questioning an applicant’s primary purpose in obtaining a *dependency order* (the inquiry posed in the 2004 Memorandum, however unmoored from the statutory language or Senator Domenici’s concern this inquiry may be), such an inquiry could yield many answers. Perhaps the young person was escaping an unsafe home situation or needed a stable adult who could make medical and educational decisions for them—or perhaps all of these purposes existed at once.

The 2009 Memorandum consent inquiry is an impossible philosophical exercise. It is misguided to ask a USCIS adjudicator to determine whether a SIJS applicant, who cannot reunify with one or both of their parents due to abuse, neglect, abandonment and/or a similar basis under state law, primarily

---

229. 2009 Memorandum, *supra* note 223, at 3.

230. See *supra* note 196 and accompanying text.

applied for SIJS to seek relief from abuse, neglect or abandonment rather than to obtain immigration status. Functionally, the “SIJ benefit” provides all approved petitioners with relief from abuse, abandonment, and neglect *and* a path to lawful permanent resident status. Generally, any applicant, in applying for an immigration benefit such as SIJS (i.e., filling out the requisite Form I-360 and submitting it to a federal agency tasked with “[administering] the nation’s lawful immigration system”<sup>231</sup>) will receive an immigration benefit that supports their permanency if their petition is approved. Additionally, it would be unreasonable for an adjudicator to attempt to extricate a SIJS applicant’s primary motivation in applying for SIJS when an adolescent applicant may not even know their primary purpose in applying for SIJS. Tellingly, both the 2004 and 2009 Memoranda cite to the same 1997 Conference Report accompanying the 1998 Appropriations Act in justifying purportedly distinct interpretations of the consent function.

Regardless, in practice, USCIS has reverted to the 2004 Memorandum’s tying of the primary purpose inquiry to the state court order, as evidenced in its own Policy Manual,<sup>232</sup> instead of connecting the inquiry to the SIJ benefit, as it did in the 2009 Memorandum. This reversion to a pre-TVRA conception of consent is further reflected in AAO decisions, several of which contain the following sentence—using essentially the same language as the 2004 Memorandum—verbatim: “This consent determination is an acknowledgement that the request for SIJ classification is bona fide, which means that *the juvenile court order and the best-interest determination* were sought primarily to gain relief from parental abuse, neglect, abandonment or a similar basis under state law, and not solely or primarily to obtain an immigration benefit.”<sup>233</sup>

#### F. 2009: *The Interim Rule Did Nothing to Align USCIS Practice with the 2008 TVRA*

After the passage of the 2008 TVRA, USCIS did publish a rule that, in part, addressed SIJS: the 2009 Interim Rule.<sup>234</sup> Given that the INS had been dissolved

---

231. U.S. CITIZENSHIP AND IMMIGRATION SERVICES: ABOUT US, <https://www.uscis.gov/aboutus> (last visited Nov. 30, 2019).

232. “In order to consent to the grant of SIJ classification, USCIS must review the juvenile court order and any supporting evidence submitted to conclude that the request for SIJ classification is bona fide, which means that the juvenile court order was sought to protect the child and provide relief from abuse, neglect, abandonment, or a similar basis under state law, and not primarily to obtain an immigration benefit.” USCIS POLICY MANUAL VOL. 6, *supra* note 34, at Pt. J.2(D).

233. *Matter of S-S-*, 2016 WL 4157702, at \*1 (DHS July 13, 2016); *Matter of L-S-*, 2016 WL 4730169 at \*1 (DHS Aug. 24, 2016); *Matter of J-A-M-*, 2016 WL 4619896, at \*1 (DHS Aug. 15, 2016); *Matter of A-Y-L-L-*, 2016 WL 6459606 at \*1 (DHS Oct. 7, 2016) (emphasis added). Other decisions use a slightly modified sentence: “USCIS’ consent is an acknowledgment that the request for SIJ classification is bona fide, which means that the *juvenile court order and best-interest determination* were sought to gain relief from abuse, abandonment, neglect, or a similar basis under state law and not primarily or solely to obtain an immigration benefit.” (emphasis added). See *Matter of D-Y-L*, 2017 WL 5260758, at \*2 (DHS Oct. 19, 2017); *Matter of M-S*, 2018 WL 802575, at \*2 (DHS Jan. 10, 2018).

234. Removing References to Filing Locations and Obsolete References to Legacy Immigration and Naturalization Service; Adding a Provision to Facilitate the Expansion of the Use of Approved Electronic Equivalents of Paper Forms, 74 Fed. Reg. 26933-01 (June 5, 2009).

and replaced largely by DHS,<sup>235</sup> the rule removed all references to the INS. It also removed information about filing locations, as the agency felt that such information would be better provided on forms.<sup>236</sup> Thus, this Interim Rule merely made technical adjustments and did not align USCIS practice with the 2008 TVPRA's statutory changes to consent.

