

April 8, 2021

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

RECEIVED

By ESEC External at 8:18 am, Apr 14, 2021

RE: Deferred Action for Children with Approved Petitions for Special Immigrant Juvenile Status

Dear Secretary Mayorkas:

I write on behalf of the American Bar Association (ABA) to encourage the Department of Homeland Security (DHS) to grant deferred action to children with approved petitions for Special Immigrant Juvenile (SIJ) status. In the alternative, DHS should issue guidance encouraging attorneys for Immigration and Customs Enforcement (ICE) to join in motions to continue, administratively close, or terminate removal proceedings for such SIJ beneficiaries. To qualify for SIJ status, a state juvenile court must find that a child has been subjected to parental mistreatment or abandonment and that returning to the child's home country would not be in the child's best interest.¹ Yet current policy does not protect children with approved SIJ petitions from removal while they wait for a visa to become available before they can apply for lawful permanent resident (LPR) status. DHS should ensure that these SIJ beneficiaries can remain in the United States while they wait for their process to be completed.

The ABA is the largest voluntary association of lawyers and legal professionals in the world. Working through its Commission on Immigration, the ABA advocates for improvements to immigration law and policy; provides continuing education to the legal community, judges, and the public on immigration law issues; and develops and assists in the operation of pro bono legal representation programs for immigrants and asylum seekers, with a special emphasis on the needs of the most vulnerable. Our views are informed by our experience in operating the South Texas Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas, which is the largest provider of legal services to unaccompanied children (UAC) in the country, as well as the Children's Immigration Law Academy (CILA), a legal resource center in Houston that serves children's immigration legal services programs throughout Texas.

SIJ Status Provides Important Humanitarian Relief for Abused, Abandoned, or Neglected Children

Among the most common forms of relief for noncitizen children is SIJ status for children who have been abused, abandoned, or neglected by at least one parent. Originally created by

¹ 8 U.S.C. § 1101(a)(27)(J).

Congress to address children who are in or belong in the state foster care system,² SIJ status later was expanded to include children who are unable to reunify with one or both of their parents due to abuse, abandonment, or neglect.³ To qualify for SIJ classification, the petitioner must be present in the United States, be unmarried, be under 21 at the time he or she files the SIJ petition, have a juvenile court order with the required determinations, and warrant consent for the classification by DHS.⁴ U.S. Citizenship and Immigration Services (USCIS) must adjudicate SIJ petitions within 180 days.⁵

Many SIJ Beneficiaries Must Wait Years Before Being Eligible to Apply for LPR Status

If the SIJ petitioner is not in removal proceedings, and a visa number is currently available, the child may file an application for adjustment of status concurrently with filing the SIJ petition.⁶ If a visa number is not currently available, classification as an SIJ allows a child to “get in line” for the opportunity to apply for LPR status in the United States. The number of immigrant visas available to Special Immigrants is limited by statute. SIJ beneficiaries are subject to the fourth preference employment-based category and are further limited by a per-country cap.⁷ Due to the increasing number of SIJ petitions, immigrant visas for children from Honduras, Guatemala, and El Salvador now have a waiting list, or backlog. Children from Mexico and India also have been subject to the backlog of cases waiting for visa availability at various times when the demand for visas exceeds the number available within the year. SIJ beneficiaries in oversubscribed categories may be required to wait years before being allowed to apply for LPR status.

SIJ Beneficiaries Are Not Protected from Removal While They Wait to Apply for LPR Status

Many children with SIJ status are in removal proceedings and approval of an SIJ petition is not considered a defense to removal. Instead of allowing the children to wait until a visa number is available to permit them to adjust status to that of an LPR, immigration judges have ordered the removal of children subject to the visa backlog even though state juvenile courts have found that returning them to their home country is not in their best interest. Moreover, the Board of Immigration Appeals (BIA) has upheld the removal of children in removal proceedings who

² U.S. Citizenship and Immigration Services Policy Manual, Vol. 6, Part J, Ch. 1, § A, 6 USCIS-PM J.1, <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1>.

³ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 § 235(d)(1)(A) (codified at 8 U.S.C. § 1101(a)(27)(J)(i)). The SIJ regulations were promulgated in 1993 and have yet to be updated to reflect statutory changes. *See* 8 C.F.R. § 204.11. Updated regulations were proposed in 2011 and released again in 2019.

⁴ USCIS Policy Manual, Vol. 6, Part J, Ch. 2, § A, 6 USCIS-PM J.2(A), <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2>.

⁵ TVPRA § 235(d)(2).

⁶ *See* 8 C.F.R. § 245.2(a)(1), (a)(2).

⁷ *See* 8 U.S.C. § 1153(b)(4). Earlier this year, the ABA urged Congress to exempt SIJ beneficiaries from numerical visa limitations, or, in the alternative, to increase the number of visas available for SIJ beneficiaries and lift the statutory per country cap.

have an approved SIJ petition.⁸ This frustrates the intent of the SIJ statute and leaves children vulnerable to future harm.

