To: KIND Staff & KIND Pro Bono Attorneys
From: KIND Legal Services Management
Date: May 19, 2016

Re: <u>Update to practice advisory on status adjustment for certain Special Immigrant Juvenile Status (SIJS) clients</u>

Pursuant to the May 2016 Department of State (DOS) Visa Bulletin, US Citizenship and Immigration Services (USCIS) is at present not accepting adjustment of status applications (Form I-485) from Special Immigrant Juveniles (SIJ) born in El Salvador, Guatemala, or Honduras (hereinafter "Northern Triangle countries") whose priority date[1] is later than January 1, 2010. This update to KIND's April 18, 2016 Practice Advisory[2] discusses early experience under the new cutoff date. We will discuss the following:

I. Cutoff date projections
II. USCIS action on past and prospective SIJ petitions (Form I-360)
III. USCIS action on prospective status adjustment applications (Form I-485)
IV. USCIS action on previously filed status adjustment applications (Form I-485)
V. Expectations for affected clients in removal proceedings

I. Cutoff date projections

On May 6, 2016, the DOS released the June 2016 Visa Bulletin.[3] The January 1, 2010 cutoff date remains in place for the Northern Triangle countries in the Employment 4th (EB-4) preference category, which includes SIJ. According to the June 2016 Visa Bulletin, visa availability remains "Current" for both India and Mexico in the EB-4 category. However, the DOS has informally shared with advocates that cutoff dates may be instituted soon for Mexico (potentially as of July 2016) and India (potentially as of July or August 2016).

[1] For SIJ-based status adjustment, the "priority date" is the date when USCIS accepts the filer's properly filed Form I-360 for processing.
[2] Wendy Wylegala and Cindy Liou, "Practice advisory on updated procedures for status adjustment filings for certain SIJS clients," Kids in Need of Defense (KIND), April 18, 2016, available at https://supportkind.org/resources/update-procedures-status-adjustment-filings-certain-sijs-clients/.
[3] U.S. Department of State, "Visa Bulletin for June 2016," May 6, 2016, available at https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-june-2016.html.

PRACTICE TIP: Because the DOS and USCIS have both forecast that a cutoff date is imminent for India and Mexico, it is advisable for attorneys to pursue expedited filing of Forms I-360 and I-485 **before the end of June 2016** on behalf of clients born in India or Mexico for whom SIJS is an appropriate and available remedy. Advocates should also check the July 2016 and August 2016 Visa Bulletins as soon as they are published.[4]

The new fiscal year begins October 1, 2016. In informal discussions with stakeholders during April 2016, a representative of the DOS explained that when DOS issues the October 2016 Visa Bulletin (which will be issued in September 2016), the bulletin will reflect a recalculated cutoff date for the Northern Triangle countries based on USCIS' and DOS' estimates of the volume of eligible applicants and available visa numbers. The DOS projected that with the October 2016 Visa Bulletin, the cutoff date is likely to advance to a date in 2015, although this is a non-binding estimate.

The DOS has also shared with stakeholders that the January 1, 2010 cutoff date was chosen for administrative purposes and to reflect the unavailability of visas for the remainder of the fiscal year, rather than to reflect the actual progress of application processing. In other words, it is not accurate to assume that the current backlog of SIJ-based adjustment applications from the Northern Triangle countries is six years. However, this information has not been provided through a formal public announcement. Advocates have requested a clarifying statement from the DOS or USCIS.

II. USCIS action on past and prospective SIJ petitions (Form I-360)

The cutoff date for status adjustment applications has no effect on a child's ability to petition for classification as an SIJ. Prospective applicants may file Form I-360 regardless of any visa numerical limitations or cutoff date restrictions. In fact, the proper filing of Form I-360 generates the applicant's priority date for status adjustment purposes. Thus, filing Form I-360 at the earliest feasible date is strongly beneficial for most prospective SIJs, absent special concerns.[5]

PRACTICE TIP: Absent special concerns, where SIJS is an appropriate and available remedy, attorneys should consider filing Form I-360 at the earliest feasible date, particularly on behalf of applicants from Northern Triangle countries, India, and Mexico.