G. *June and July 2011: The USCIS Ombudsman Expressed Concerns about De Novo Review of Dependency Orders, and in Response, USCIS Asserted That Consent is a Discretionary Determination*

In its 2011 report, the Ombudsman pointed out to USCIS several issues related to SIJS adjudications, including USCIS' failure to comply with the statutorily required 180-day adjudication period<sup>237</sup> and officers' use of age-inappropriate interviewing techniques during interviews.<sup>238</sup>

As relevant to the USCIS consent function, the Ombudsman also expressed concern that through Requests for Evidence (RFEs), USCIS was improperly conducting *de novo* review of the facts underlying dependency orders. Because of these RFEs, advocates were forced to share with USCIS confidential juvenile court records containing the facts underlying their client's dependency order or risk prejudicing their client's case.<sup>239</sup> Additionally, given how upsetting, invasive and lengthy these efforts to collect sensitive information could be, SIJS stakeholders (individuals and organizations seeking to assist SIJS applicants) noted that they sometimes "refrained from advising eligible children to seek SIJ status because re-adjudication of the dependency issue can upset the child, intrude on the child's privacy, and lengthen processing times."<sup>240</sup> The Ombudsman asserted clearly that the "TVPRA [] permits USCIS to require additional evidence relating to the basis for the juvenile dependency order only in very limited circumstances. Generally speaking, such evidence may be requested when the dependency order fails to specify whether it was issued on the basis of abuse, neglect, or abandonment."<sup>241</sup>

The Ombudsman also requested that USCIS issue regulations and more guidance about what constituted adequate evidence for SIJS post-TVPRA and when interviews were deemed necessary.<sup>242</sup> The USCIS Ombudsman

---

235. Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 101 et. seq.).

236. Removing References to Filing Locations and Obsolete References to Legacy Immigration and Naturalization Service; Adding a Provision to Facilitate the Expansion of the Use of Approved Electronic Equivalents of Paper Forms, 74 Fed. Reg. 26933-01 (June 5, 2009).

237. USCIS OMBUDSMAN RECOMMENDATION, SPECIAL IMMIGRANT JUVENILE ADJUDICATIONS: AN OPPORTUNITY FOR ADOPTION OF BEST PRACTICES (Apr. 15, 2011) at 1, <https://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf> [hereinafter 2011 Ombudsman Report].

238. *Id.*

239. *Id.* at 5.

240. *Id.* at 7.

241. *Id.* at 5.

242. *Id.* at 7-8.

noted that USCIS had issued no guidance even internally about how to treat evidence or interviews.<sup>243</sup> Furthermore, the Adjudicator's Field Manual did not engage with the 2008 TVPRA revisions (not even by directing adjudicators to the 2009 Memorandum).<sup>244</sup> It instead referred adjudicators to the pre-TVPRA 2004 Memorandum "as prevailing guidance."<sup>245</sup>

In response, USCIS issued the 2011 Memorandum<sup>246</sup> that effectively disregarded the Ombudsman's recommendations. With respect to the concern that it was issuing RFEs improperly, USCIS again cited the 1997 Conference Report, but now added that the consent function "is effectively a *discretionary* determination that the petition is bona fide and that there is a reasonable basis for the agency's consent to the SIJ classification."<sup>247</sup> Here, USCIS clearly admitted that it believed that this function was wholly a matter of discretion. Also, in failing to identify any criteria guiding this discretion, USCIS intimated that this discretion was essentially boundless. Moreover, in response to the charge that it was engaging in *de novo* review, USCIS first found it necessary to assert that none of the sources cited by the Ombudsman prohibited *de novo* review and only then proceeded to deny that it was employing this standard.<sup>248</sup> Finally, with regard to the request for regulations, USCIS responded that a regulation was forthcoming;<sup>249</sup> the end result appears to have been the 2011 Proposed Rule.

#### H. *September 2011: Proposed Rule—Never Enacted But Reopened for Comments in 2019—Revealed that USCIS Intended to Exercise not Consent, but Discretion*

In 2011, USCIS proposed a Rule that "would implement statutorily mandated changes [to SIJS] by revising the existing eligibility requirements, including protections against aging-out, adding the revised consent requirements, and further exempting SIJ adjustment of status applicants from several grounds of inadmissibility."<sup>250</sup> Critically, the Rule added consent as a formal eligibility requirement<sup>251</sup> and added a separate regulatory provision that described consent.<sup>252</sup>

Notably, USCIS in the 2011 Proposed Rule acknowledges that the formal addition of consent as an eligibility criterion is a radical departure: "Based on

---

243. *Id.* at 5–6.

244. *Id.*

245. *Id.* at 6.

246. Memorandum from Lori Scialabba, Dep. Dir., USCIS, Response to Recommendation 47, Special Immigrant Juvenile (SIJ) Adjudications: An Opportunity for Adoption of Best Practices (July 13, 2011), <https://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2011-response47.pdf> [hereinafter 2011 Memorandum].

247. *Id.* at 4 (emphasis added).

248. 2011 Memo, *supra* note 246, at 7.

249. *Id.* at 5.

250. 2011 Proposed Rule, *supra* note 9, at 54979.

251. *Id.* at 54985, 8 C.F.R. § 204.11(b)(1)(vii).