DHS Should Grant Special Immigrant Juveniles Deferred Action to Protect them From Removal Until They Are Eligible to Adjust Their Status

USCIS should grant SIJ beneficiaries deferred action. Deferred action is an exercise of prosecutorial discretion to defer removal action against an individual for a certain period of time.⁹ For an SIJ beneficiary waiting for a visa to become available, deferred action can protect a child or young adult from removal from the United States and grant employment authorization, if the beneficiary can show an economic necessity for employment.¹⁰ USCIS already uses its discretion to grant protection from removal for recipients of other forms of humanitarian-based immigration relief. Since 1997, Violence Against Women Act beneficiaries have received deferred action if they are subject to the backlog of cases waiting for visa availability and are in removal proceedings.¹¹ Similarly, crime victims who have been granted U-status but who are waiting for a U-nonimmigrant visa to become available also are granted deferred action from USCIS.¹² SIJ status should be no different because it serves a similar purpose: to recognize past harm and protect a child or young adult from future harm.

In the alternative, DHS should issue guidance encouraging ICE attorneys to join in motions to continue, administratively close, or terminate removal proceedings for such SIJ beneficiaries. Recent decisions from the BIA and the Attorney General have curtailed immigration judges' discretion in utilizing these administrative tools,¹³ however judges may be more likely to grant

⁸ *In re REDACTED*, XXX-XXX-XXX (BIA July 20, 2020) (affirming immigration judge's denial of continuance and order of removal because "[t]he high degree of uncertainty as to when the respondent will be eligible to adjust her status as an SIJ outweighs her otherwise apparent prima facie eligibility for such relief and the underlying humanitarian concerns of the SIJ program"); *Garcia v. Barr*, 960 F.3d 893, 897, 902 (6th Cir. 2020) (finding an appeal of a request for a continuance that was denied by the immigration judge and the BIA moot where the person with SIJ status had already been removed to his home country). *See also Joshua M. v. Barr*, 439 F. Supp. 3d 632, 677 (E.D. Va. 2020) (denying government motion to dismiss habeas claim because litigating from abroad does not provide an adequate substitute for habeas for a person with SIJ status who has no meaningful criminal history and who faces specific threats should he return to Honduras).

⁹ Deferred action is defined as "an act of administrative convenience to the government which gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14).

¹⁰ *Id.*

¹¹ Memorandum to Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues 3 (May 6, 1997), available at [DOJ-Memorandum-Supplemental-Guidance-on-Battered-Alien-Self-Petitioning-Process-and-Related-Issues.pdf](https://www.asistahelp.org/DOJ-Memorandum-Supplemental-Guidance-on-Battered-Alien-Self-Petitioning-Process-and-Related-Issues.pdf) (asistahelp.org).

¹² 8 C.F.R. § 214.14(d)(2).

¹³ *Matter of L-A-B-R-*, 27 I&N Dec. 405, 406, 418 (A.G. 2018) (addressing "application of the good-cause standard to a motion for continuance to accommodate collateral proceedings" and making clear that in requests for continuances "good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level"); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (holding that immigration judges have no inherent authority to administratively close cases and limiting an immigration judge's ability to administratively close a case to "where a previous regulation or a previous judicially approved settlement expressly authorizes such an action"); *Matter of S-O-G & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (holding that an immigration judge has no inherent authority to terminate or dismiss removal proceedings and limiting an immigration judge's ability to terminate or dismiss a case to "only under the circumstances expressly identified in

these motions if ICE joins them. Granting deferred action to SIJ beneficiaries, or joining in motions to terminate, administratively close, or continue removal proceedings for such beneficiaries also would assist immigration judges in prioritizing more urgent cases on their dockets and reducing the current backlog of pending cases.

Conclusion

SIJ beneficiaries have been granted a humanitarian form of protection because of the parental mistreatment or abandonment they have suffered, and a state court with expertise in the best interest of the child has ruled that it would not be in their best interest to return to their home country. Due to the numerical visa limitations and per country caps, some SIJ beneficiaries are subject to lengthy wait times before seeking LPR status. While they wait for a visa to become available, SIJ beneficiaries should be allowed to remain in the United States and be protected from removal.

Thank you for considering our views. If you have any questions or need additional information, please contact Kristi Gaines in our Governmental Affairs Office at kristi.gaines@americanbar.org.

Sincerely,

A handwritten signature in cursive script that reads "Patricia Lee Refo".

Patricia Lee Refo
President

the regulations... or where the Department of Homeland Security fails to sustain the charges of removability against a respondent”).



U.S. Citizenship
and Immigration
Services

May 20, 2021

Patricia Lee Refo
President
American Bar Association
321 N. Clark Street
Chicago, IL 60654

Dear Ms. Refo:

Thank you for your April 8, 2021 letter to the Department of Homeland Security (DHS). Secretary Mayorkas asked that I respond on his behalf.

We appreciate your input and recommendations regarding deferred action for children with approved petitions for Special Immigrant Juvenile (SIJ) status. As directed by President Biden, DHS is reviewing existing regulations, orders, guidance documents, policies, and similar agency actions to “identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits,” as well as to “identify any agency actions that fail to promote access to the legal immigration system.”¹

We recognize the importance of rebuilding and strengthening our humanitarian programs. DHS is actively evaluating the impact of the policies and operational changes enacted under the prior administration with the aim of restoring and bolstering programs serving vulnerable populations. Through this work we aim to enhance our ability to provide fair and timely adjudications, as well as to increase access for those in need of protection.

Thank you again for your letter and interest in this important issue. Should you require any additional assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Tracy L. Renaud".

Tracy L. Renaud
Acting Director

¹ Sections 3(a)(i) and (ii) of the *Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans* ([E.O. 14012](#)), signed February 2, 2021.