III. USCIS action on prospective status adjustment applications (Form I-485)

USCIS has reiterated that it will not accept any Form I-485 filed by an applicant whose priority date is not current. Accordingly, applicants from the Northern Triangle countries must wait to file until USCIS and DOS adjust the cutoff date to a date later than the applicant's priority date. As noted, it is possible that a cutoff date situated some time in 2015 may take effect in October 2016.

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[4] Department of State, "Visa Bulletin," available at https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html.

[5] Special concerns are most likely to surface in an affirmative case, but if you have any questions about whether SIJS is an appropriate remedy for your client, feel free to discuss this with your pro bono mentor.

As of May 1, 2016, if a child from a Northern Triangle country files a SIJS-based Form I-485, USCIS will reject the Form I-485 without adjudication. If that child files Forms I-360 and I-485 concurrently, the Form I-360 will be adjudicated, but the accompanying Form I-485 will be rejected. SIJ-based adjustment applicants born in other countries are not currently subject to a cutoff date requirement, although as noted earlier, DOS has informally signaled that cutoff dates may be instituted soon for Mexico (potentially in July 2016) and India (potentially in July or August 2016).

PRACTICE TIP: Attorneys should continuously monitor the DOS Visa Bulletins (which are issued monthly, but may be updated or amended during the course of a month) and related USCIS announcements regarding adjustments of the cutoff dates for the Northern Triangle countries, India, and Mexico. Attorneys are advised to file Form I-485 as promptly as possible for a client whose priority date falls before the cutoff date. As a reminder, cutoff dates can advance or retrogress at any time, so it should not be assumed that a priority date that has become current will remain so indefinitely.

IV. USCIS action on previously filed status adjustment applications (Form I-485)

If an applicant properly filed Form I-485 with USCIS prior to May 1, 2016, according to USCIS, the application will be held in abeyance and adjudicated only when a visa number becomes available. USCIS has not given estimates of the wait time for adjudication. An initial sampling of data pooled by advocates shortly after May 1 suggests that nationwide, over 1,000 children from the Northern Triangle countries filed Form I-485 during the second half of April 2016. More precise information is currently being compiled, but even that initial number suggests that the allotment of approximately 700 visas available to applicants from each country is likely to be fully subscribed before FY 2017 begins on October 1, 2016.

Form I-693, the medical exam report that is required for status adjustment, remains valid for only one year, and the exam can be costly for the applicant. It is not mandatory to enclose Form I-693 when filing Form I-485.[6] Instead, because the timeframe for adjudicating Form I-485 is unclear, it is advisable to wait to complete Form I-693 until USCIS schedules a status adjustment interview or issues a Request for Evidence (RFE) for the medical exam report. In the event that USCIS issues an RFE seeking the medical exam report while the child's priority date is still not current, the attorney may consider seeking an extension of time for responding to the RFE.

PRACTICE TIP: For an affected client with a 2015 priority date, it may be strategic for the attorney to prepare the I-485 application packet to near completion, so that the applicant can be ready to review, finalize, and file on short notice if his or her priority date becomes current. To help avoid the expiration of the Form I-693 medical exam report, attorneys may want to advise their clients to time

[6] USCIS, "Visa Availability and Priority Dates," November 5, 2015, *available at* https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-and-priority-dates#Medical. ("Because a completed Form I-693 has limited validity, if you submit your Form I-693 at the same time as your Form I-485, it may no longer be valid at the time USCIS adjudicates your Form I-485. Therefore, in order to avoid having to repeat the immigration medical examination, you may choose to wait until after receiving an RFE or until an interview to provide your Form I-693.")

the medical exam to coincide with the time when the priority date is expected to become current. Alternatively, the medical exam may be taken after submission of Form I-485, and the Form I-693 provided upon request by USCIS or at a scheduled interview.

V. Expectations for affected clients in removal proceedings

This section reflects our current understanding of the positions of the Executive Office for Immigration Review (EOIR) and the Immigration and Customs Enforcement (ICE) Office of Chief Counsel (OCC) at the Department of Homeland Security (DHS). Neither agency has issued public written guidance on these developments. In remarks to stakeholders in late April 2016, an EOIR representative stated that the Immigration Court can accept an adjustment of status application (Form I-485) through defensive filing procedures,[7] and that EOIR has not expressly varied that policy in the wake of the cutoff date announcement.