252. *Id.* at 8 C.F.R. § 204.11(c).

the [ ] 1998 Appropriations Act and TVPRA 2008, the proposed regulation would significantly change the Form I-360 eligibility criteria.”<sup>253</sup> However, after this admission, the 2011 Proposed Rule impermissibly reverted to pre-TVPRA language around consent (subsection 1) and expanded this language to encompass not just consent, but discretion (subsection 2), for which USCIS has no statutory authority. In 2019, USCIS re-opened the comment period for thirty days, demonstrating an intent to implement the previously proposed regulations.<sup>254</sup>

1. *The Proposed Rule’s Description of the Consent Function Revealed USCIS’ Adherence to its Pre-TVPRA Conception of Consent*

In its 2011 Proposed Rule, USCIS acknowledged that the consent function had changed: “Consent to the dependency order was historically a precondition to granting special immigrant juvenile classification. Section 235(d)(1)(B) of TVPRA 2008, however, replaced that precondition with the requirement that the Secretary consent to the SIJ classification itself.”<sup>255</sup> However, in describing this ostensibly distinct version of consent (now an end-stage step rather than a “precondition”), USCIS in the 2011 Rule adopted language essentially identical to that which the 2004 Memorandum (as quoted *supra* in section (V)(E)) used to describe express consent to the dependency order: “[C]onsent will be granted . . . where the *qualifying State court order* was sought primarily for the purpose of obtaining relief from abuse, neglect, abandonment, or some similar basis under State law, and not primarily for the purpose of obtaining lawful immigration status.”<sup>256</sup> Given that “the qualifying State court order” mentioned in the 2011 Proposed Rule likely contained both the dependency order and the best interest determination mentioned in the 2004 Memorandum, the definition of “consent” in the 2011 Rule was, in fact, the same as the 2004 Memorandum’s definition of express consent.<sup>257</sup> USCIS abandoned its own recognition that what was being consented to – now “the SIJ classification itself”<sup>258</sup> – had changed.<sup>259</sup> It simply reverted back to its pre-TVPRA interrogation of dependency orders.

Indeed, USCIS effectively acknowledged how little its interpretation had changed when it stated in the 2011 Proposed Rule, “This policy is consistent

253. *Id.* at 54979.

254. October 2019 USCIS Announcement, *supra* note 10.

255. 2011 Proposed Rule, *supra* note 9, at 54981.

256. *Id.* at 54981.

257. *See id.* (“The State judicial or administrative proceedings must additionally determine, under applicable State law, that it would not be in the alien’s best interest to be returned to the country of nationality or last habitual residence of the alien or of his or her parents. . . Typically, the juvenile court order itself will include this finding.”)

258. 2011 Proposed Rule, *supra* note 9, at 54981.

259. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235, 122 Stat. 5044, 5079–80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)).

with congressional intent in *creating* the consent function.”<sup>260</sup> The Rule did not explain how, if at all, this policy was consistent with congressional intent in *altering* the consent function in the 2008 TVPRA.<sup>261</sup> The Rule also includes a citation to the perpetually referenced 1997 Conference Report<sup>262</sup> and subsequently elaborated:

The scant legislative history behind these amendments suggests that Congress intended to limit eligibility to prevent potential abuse of this benefit, tying eligibility more directly to judicial findings of abuse, abandonment, or neglect and allowing the government to consent to the State court’s jurisdiction and to the granting of an immigration benefit.<sup>263</sup>

Consenting to the grant of juvenile court jurisdiction (i.e., specific consent) is indeed within the purview of the agency in some limited circumstances (though it was delegated to HHS, as discussed *supra* in Sections (V)(C)-(D)), as is the granting of the immigration benefit. However, this statement provides no support for a consent function tied to a primary purpose inquiry and especially not for the discretionary inquiry USCIS claimed. As described *supra* in Section (IV)(B), Congress did respond to Senator Domenici’s concerns about fraud by tying eligibility to *judicial* findings of abuse, abandonment, or neglect; however, the immigration agency has never been invited to play any role in the determination of parental mistreatment. Thus, yet again, USCIS failed to offer any support for its inquiry into applicants’ primary purpose in obtaining a state court order.

## 2. *After Failing to Align its Consent Function with the 2008 TVPRA, USCIS Attempted to Convert its Authority from Consent to Discretion in the 2011 Proposed Rule*

In the 2011 Proposed Rule, USCIS not only reverted to its flawed understanding of the express consent standard, but also attempted to inflate the agency’s power from consent to discretion (subsection (a)) and empower itself to impose excessive evidentiary burdens (subsection (b)).

### *a. The 2011 Proposed Rule Contained Many References to Discretion*

Congress has never described the INS and later the USCIS consent function as a discretionary power. The INS and USCIS themselves never linked consent to discretion before the 2004 Memorandum, as discussed *supra* in Section IV(F)(2). The 2009 Memorandum made no mention of discretion,

---

260. 2011 Proposed Rule, *supra* note 9, at 54981 (emphasis added).

261. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457 § 235, 122 Stat. 5044, 5079–80 (codified at 8 U.S.C. § 1101(a)(27)(J) (2019)).

262. H.R. Rep. No. 105-405, at 130 (1997) (Conf. Rep.).

263. 2011 Proposed Rule, *supra* note 9, at 54979 (citing H.R. Rep. No. 105-405, at 130 (1997) (Conf. Rep.)).



but two years later, the 2011 Proposed Rule contained multiple references to discretion:

- “Eligibility for special immigrant juvenile classification, however, depends only in part on the findings of the State court, since USCIS retains the *discretionary* authority to grant, deny, or revoke SIJ classification.”<sup>264</sup>
- “In determining whether to provide consent to classification as a special immigrant juvenile *as a matter of discretion*, USCIS will consider, among other permissible *discretionary* factors, 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; and that the evidence otherwise demonstrates that there is a bona fide basis for granting special immigrant juvenile status.”<sup>265</sup>
- “The alien has the burden of proof to show that *discretion* should be exercised in his or her favor.”<sup>266</sup>

