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February 1, 2022

Hon. Alejandro Mayorkas
Secretary
Department of Homeland Security
1880 2nd Street SW
Washington, DC 20024

Ms. Ur M. Jaddou
Director
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, Maryland 20588

Mr. Tae D. Johnson
Acting Director
Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, D.C. 20536

Re: Reforms Needed to Safeguard Vulnerable Youth Applying for Special Immigrant Juvenile Status (SIJS)

Dear Secretary Mayorkas, Director Jaddou, and Acting Director Johnson:

The New York City Bar Association, through its Immigration and Nationality Law, Children and the Law, and Family Court and Family Law Committees, calls upon your Administration to adopt reforms to safeguard vulnerable youth applying for Special Immigrant Juvenile Status (SIJS) from deportation and to provide them with Employment Authorization Documents (EADs) while their cases are pending. Doing so would help protect these youth—who

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

are survivors of parental abuse, abandonment, neglect, and similar circumstances and thousands of whom are residents of New York City—from further harm including wage theft, trafficking, and deportation, and uphold the purpose of Special Immigrant Juvenile Status.

As this Administration is aware, in 1990 Congress established SIJS to provide permanent humanitarian protection in the United States to immigrant children under the age of 21 found by state courts to have survived parental abuse, abandonment, neglect, or similar circumstances, and whose best interests would not be served by return to their countries of origin.¹ Eligible children can apply for SIJS with the United States Citizenship and Immigration Service (USCIS) once a state court has issued an order making these requisite findings. In the case of SIJS-eligible children in New York, typically a Family Court judge issues these findings after conducting a hearing. Many of these children are in the custody of the New York City Administration for Children’s Services and in foster care.

Youth with an approved SIJS petition can seek Lawful Permanent Residence and later pursue U.S. citizenship. However, while SIJS is a form of humanitarian protection, the Immigration and Nationality Act places SIJS, along with other special immigrant categories, in an employment-based visa category which subjects SIJS youth to worldwide and per-country annual visa caps. With only a small portion of the annual visa supply available to these youth, the result is a years-long backlog currently impacting youth from El Salvador, Guatemala, Honduras, and Mexico.² This legislative framework prohibits many SIJS youth from applying for Lawful Permanent Residence for years, leaving them in legal limbo during a pivotal time in their young lives and exposing them to many of the harms that SIJS was enacted to shield them from. It also disparately impacts youth from the countries where the greatest need for SIJS-based visas arises, as youth from all other countries can apply for SIJS concurrently with their Lawful Permanent Residence and Employment Authorization (EAD) applications.

The creation of SIJS reflects Congress’s recognition of the need to ensure the safety and well-being of eligible young people, and it is incumbent upon this Administration to ensure that Congressional intent and the protective purpose of SIJS are upheld. The young people who apply for SIJS are survivors of domestic violence, sexual assault, child labor, exploitation, and other grave harms, but that is not the entirety of their identities. These young people are inspiring and contributing members of the greater New York and U.S. communities. Their dreams and lives are undermined by starkly limited visa availability, the resulting inability to work lawfully, and vulnerability to deportation. While the limited visa supply that in large part creates these harms can be remedied only by Congressional action, there is much that can be done without legislative change to ameliorate the associated harms.

¹ Immigration and Nationality Act (INA) § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

² 8 U.S.C. § 1151(d); § 1153(b)(4); *see also* Rachel Leya Davidson & Laila L Hlass, “Any Day They Could Deport Me,” Nov. 2021,

<https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/61a7bceb18795020f6712eff/1638382830688/Any+Day+They+Could+Deport+Me+-+Over+44%2C000+Immigrant+Children+Trapped+in+the+SIJS+Backlog+%28FULL+REPORT%29.pdf>

(hereinafter “Any Day” Report)(all websites last visited Feb. 1, 2022).

Congress’s intent behind creating SIJS is undermined by USCIS’s current EAD policy and the Department of Homeland Security’s (DHS) lack of formal final administrative directives to ensure that SIJS youth are not deported.