PRACTICE TIP: It may be prudent for attorneys who represent clients in removal proceedings to seek to file Form I-485 defensively; however, at this date there is little to no reported experience with this approach subsequent to the recent cutoff date retrogression. It is possible that EOIR may determine that it will not accept such filings while visa numbers are unavailable.

PRACTICE TIP: Filing Form I-485 allows the applicant to concurrently or subsequently file Form I-765, the application for an employment authorization document (EAD). Even for clients who may not need to work immediately, an EAD is a valuable form of government-issued photo identification that may be helpful in obtaining benefits, applying for a driver's license, entering federal buildings, etc. If a client wishes to file Form I-765, it may be advisable for his or her attorney to: 1) defensively file Form I-485 with the Immigration Court, 2) file Form I-765 with USCIS, and then 3) move the Immigration Court to administratively close or adjourn the proceedings, as discussed further below.

During April 2016 discussions with stakeholders, representatives of EOIR also clarified that given the Immigration Judges' (IJs') discretion and authority, the agency had no plans to issue a national directive on the processing of SIJ cases. However, EOIR planned to issue internal guidance regarding three options available in cases where a respondent is an SIJS-based adjustment applicant: 1) terminating proceedings without prejudice, 2) administrative closure, and 3) adjournment until adjustment becomes possible. Each of these three options represents an available alternative to the fourth possibility of proceeding on the merits and ordering either removal or voluntary departure, on the basis that relief is not currently available to the child due to the unavailability of a visa number. To avoid this outcome, advocates should be prepared to argue for one or more of the three options as appropriate alternatives:

[7] These are set forth in the EOIR Immigration Court Practice Manual and the DHS Pre-Order Instructions. *See* USCIS, "Instructions for Submitting Certain Applications in Immigration Court, and for Providing Biometric and Biographic Information to USCIS," *available at* https://www.uscis.gov/sites/default/files/files/article/PreOrderInstr.pdf.

1) **Terminating proceedings without prejudice**. This alternative is most advantageous for the client, as it would allow the client to file Form I-485 with USCIS when the priority date is current without being in removal proceedings. Although a newly adopted ICE OCC policy reportedly rejects this option where visa numbers are not available, Immigration Judges retain authority to order termination over ICE's opposition and have recently done so in at least one jurisdiction, citing administrative efficiency. However, a client who successfully files Form I-485 with EOIR should not move to terminate proceedings, since termination would also terminate the pendency of his or her application for relief. A defensive filer will therefore need to pursue administrative closure or adjournment instead.

2) **Administrative closure.** This option also offers the advantage of removing the case from the Immigration Court's calendar. While a case is administratively closed, there will be no hearings for the client to attend, and the court will take no action on the case until one of the parties files a request to re-calendar. When a visa number is available, the child's attorney should: 1) file a motion to re-calendar with the Immigration Court, 2) simultaneously request termination of proceedings, and 3) file Form I-485 with USCIS. Alternatively, if the Immigration Court accepts a defensively filed I-485, an attorney may: 1) move to administratively close the case, and then 2) re-calendar the case once a visa number is available to the client. Note that pursuant to *Matter of Avetisyan*, 25 I&N 688 (BIA 2012), an IJ may administratively close proceedings over the objection of ICE.

3) **Adjournment until adjustment becomes possible.** This option continues the case and requires attendance at future master calendar hearings. At present, it is the preferred option of ICE in most jurisdictions, as discussed below.

As recently as May 4, 2016 it was reported that OCC in some jurisdictions had agreed to termination of proceedings on the basis of a signed state court predicate order. However, advocates were informed that as of May 4, 2016, OCC had issued internal guidance on SIJ cases to its trial attorneys. While the OCC guidance has not been made publicly available, statements by ICE attorneys in several jurisdictions at master calendar hearings reflect that ICE would support continuances but not termination where a child has a pending or approved I-360 petition and is awaiting the availability of a visa number. As some variations have been noted across jurisdictions, we ask KIND pro bono attorneys to consult with their mentors at KIND for updated information on the OCC's approach to SIJ matters in your jurisdiction.

KIND thanks you for your time, patience, and commitment to ensuring the rights of unaccompanied children. We will work diligently to provide you with updated information as it develops. Please do not hesitate to reach out to the Pro Bono Coordinating Attorney mentoring your case at KIND with any questions.