*b. This Shift to Discretion was Further Manifest in Excessive Evidentiary Requirements*

As described *supra* in subsection III(D)(2)(c), the 1993 Rule, at least implicitly, acknowledged that the INS requirement of four separate documents—three issued by a court or agency and one application<sup>267</sup>—was excessive. Eighteen years later in the 2011 Proposed Rule, USCIS asserted that petitioners must meet a new burden of proving an acceptable primary purpose and went on to describe what supplemental evidence a petitioner could include to prove this purpose: “a dependency or guardianship order, findings accompanying the order, actual records from the proceedings . . . other evidence that summarizes the evidence presented to the court . . . information from persons who know the petitioner in a personal or professional manner. . . . affidavits, letters, evaluations, or treatment plans.”<sup>268</sup> The sources of this information could include “the court, State agency, department, or individual with whom the juvenile has been placed, health care professionals, social workers, others with responsibility to evaluate and treat the juvenile, attorneys, guardians, adoptive parents, family members, and friends.”<sup>269</sup>

264. 2011 Proposed Rule, *supra* note 9, at 54980 (emphasis added).

265. *Id.* at 54985 (emphasis added).

266. *Id.* (emphasis added).

267. 1991 Interim Rule, *supra* note 7. See also discussion *supra* in Section III(B)(2).

268. *Id.* at 54981.

269. *Id.*

Despite this exhaustive list of what petitioners could submit, there was no indication of what exactly USCIS officers should be looking for in these pieces of evidence. What would suggest an acceptable primary purpose, and what would not? The Rule did not give any criteria to guide an adjudicator's decision with one exception. The Rule specified, "USCIS may consider any evidence of the role of a parent or other custodian in arranging for a petitioner to travel to the United States or to petition for SIJ classification."<sup>270</sup> Given that this was the sole adjudicatory criterion mentioned, some petitioners could be required to submit "the entire confidential state court file" in response to RFEs and Notices of Intent to Deny from USCIS.<sup>271</sup> Furthermore, this consideration illustrated that USCIS was no longer adhering to the protection-oriented purpose of the 2008 TVPRA and additionally, without explanation, about-faced on a practice explicitly contemplated and rejected in the 1993 Rule.<sup>272</sup>

If the lengthy list above were not enough, USCIS reserved the right to "obtain initial or additional supporting evidence, documents, or materials directly from a court, government agency, or other administrative body in either paper or electronic format."<sup>273</sup> With no limits on the criteria they could consider and apparently new authority to directly request even more evidence from any "court, government agency or other administrative body," – despite state confidentiality laws – the agency could not claim that it was not second-guessing the juvenile court's order. Indeed, it made no such claim in the Rule. In fact, USCIS stated: "*Generally*, 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."<sup>274</sup> The possibility was left open that a young person would be directly interrogated, with or without a trusted adult or counsel present, about traumatic details to verify any findings in the state court order.<sup>275</sup>

The 2011 Proposed Rule suggested that USCIS felt justified in converting its consent function into "unfettered discretion" — an authority it had not claimed to have since 1995.<sup>276</sup> Given USCIS' October 15, 2019

---

270. *Id.* at 54982.

271. Letter from Organizations and Immigration Law Practitioners to León Rodríguez, Director of USCIS at 1 (Feb. 20, 2015) (on file with authors).

272. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, and 245) (1993) ("This commenter recommended that the Service rewrite the eligibility criteria to exclude children who were brought or sent to the United States to take advantage of the special immigrant juvenile provision. . . . However, the Service believes that a child in need of the care and protection of the juvenile court should not be precluded from obtaining special immigrant status because of the actions of an irresponsible parent or other adult.")

273. 2011 Proposed Rule, *supra* note 9, at 54982.

274. *Id.* (emphasis added).

275. *Id.* ("USCIS still maintains discretion to interview a child separately when necessary.")

276. 1995 INS Opinion Letter, *supra* note 37 ("Interference by the states with the custodial arrangement of the federal government is problematic since the Attorney General has unfettered discretion over the detention of illegal aliens.")

announcement reopening the 2011 Proposed Rule for comments,<sup>277</sup> the implementation of the proposed regulation appears imminent. However, because it is not yet enforceable, the rest of the article discusses USCIS' actions subsequent to the issuance of the 2011 Proposed Rule but prior to its seemingly imminent implementation.

I. *2015: Ombudsman Report Pointed out Further Problems with SIJS Adjudications*

1. *USCIS Policy was Out of Step with Controlling Statutory Language*

In 2015, the Ombudsman issued another report on SIJS adjudications. A key finding of the report was that USCIS policy concerning consent did not reflect the statutory amendments. The report explained, "SIJ is a complex benefit adjudication, which has undergone substantial legislative changes that supersede existing regulations and written policy guidance."<sup>278</sup> The report found that USCIS policy did not keep up with statutory revisions, "relying instead on language that had disappeared from the statute."<sup>279</sup> The report urged:

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.<sup>280</sup>

As a result, among other recommendations, the report called for the issuance of "updated regulations to incorporate the statute fully, clarify policy guidance and articulate the limitations of USCIS' consent authority," and that USCIS do so "fully and consistently with the statute as it now exists."<sup>281</sup>

2. *USCIS was Improperly Conducting De Novo Review of Dependency Orders*

The Ombudsman also clarified, "USCIS's statutory consent function does not appropriately extend to a *de novo* review of every underlying fact that supported the Court's findings."<sup>282</sup> The 2008 TVPRA, by eliminating the express consent requirement, recognized "State court authority and 'presumptive competence' over determinations of dependency, abuse, neglect, abandonment, reunification, and the best interests of children."<sup>283</sup> The

---

277. October 2019 USCIS Announcement, *supra* note 10.

278. 2015 Ombudsman Report, *supra* note 12, at 5.