THE NEED TO ENSURE ACCESS TO WORK AUTHORIZATION FOR SIJS YOUTH

Under USCIS’s current EAD policy, SIJS youth cannot apply for EADs unless and until they have a pending application for Lawful Permanent Residence.³ As of April 2021, based on USCIS’s own data, more than 44,000 SIJS petitioners from El Salvador, Guatemala, Honduras, and Mexico are prevented from applying for Lawful Permanent Residence because of the statutory visa limits described above.⁴ Accordingly, USCIS’s current EAD policy prohibits the same youth trapped in this SIJS visa backlog from accessing employment authorization. USCIS has already approved the SIJS petitions for many of these youth, yet USCIS’s EAD policy forces them into a years-long limbo, unable to work, access financial aid for college, or find the permanency and stability that SIJS is designed to provide for them.⁵

The current EAD policy has many unintended and pernicious consequences. Many SIJS youth reaching their later teens hope to acquire life skills, progress toward independence, and contribute to their own financial needs by accepting employment—out of reach under the current EAD policy. As a result, SIJS youth, including those with dependent children, may face food and housing insecurity. Youth in foster care may struggle as they approach the end of their time in care without the ability to work to support themselves and without access to vital benefits to transition to independent adulthood, which may result in burdening city foster care agencies with their continued care. Without work authorization, SIJS youth are at risk of exploitation and trafficking; they may be forced to work in unsafe conditions and face discrimination.

They also are left without state identification, as an EAD is not only work authorization, but also one of the few forms of government-issued identification available to youth who lack permanent immigration status. As such, an EAD is the gateway to many forms of benefits and services including driver’s licenses, social security numbers, and access to bank accounts.

Youth without EADs also may be unable to access higher education programs. Many SIJS youth dream of college or other vocational training. Without Lawful Permanent Residence, they are barred from accessing federal financial aid. This, coupled with an inability to work lawfully and lack of the ID needed to apply for other forms of financial aid, excludes many SIJS youth from pursuing higher education.⁶

³ 8 CFR § 274a.12(c)(9).

⁴ “Any Day” Report at 11.

⁵ *Ibid.*

⁶ See Kids in Need of Defense, “Left in Limbo: Why Special Immigrant Juveniles Need Employment Authorization,” Jan. 2022, available at <https://supportkind.org/resources/left-in-limbo-why-special-immigrant-juveniles-need-employment-authorization/> (hereinafter “Left in Limbo” Report); “Any Day” Report at 18; and Dalia Castillo-Granados, The Center for Public Interest Law/Commission on Immigration, American Bar Association, “A Long Wait for Special Immigrant Juveniles Means a Risk of Deportation,” Feb. 23, 2021,

The ongoing lack of access to work authorization places SIJS youth at risk and runs contrary to Congress's intent in creating the SIJS program.⁷ USCIS has *full authority* under the law to adopt reforms that would help end these harms by providing automatic EADs for SIJS petitioners without need for the filing of a separate application either upon SIJS approval or within 180 days of filing a SIJS petition, whichever date is earlier, that are necessary for their safety and well-being.⁸ We urge the Biden Administration to move forward to protect SIJS youth as soon as possible.

THE NEED TO PROTECT SIJS YOUTH FROM REMOVAL

The ongoing threat of removal places SIJS youth at risk and runs contrary to Congress's intent in creating the SIJS program.⁹ DHS has the power to prohibit the removal, and threat thereof, of SIJS youth.¹⁰ It is incumbent upon this administration to take action to address and ameliorate this harm.

In recent years, DHS and the Executive office for Immigration Review have pursued the removal of SIJS youth for lack of visa availability. This is true despite DHS having approved them for SIJS and agreeing with the state court's determination that it is not in their best interests to be returned to the countries where they faced abuse, neglect, abandonment or other harms. We commend DHS leadership for taking preliminary steps to protect vulnerable populations, including the May 27, 2021 Interim Guidance to the Office of the Principal Legal Advisor (OPLA) Attorneys and the August 10, 2021 ICE Directive on Using a Victim-Centered Approach with Noncitizen Crime Victims. We were particularly heartened to see that those policies include explicit protections for SIJS-eligible youth. That said, we urge DHS to employ further administrative tools to protect SIJS youth from deportation and thereby help fulfill the purpose of SIJS. The implementation of the above guidance has not been systematic in New York's immigration courts, and the protection of SIJS youth without visa availability requires a more explicit and final directive from DHS.

The Administration should promulgate regulations that prohibit the removal of SIJS petitioners and beneficiaries who are awaiting visa availability. In the meantime, we urge you to immediately direct OPLA attorneys to take the following actions in cases of SIJS youth:

- Join motions to dismiss or terminate cases where the respondent has a pending or approved SIJS petition, regardless of the petition's priority date;

https://www.americanbar.org/groups/public_interest/immigration/generating_justice_blog/a-long-wait-for-special-immigrant-juveniles-means-a-risk-of-depo/ (hereinafter "A Long Wait" Report).

