



Submitted via email to: USCISPolicyManual@uscis.dhs.gov

August 13, 2020

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of the Director  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20529

**Re: Opposition to Changes to USCIS Policy Manual, Applying Discretion in USCIS Adjudications, 1 USCIS-PM 8 and 10 USCIS-PM**

Kids in Need of Defense (KIND) writes to express opposition to recent changes made to the U.S. Citizenship and Immigration Services (USCIS) Policy Manual, Volume 1, Chapter 8 and Volume 10, Chapter 5, announced by USCIS on July 15, 2020,<sup>1</sup> regarding the role of discretionary analysis in adjudicating applications and benefits. These changes will sow confusion and uncertainty for applicants, petitioners, and beneficiaries, encourage arbitrary and capricious decision-making, and undermine USCIS's ability to fairly and efficiently process applications and petitions for immigration benefits. Although KIND has joined in several letters signed by many organizations voicing general opposition to these changes, we write separately to address the specific impact these changes will have on the unaccompanied children we serve. From KIND's perspective, these changes do nothing to advance better decision-making and, instead, perpetuate a misunderstanding of how to balance equities in cases where a child is the petitioner, beneficiary, or applicant. Withdrawing the new guidance and engaging with stakeholders to develop a better framework for decision-making is the only reasonable outcome. If these changes are kept, however, an additional change to clarify the appropriate treatment of Form I-360 is called for.

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. KIND and its pro bono partners have helped hundreds of children to obtain asylum in the United States, and our organization is well-known for providing expert advice and guidance on the unique issues and needs facing children, particularly unaccompanied children, throughout the asylum process. Since January 2009, KIND has received referrals for more than 21,000 children from 77 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and

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<sup>1</sup> USCIS Policy Alert "Applying Discretion in USCIS Adjudications" (PA-2020-10), July 15, 2020, <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf>.

Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits, including asylum, withholding of removal, and protection under the Convention Against Torture (CAT) on behalf of their child clients. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children.

KIND's expertise in working with unaccompanied and separated children, as well as their families, has given our organization a unique perspective into the way seemingly ordinary immigration agency practices, policies, and decisions affect the lives of children. While USCIS characterizes the changes as a consolidation of existing guidance, the changes actually represent a material shift in the role of discretion in adjudications: moving away from a philosophy in which, absent evidence of adverse factors, an application will normally be granted as a matter of discretion, to one in which every application must be scrubbed and scrutinized to hunt for adverse factors. Each adjudication, even one as straightforward as granting employment authorization, now becomes an exercise in *disproving* eligibility, requiring the adjudicator to independently justify each decision. In turn, the applicant must expend additional time and effort attempting to establish their worth under no clear standard, and so no clear sense of what kinds of evidence would be valuable in further persuading an adjudicator that he or she is entitled to receive a benefit where statutory eligibility has clearly been established or where the benefit affords an interim means of support while the full adjudication is under consideration.

KIND predicts at least three types of adverse outcomes for the children we serve. First, a failure to understand the circumstances of unaccompanied children will likely lead to more denials of applications, as they will be judged on a series of amorphous negative standards, with little or no opportunity to provide counterbalancing information. Second, the discretionary guidance will bring USCIS directly into conflict with the Trafficking Victims Protection Reauthorization Act of 2008<sup>2</sup> (TVPRA), which requires the government to consider the vulnerabilities of unaccompanied minors during all aspects of their interaction with the immigration system. Third, we predict that the new guidance will lead to confusion and poor decision-making with respect to adjudicating petitions for Special Immigrant Juvenile Status (SIJS), as well as for adjustment of status applications made on the basis of an SIJS grant. Taken together these outcomes result in a further erosion of public trust and confidence in USCIS. At a time when the agency is plagued by significant delays in completing pending applications, injecting new standards that increase the workload of adjudicators and heighten the uncertainty for the public seems to invite more delays, more litigation, and greater scrutiny of USCIS's faithful application of its duties to the public.

**I. The New Policy Guidance on Discretion Invites Arbitrary and Capricious Decisions, Distorting the Historic Use of Discretion in Immigration Adjudications by Permitting an Overly Broad**

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<sup>2</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act 2008 (TVPRA) (Pub. L. No. 110-457) § 235.