279. *Id.* at 6.

280. *Id.* at 7.

281. *Id.* at 12.

282. *Id.* at 2.

283. *Id.* at 5.

Ombudsman elaborated, “Congress, through statute, did not charge USCIS with determining a child’s best interests; whether a child has been abused, abandoned or neglected . . . [b]y statute, that is the role of the State court.”<sup>284</sup> The Ombudsman admonished USCIS that it should “presume regularity of the State court decision rather than challenge them, and seek information regarding the consistency of the process or the courts’ finding only when there is cause to believe the criteria have not been met.”<sup>285</sup>

The Ombudsman identified a practical consequence of USCIS second-guessing state court findings: requests for documentation that were “overly burdensome and intrusive” and even impossible to produce given the nature of certain confidential court documentation.<sup>286</sup> Significantly, because USCIS continued to apply the *de novo* standard of review, the “express consent” standard remained, to the effect of nullifying the 2008 TVPRA’s directive that the AG consent to the SIJ classification and not the underlying dependency order.<sup>287</sup>

### 3. *The USCIS Director’s Response Evinced No Intention to Update USCIS Policies*

In response to the 2015 Ombudsman Report, USCIS Director León Rodríguez stated, “USCIS generally concurs with the recommendations and will work to implement them.”<sup>288</sup> But with respect to consent, Director Rodríguez asserted:

DHS/USCIS will consent to SIJ classification when it is determined that the request for SIJ classification is bona fide, which means the court order was sought for relief from abuse, neglect, abandonment, or a similar basis under State law, and not sought solely or primarily to obtain an immigration benefit. USCIS does not determine whether or not a child has been abused, abandoned, or neglected or re-weigh the evidence to form independent conclusions about what is in a child’s best interests. Orders that include or are supplemented by a reasonable factual basis for the required findings will usually be sufficient to establish eligibility.<sup>289</sup>

---

284. *Id.* at 6.

285. *Id.* at 12.

286. *Id.* at 7.

287. *Id.* at 8 (“The 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.”) (emphasis in original).

288. Memorandum from León Rodríguez, USCIS Dir., to Maria Odom, USCIS Ombudsman, Response to Recommendations on Special Immigrant Juvenile Adjudications (Apr. 19, 2016) at 1, [https://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/Response\\_to\\_CISOMB\\_SIJ\\_Recommendations\\_CSPE\\_LCU\\_9.28.16.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/Response_to_CISOMB_SIJ_Recommendations_CSPE_LCU_9.28.16.pdf).

289. *Id.* at 3 (internal citations omitted).

Holding fast to the 2004 Memorandum's interrogation of petitioners' primary purpose in seeking dependency orders, the Director thus failed to respond to the Ombudsman's concerns that USCIS' interpretation of the consent function had been repudiated by the 2008 TVPRA, that USCIS' role was now merely to verify eligibility criteria, and that its *de novo* review of state court orders did not reflect adequate respect for the competency of state courts.

J. 2016: USCIS Policy Manual Update Partially Updated SIJS Adjudication Policies

The USCIS Policy Manual is "the agency's centralized online repository for USCIS' immigration policies",<sup>290</sup> and in 2016, the Manual's SIJS section was updated.<sup>291</sup> Unfortunately, the eligibility requirements listed in the USCIS Policy Manual continued to include the vestigial primary purpose inquiry.<sup>292</sup> Such verbiage reinforced the misguided position that USCIS has discretion when adjudicating SIJS petitions and could decide that a young person harboring the primary motivation of gaining lawful status does not deserve SIJS. As pointed out by the Ombudsman in 2015 and as discussed in Section (V)(I)(2), USCIS only has the power to review the dependency order's language to ensure it satisfies the prongs of the SIJS statute. Chapters 3 and 4 of the Policy Manual identified a workable standard by which USCIS must adjudicate these petitions: the "reasonable factual basis standard," which requires USCIS to review SIJS submissions to determine whether a reasonable factual basis supports the findings.<sup>293</sup> This was potentially consistent with the deference plus standard, explained further *supra* in section II(C) and *infra* in section VI. Moreover, if USCIS had eradicated from this version of the Policy Manual all references to "bona fide" and "primary purpose," the Manual would have, as a whole, been more internally consistent, as the Manual itself contained multiple references to the deference owed to state

290. USCIS POLICY MANUAL VOL. 6 (Nov. 19, 2019), <https://www.uscis.gov/policy-manual>.

291. U.S. Citizenship and Immigr. Serv., Policy Alert from USCIS, *Special Immigrant Juvenile Classification and Special Immigrant-Based Adjustment Of Status*, PA-2016-06 (Oct. 26, 2016), <https://www.uscis.gov/sites/default/files/policymanual/updates/20161026-SIJ-EB4Adjustment.pdf> (last visited Nov. 30, 2019).