⁷ See "Left in Limbo" Report; "Any Day" Report; and "A Long Wait" Report.

⁸ 8 U.S.C. § 1103(a); 8 U.S.C. § 1324a(h)(3).

⁹ See "Left in Limbo" Report; "Any Day" Report; and "A Long Wait" Report.

¹⁰ 8 U.S.C. § 1103.

- Join motions to reopen cases of individuals with orders of removal who have a pending or approved SIJS petition, regardless of the petition’s priority date; and
- Facilitate adjustment of status for those SIJS beneficiaries with current priority dates who wish to pursue adjustment in court, by, where appropriate, joining motions to adjudicate without a hearing or to advance individual adjustment of status hearings or stipulating to adjustment of status relief.

IMPACTS OF USCIS AND DHS SIJS POLICY ON NEW YORK CITY AND NEW YORK STATE

According to data from a USCIS Freedom of Information Act request, Greater New York City has over 3,000 immigrant youth trapped in the SIJS backlog residing in our community, the largest concentration of impacted youth in any city in the country.¹¹ And 7,695 immigrant youth trapped in the SIJS Backlog call New York State home.¹² New York State, with eighteen percent of the total number of impacted youth in the country, has the highest number of immigrant children and youth trapped in the SIJS backlog of any state.¹³ That so many young people impacted by the SIJS backlog live in our city and state and remain vulnerable to exploitation, trafficking and deportation to the very countries our state family courts have determined are not in their best interests to return to is of serious concern to the New York City Bar Association. These youth are integral members of our communities: they have families here, go to our city public schools, play soccer in our youth leagues, are in the custody of our city’s children’s services agency, and are under the jurisdiction of our family courts. Many of them, lacking employment authorization, work in New York City’s unregulated labor economy in order to survive. USCIS and DHS have the power to extend protection to these youth, as Congress intended.

Without meaningful action from the Biden Administration, not only will New York City have to grapple with the possible removal of thousands of valued community members, it will also continue to have to absorb the costs of extended foster care for children in the SIJS backlog. Moreover, DHS action could alleviate our city’s backlogged immigration courts by terminating thousands of removal cases against young people with pending and approved SIJS applications, allowing Immigration and Customs Enforcement to focus its resources on those who pose an actual threat to the United States.

CONCLUSION

The New York City Bar Association previously called for reform to the SIJS regulations, commenting on the proposed regulations.¹⁴ While we stand by our comments to those proposed regulations, what was proposed by the government in those regulations was drafted in 2011 before

¹¹ FOIA PRODUCTION COW2021—1524 (U.S. Citizenship and Immigr. Serv. CD-ROM, Sept. 2021).

¹² “Any Day” Report at page 31.

¹³ *Ibid.*

¹⁴ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-dhs-proposed-rule-regarding-special-immigrant-juvenile-petitions-comments>.

the SIJS visa backlog was a reality and therefore does not contemplate the impacts of the lack of visa availability on immigrant youth. It is clear from USCIS's own data that the impacts of the SIJS backlog are vast.

This administration should promulgate new proposed regulations that account for the current reality of SIJS, including creating EAD eligibility for SIJS and codifying the protections from removal for SIJS youth described above, and allow for a robust comment period. In the meantime, we urge you to *immediately* extend automatic eligibility for EADs to all SIJS petitioners, regardless of visa availability, and to enact formal administrative protections from deportation to uphold the intent of SIJS and ensure stability and permanency for vulnerable SIJS petitioners living in New York and across the country.

Respectfully,

Danny Alicea, Chair
Immigration and Nationality Law Committee

Melissa J. Friedman, Co-Chair
Children and the Law Committee

Rachel Stanton, Co-Chair
Children and the Law Committee

Michelle Burrell, Chair
Family Court and Family Law Committee*

Cc: Ambassador Susan E. Rice, Director, White House Domestic Policy Council
Hon. Nancy Pelosi, Speaker, U.S. House of Representatives
Hon. Chuck Schumer, Majority Leader, U.S. Senate
Hon. Dick Durbin, Chair, U.S. Senate Judiciary Committee
Hon. Jerrold Nadler, Chair, U.S. House of Representatives Judiciary Committee
Members New York State Congressional Delegation

* The Family Court and Family Law Committee signed on after the initial issuance of this letter. The letter was updated on Feb. 2, 2022 to reflect their support.