## **Inquiry into Supposedly Adverse Factors that Do Nothing to Protect the Integrity of the Immigration System.**

Congress has entrusted the Secretary of Homeland Security with fairly administering the vast majority of immigration laws, including the benefits and services provided by USCIS.<sup>3</sup> The delegation of authority to USCIS officers to grant or deny these benefits and services comes with great responsibility, as these decisions often shape the future of many immigrants, but also their U.S. citizen family members and employers. Many of these statutory benefits include a discretionary component, such as an exercise of discretion to grant asylum or adjustment of status to that of lawful permanent resident, but the existence of a discretionary component is not designed to outweigh or cancel out proof of eligibility. Instead, discretion is a mechanism for ensuring that adjudicators remain engaged in the decision-making process, neither rubber-stamping an application based on the barest set of facts, nor making enquires that range far afield of statutory requirements. That is, while discretion is meant to be an element of decision-making under the statutory factors, the new guidance turns it into a separate phase of the adjudicative process, one in which each decision must be subject to fact-intensive scrutiny after eligibility has been established.<sup>4</sup> This requirement actually denies autonomy to the adjudicator, forcing him or her to substitute his or her own judgment for that of Congress in every single case, rather than using discretion to identify when it is necessary to go beyond statutory eligibility. Ultimately, as the Supreme Court observed many years ago, “And if the word ‘discretion’ means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience.”<sup>5</sup>

### **A. Changes to the Policy Manual that alter the use of discretion for all relevant applications and petitions are a violation of the Administrative Procedure Act, as they represent an attempt to impose new eligibility requirements without going through required notice and comment.**

The expanded discussion of discretionary analysis contained in the USCIS Policy Manual supersedes a very short discussion on discretion that reminded the adjudicator to weigh issues carefully and to become familiar with the precedent decisions governing the particular areas an adjudicator covered.<sup>6</sup> In theory, an expanded discussion on discretion that provides education regarding appropriate judgment and the tools necessary for making good decisions is a positive development, but in practice the expanded discussion constitutes an effort to increase the number of discretionary denials rendered by USCIS. The changes contained in Chapter 1 of the Policy Manual, in particular, go far beyond merely consolidating current agency guidance on exercising discretion, and instead impose a new regime for

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<sup>3</sup> Title IV, Subtitle E, Homeland Security Act of 2002, (Pub. L. 107–296), 116 Stat. 2135 (November 25, 2002).

<sup>4</sup> See, Policy Manual, Vol. 1, Part E, Chap. 8.C.1, Table.

<sup>5</sup> *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954)

<sup>6</sup> USCIS Adjudicator’s Field Manual, Chapter 10.15, Exercise of Discretion; Uniformity of Decisions. On file with KIND. See, also, Table of Changes available at <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm10-external.pdf>.

adjudicating the vast majority of immigration benefits and services, adding to fact-finding and eligibility determination a third distinct step in which the adjudicator must explicitly exercise discretion in each case. This section is also relied upon to buttress a shorter discussion of discretion that has been added to Chapter 10 of the Policy Manual, which reminds adjudicators that many applications for EADs require a discretionary determination.

In other contexts, the agency has relied on rulemaking to alter the force of the discretionary component, as in recent regulations regarding asylum.<sup>7</sup> While KIND vigorously objected to the notices of those proposed regulations, their existence demonstrates that the agency is more than capable of announcing major policy changes through the rulemaking procedures prescribed by the Administrative Procedure Act (APA).<sup>8</sup> USCIS's failure to acknowledge that the change in policy over the use of discretion is itself a drastic change, of the sort that should go through rulemaking, is in itself the kind of arbitrary and capricious agency action the APA forbids.<sup>9</sup>

Moreover, the guidance suggests a long list of factors to guide discretion, culled from immigration jurisprudence that have been considered primarily in various waiver of inadmissibility contexts, but fails to explain to the adjudicator the importance of matching the relevant factors to the particular benefit sought. For instance, the new guidance relies heavily on lines of cases exploring discretion in the context of former INA Section 212(c) adjudications in which immigration judges were required to balance inadmissibility based on a criminal conviction against countervailing evidence of humane considerations and social contributions. Any waiver of inadmissibility, however, begins from the premise that the applicant or petitioner must overcome some type of adverse factor—one serious enough to warrant an inadmissibility finding in the first place. Importing those factors into adjudications for EADs or green cards impermissibly twists the adjudicatory process by *assuming* that negative factors exist and require further inquiry on the adjudicator's part. This inevitably skews the analysis because it builds into adjudications the assumption that the applicant must prove himself worthy for the benefit without taking into account the nature of the benefit itself.<sup>10</sup>

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<sup>7</sup> See DHS and EOIR, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264 (June 15, 2020).

<sup>8</sup> 5 U.S.C. § 553.

<sup>9</sup> See *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (“Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as ‘arbitrary, capricious, [or] an abuse of discretion’ within the meaning of the Administrative Procedure Act, [5 U.S.C. § 706\(2\)\(A\)](#).”). In the case of changes to the Policy Manual, the lack of any explanation, coupled with language that appears to require adjudicators to look for reasons to deny an application far exceeds the kind of “avowed alteration” or “narrowing” the Court found permissible in *Yueh-Shaio*.

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Indeed, this very point is made in one of the cases USCIS cites for its list of discretionary factors, further confusing adjudicators subject to the new policy. In *Matter of Arai*,<sup>11</sup> the Board held that the absence of adverse factors would generally be sufficient in an adjustment of status application to exercise favorable discretion; as nothing in the record indicated an adverse factor, the respondent was under no obligation to provide additional evidence of positive factors in his favor.