292. USCIS POLICY MANUAL VOL. 6, Pt. J.2(D)(5) (May 23, 2018) (on file with authors) ("In order to consent, USCIS must review the juvenile court order to conclude that the request for SIJ classification is bona fide, which means that the juvenile court order was sought to obtain relief from abuse, neglect, abandonment, or a similar basis under state law, and *not primarily or solely to obtain an immigration benefit*. . . [T]he factual basis of each of the required findings is evidence that the request for SIJ classification is bona fide.") (emphasis added).

293. *Id.* ("USCIS requires that the juvenile court order or other supporting evidence contain or provide a reasonable factual basis for each of the findings necessary for classification as a SIJ. The evidence needed does not have to be overly detailed, but must confirm that the juvenile court made an informed decision in order to be considered 'reasonable.' USCIS generally consents to the grant of SIJ classification when the order includes or is supplemented by a reasonable factual basis for all of the required findings.").

court determinations.<sup>294</sup> The “bona fide” and “primary purpose” language overstated USCIS’ actual authority under the law.

K. *March 2019: Zabaleta Confirmed that USCIS was Overreaching in its Use of the Consent Function*

In examining the case of a SIJS applicant who had experienced abandonment and neglect from his father since his birth and whose SIJS application had been denied, the Southern District of New York in *Flores Zabaleta v. Nielsen* clarified the consent standard.<sup>295</sup> Although the Family Court had issued an order containing the required findings, USCIS denied the young man’s SIJS petition in part because it believed that the Family Court’s finding that it was not in Mr. Flores Zabaleta’s best interest to be returned to Guatemala was not well-informed.<sup>296</sup> USCIS based this determination on allegations that Mr. Flores Zabaleta was a gang member, an allegation that Mr. Flores Zabaleta was not informed of before the denial of his petition and one that he denied.<sup>297</sup> In affirming the USCIS denial of consent, the USCIS Administrative Appeals Office (AAO) held that Mr. Flores Zabaleta’s alleged gang membership would be relevant to the Family Court’s best interest determination and that it was unclear whether the Family Court had considered this factor.<sup>298</sup>

On appeal, the District Court agreed with Mr. Flores Zabaleta that USCIS had acted “outside the scope of its consent authority” when the agency set aside the Family Court’s best interest determination.<sup>299</sup> The District Court clarified that “[i]n determining if an SIJ petition is bona fide, the agency assesses only whether there is a reasonable factual basis for the findings necessary for SIJ status” and that by excising “express” from the consent function, “Congress decreased the agency’s authority” and acknowledged the authority of state courts in determining matters like the best interests of a young person.<sup>300</sup> The Court correctly interpreted the USCIS claim that the Family Court had not considered an additional factor as “an effort to second-guess the evidentiary determination of the Family Court.”<sup>301</sup> Notably, the Court specified, “[I]t is important to understand the narrow scope of the

---

294. *Id.* at Pt. J.2(A) (“USCIS generally defers to the court on matters of state law and does not go behind the juvenile court order to reweigh evidence and make independent determinations about abuse, neglect, or abandonment”) and (D)(3) (“USCIS defers to the juvenile court in making [the best interests] determination and as such does not require the court to conduct any analysis other than what is required under state law.”).

295. *Zabaleta*, 367 F. Supp. 3d at 208.

296. *Id.* at 213–14.

297. *Id.* at 214, n.5.

298. *Id.* at 216–18. The District Court found this determination to be arbitrary and capricious: “[T]he AAO took a factor – alleged gang membership – which would not be a basis for rejecting an SIJ application, and which it could not determine would affect that state court findings, and leveraged it into a denial of consent because it simply did not know how it would have affected the Family Court decision.”

299. *Id.* at 216.

300. *Id.* at 216 (internal quotation marks omitted).

301. *Id.* at 217.

agency's consent authority."<sup>302</sup> Mr. Flores Zabaleta's case provides just one instance of how USCIS abused its consent authority in an attempt to render SIJS a discretionary determination.

L. *October 2019: USCIS Reopened the Comment Period for the 2011 Proposed Rule and Adopted Three AAO Decisions*

As discussed in Section V(H), more than eight years after it proposed a rule in 2011, USCIS announced on October 15, 2019 that it was reopening the comment period for this rule for thirty days, explaining:

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. Through this rulemaking, USCIS seeks 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.<sup>303</sup>

Concurrently, USCIS adopted three AAO decisions regarding SIJS: 1) *Matter of E-A-L-O-*, Adopted Decision 2019-04 (AAO Oct. 11, 2019); 2) *Matter of A-O-C-*, Adopted Decision 2019-03 (AAO Oct. 11, 2019); and 3) *Matter of D-Y-S-C-*, Adopted Decision 2019-02 (AAO Oct. 11, 2019). Significantly, they "establish policy guidance," as "USCIS personnel are directed to follow the reasoning in [these decisions] in similar cases."<sup>304</sup> The AAO decisions provide direction on a variety of concepts related to SIJS adjudication, including classification of juvenile courts, qualifying dependency orders, parental reunification, and best interest determinations—at times in ways that bring USCIS SIJS adjudication practices more in line with its statutory mandate.<sup>305</sup> However, these decisions also exacerbate and solidify existing improper use of the consent function to conduct a primary purpose inquiry and thereby justify an unwarranted investigation into the factual basis of dependency orders.

Each of the decisions premised the grant or denial of consent around a two-pronged analysis: whether the applicant met the statutory eligibility

---

302. *Id.* at 216. That said, the *Zabaleta* court did not question the primary purpose inquiry itself; the authors, of course, disagree.

303. October 2019 USCIS Announcement, *supra* note 10.

304. Lifted from the "Purpose" section of all three decisions.

305. For example, *E-A-L-O-* and *A-O-C-* corrected previous decisions by recognizing that the state court orders in question were issued by juvenile courts as this term is defined in 8 C.F.R. § 204.11(a). *E-A-L-O-* at 4; *A-O-C-* at 4-5. Additionally, *D-Y-S-C-* recognized that, contrary to previous practice, "USCIS does not require that the juvenile court had jurisdiction to place the juvenile in the custody of the unfit parent(s) in order to make a qualifying determination regarding the viability of parental reunification." *D-Y-S-C-* at 6 (citing *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 382 (S.D.N.Y. Mar. 15, 2019); *J.L., et al v. Cissna*, 341 F. Supp. 3d 1048 (N.D.C.A. 2018); *Moreno-Galvez v. Cissna*, No. 19-321 (W.D.W.A. July 17, 2019); and *W.A.O. v. Cissna*, No. 19-11696 (D.N.J. July 3, 2019)).

requirements *and* whether they could establish that the juvenile court order was “sought to obtain relief from parental abuse, neglect, abandonment, or a similar basis under state law and not primarily to obtain an immigration benefit.”<sup>306</sup> These decisions thus created a stand-alone primary purpose inquiry separate from what was statutorily required. Furthermore, USCIS imposed the formidable task of proving a negative—*not* being primarily motivated by the immigration benefit—on juveniles who, by definition, lack parental support in a country they are often unfamiliar with.

In all three decisions, USCIS justified the primary purpose inquiry, as always, using the 1997 Conference Report. It stated that the 1997 Report

reiterate[ed] the requirement “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, rather than for the purpose of obtaining relief from abuse or neglect.”<sup>307</sup>

As discussed *infra* in Section IV(B), rather than “reiterating” any such requirement, the Report was the first and only reference to a primary purpose inquiry that — inappositely — stemmed from a fraud concern voiced by one senator over twenty years ago, a concern which was redressed by the 1998 Act incorporating abandonment, abuse and neglect into the SIJS statute. The inquiry into juveniles’ motives in approaching juvenile courts, if ever it was valid, should have lost any traction after the enactment of the TVPRA in 2008, as discussed in Section V(C), which reoriented and diminished the agency’s role in SIJS adjudications.

M. *November 2019: USCIS Again Updated the USCIS Policy Manual Portions Pertaining to SIJS, Eschewing Notice-and-Comment Rulemaking Procedures*

USCIS announced that it was updating its Policy Manual portions pertaining to SIJS through a November 2019 Policy Alert,<sup>308</sup> which included within the Manual’s upcoming “Policy Highlights,” “guidance on the statutorily-mandated USCIS consent function.”<sup>309</sup> It was unclear at the time of this article’s publishing both how these SIJS policies will be implemented and if they will withstand judicial review because the agency declined to issue these new policies using notice-and-comment procedures.<sup>310</sup>

---

306. *A-O-C-* at 2 (citing 8 USC § 1101(a)(27)(J)(i)-(iii) and *D-Y-S-C-*). *See also E-A-L-O* at 2; *D-Y-S-C-* at 2.

307. *A-O-C-* at 7-8. *See also E-A-L-O* at 7; *D-Y-S-C-* at 7.

308. U.S. Citizenship and Immigr. Serv., Policy Alert from USCIS, USCIS Special Immigrant Juvenile Classification, PA-2019-08 (Nov. 19, 2019).

309. *Id.* at 1.

310. *Id.* at 1.



Notably, the revised Policy Manual made several references to forms of juvenile court action that have not previously appeared in the SIJS statutes, regulations, or memoranda. Some of the most striking additions are at J.2(C)(1) (“The term dependent child. . .generally means a child subject to the jurisdiction of a juvenile court because the court has determined that allegations of parental abuse, neglect, abandonment, or similar maltreatment . . .are legally sufficient to support *state intervention on behalf of the child.*”) and J.3(A)(3) (“Where the factual basis for the court’s determinations demonstrates that the juvenile court order was sought to protect the child and the record shows the juvenile court *actually provided relief* from abuse, neglect, abandonment, or a similar basis under state law, USCIS generally consents to the grant of SIJ classification.”).<sup>311</sup>

While these references need not be implemented in problematic ways, the specter of USCIS denying consent if they determine that either a dependency order has not effected a certain level of state court intervention or a juvenile court did not provide sufficient relief from abuse, neglect, abandonment, or a similar basis under state law is disquieting, especially because such language finds no purchase in the SIJS statute. Moreover, if this new language in the Policy Manual is used to deny SIJS based on state court proceedings that have traditionally been sufficient for SIJS purposes, the revised language would constitute new rules that would consequently have required the notice-and-comment procedure under the Administrative Procedure Act.<sup>312</sup>

Additionally, as noted *supra* in section (II)(C), the updated Policy Manual removed two key sentences from its explanation of the reasonable factual basis standard used to examine the juvenile court order and other supporting evidence:

The evidence needed does not have to be overly detailed, but must confirm that the juvenile court made an informed decision in order to be considered “reasonable.” USCIS generally consents to the grant of SIJ classification when the order includes or is supplemented by a reasonable factual basis for all of the required findings.<sup>313</sup>

The removal of these sentences is worrisome if it reflects an intent on USCIS’ part to require the sharing of protected information even when a reasonable factual basis for all of the required findings has been established.

## VI. CONSENT, DEFERENCE PLUS, AND FRAUD

Given the history of SIJS we have traced, the statute envisions a consent function that operates as a “deference plus” standard, as discussed in Section II.

---

311. See USCIS POLICY MANUAL VOL. 6, *supra* note 34, at Pt. J.2(C)(1) (emphasis added), J.3(A)(3) (emphasis added).

312. 5 U.S.C. § 553.

313. USCIS POLICY MANUAL VOL. 6, Pt. J.2(D) (May 23, 2018) (on file with authors).

Under a “deference plus” standard, USCIS’ role in consenting to the SIJS classification involves verifying that all required elements are present in the necessary state court orders. If fraud is a concern,<sup>314</sup> perhaps because material inconsistencies were noted between the dependency order and immigration documents in DHS’ possession, USCIS is permitted to request clarification regarding these inconsistencies through the request for evidence process, as the Ombudsman pointed out in its 2011 (section (V)(G)) and 2015 (section (V)(I)(2)) Reports. However, determinations regarding whether a young person is fabricating claims of abuse, abandonment or neglect are best left to state courts, who have unparalleled expertise in assessing the credibility of juveniles and have the full factual record. To undertake these determinations, judges are given a wide range of powers through state law, which includes the power to elicit testimony, review lengthy factual and legal submissions, make findings of fact and law, and order home studies and services for parents and children to promote family unity. Should there arise any concern regarding the veracity of a young person’s narrative, the state court judge is free to deny the request for findings of parental mistreatment, the non-viability of parental reunification, and the young person’s best interests. USCIS’ role is confined to review using the reasonable factual basis standard.

However, under its current analytical framework, USCIS purports to assess more than credibility, since credibility is a distinct concern from the petitioner’s purported primary purpose. The evaluation of a petitioner’s “primary purpose” is not fraud-related in that USCIS does not claim to be determining whether a young person is lying about the harm suffered.<sup>315</sup> USCIS’ apparent position is that a petitioner who was entirely truthful to the juvenile court about abuse, abandonment or neglect will *still* not be SIJS-eligible if USCIS asserts that seeking lawful presence in this country was the young person’s primary motivation for seeking the juvenile court order. But USCIS would do well to remember that it is not a fact-finder tasked with ascertaining applicants’ *mens rea*. Furthermore, weighing applicants’ motives in applying for relief – especially in the cases of juveniles who direly need both permanency (whether it be through the appointment of a guardian or some other juvenile court action) *and* legal status – undercuts the purpose of the statute. SIJS was intended by Congress to be one layer of the protections afforded these vulnerable youth, a layer of protection that family courts cannot provide. But, USCIS aims to punish applicants for being motivated to seek the protection to which they are entitled. This incoherent examination of a young

---

314. Here we define fraud as making material misrepresentations on an application, i.e., a juvenile asserting that they have been abused, abandoned, or neglected when they have not. Any such concerns that ineligible applicants might get a green card should pale in comparison with the safety-related concern that juveniles may be incorrectly deemed to have fabricated their claim and then returned to harmful situations.

315. See *E-A-L-O-* at 8 (USCIS “does not question the hardship the Petitioner suffered as a result of his mother’s actions, as described in his affidavit and the underlying petition submitted to the juvenile court and reflected in the juvenile court’s factual findings.”).

petitioner's motives is an impossible task and, critically, one wholly unrelated to the eligibility criteria set out in the INA.

## VII. CONCLUSION

SIJS is unlike any other form of immigration relief. It is a humanitarian protection for youth that requires significant state court intervention in order for a petitioner to apply. At the heart of this relief is safety. When abandoned, neglected and abused juveniles avail themselves of the family court, they do so because they have been unsafe or experienced significant instability at home. The family court's ability to formalize relationships through guardianship and custody orders supports a young person's "permanency," or permanent safety, just as adoption and foster care proceedings do. In alignment with their historic role, family court adjudicators are the true fact-finders of abandonment, abuse, neglect, and best interests of the young person. USCIS is required to recognize the competence of state courts that make these determinations in the dependency orders included in each SIJS petition.

USCIS claims to be carrying out congressional intent in its invasive and unforgiving interrogation of whether young people's true motivation in applying for SIJS is to access lawful permanent residence. But that is not its role. As demonstrated, this practice—if it was ever a valid one—was explicitly discarded in the 2008 TVPRA and remains defunct.

Unfortunately, USCIS has been aggressively re-writing the authority delegated by statute and attempting to use its consent function to undermine state court findings as if it had the discretion to do so through *de novo* review. USCIS' intent to continue this practice is evidenced by the recent reopening of the 2011 Proposed Rule for comments. The assumption that SIJS applicants are driven by only unacceptable motivations must end. USCIS must re-orient its process around the congressional intent to protect vulnerable immigrant juveniles and return to its proper role of granting or denying SIJS after verifying whether state court documents, which must enjoy a presumption of validity, contain the requisite findings. Anything more exceeds the agency's statutory mandate.