The problem of treating an absence of adverse factors as insufficient to ground discretion is of particular concern in the context of interim employment authorization while an underlying application, such as for asylum, is pending. There, an independent analysis of eligibility as a matter of discretion that looks beyond an absence of adverse factors creates the untenable situation in which an applicant may have to provide as much, if not more, documentation for their interim employment authorization as they ultimately would for their application for adjustment of status.

**B. Unaccompanied children’s applications will be subject to greater denials because the list of relevant factors completely ignores their unique circumstances and particular vulnerabilities.**

In recent years, unaccompanied and separated children have made up a significant subset of those who seek benefits before USCIS. Whether unaccompanied children are applying for asylum, SIJS, employment authorization, or adjustment of status, their tender years and unique circumstances should be considered in any discretionary component of decision-making. With respect to asylum, the TVPRA specifically provides that the government consider the age, maturity and vulnerabilities of unaccompanied children seeking asylum, and excludes them from asylum bars such as the one-year filing deadline or application of any safe third country agreement.<sup>12</sup> While Congress clearly intended the agency to be mindful of the special circumstances of unaccompanied children, the new discretionary guidance fails to include any discussion of the appropriate balancing of factors inherent in adjudicating a child’s application for asylum or any other benefit. Factors, whether negative or positive, relating to paying taxes or establishing community ties or the nature of good moral character may simply be irrelevant or far less meaningful in the context of a child’s case. Any rigid use of the adverse factors

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<sup>11</sup> 13 I & N Dec. 494 (BIA 1970).

<sup>12</sup> See, e.g., First Focus, Legal Protection of Minors in the Trafficking Victims Protection Act of 2008 (July 2014), <https://firstfocus.org/wp-content/uploads/2014/08/Legal-Protections-for-Unaccompanied-Minors-in-the-Trafficking-Victims-Protection-Act-of-2008.pdf>; see also INA § 208(a)(2)(E); TVPRA § 235(d)(7); TVPRA § 235(d)(8) (“Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children’s cases.”).

listed in the guidance could easily lead to denials where a child's circumstances do not meet the criteria established.

This problem could become particularly severe when a child seeks asylum, due to the interaction between the policy manual and USCIS's Proposed Rule that dictates that adjudicators consider three adverse factors in all asylum cases, and presumptively deny asylum as a matter of discretion in nine circumstances, including transiting through a country where one might have sought asylum, residing in another country for 14 days before entering the United States, or not paying taxes.<sup>13</sup> This confused and contradictory message, to apply officer discretion in all cases but with the outcome of that discretion decided in advance by regulation in many, undermines Congress's intention that unaccompanied children receive considerations appropriate to their age and circumstances. In fact, they are likely to be held to impossible standards such that even when they meet all eligibility requirements, they are expected to meet the same level of eligibility for "administrative grace" as that of a lawful permanent resident convicted of a crime seeking a waiver of inadmissibility.

**C. The Policy Manual creates new expectations for applicants without providing any corresponding guidance to the public, which is likely to create increased uncertainty and anxiety, particularly among unaccompanied children.**

Avoiding established notice and comment procedures and creating confusing and inexact guidance for exercising discretion is a recipe for administrative disaster. Adjudicators will suffer from increased documentation requirements and expanded workloads, but applicants and petitioners will suffer from greater uncertainty and anxiety at every stage in their case. Over the years, KIND has observed that uncertainty and processing delays are highly detrimental to our clients, whose young lives are often on hold as they await word of a decision. The plethora of new rules and requirements issued in the last few years and the resulting complications for our clients is already of grave concern to KIND. Under the new policy guidance, nothing is predictable, and applicants may have to guess at what additional material is necessary to reinforce eligibility. Any application could be subject to multiple requests for evidence in an effort to find adverse factors; conversely applications could be quickly denied based on any trace of an adverse factor without providing the applicant an opportunity to rebut the decision. The implications of these policy changes are immense and could cause material harm. Social science research suggests that delays and uncertainty in immigration matters pose a threat to the health and well-being of children whose cases are pending within the immigration system.<sup>14</sup>

Similarly, KIND is aware that our clients seek to put their trauma and harms behind them, and yet the possibility of revisiting the past each time a new application is submitted increases dramatically under the new guidance. Unchecked discretion could allow an adjudicator to repeatedly go over the contents

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<sup>13</sup> 85 Fed. Reg. at 36282-85.

<sup>14</sup> Kiara Alvarez and Margarita Alegria, *Understanding and Addressing the Needs of Unaccompanied Immigrant Minors*, Am. Psychological Ass'n (June 2016), at <https://www.apa.org/pi/families/resources/newsletter/2016/06/immigrant-minors>.

of an asylum or SIJS application every time an applicant submits a new request for employment authorization, issuing Requests for Evidence that question aspects of the applicant's case and thereby re-traumatizing the child.<sup>15</sup>

## **II The Policy Manual Changes Lack Clarity Regarding the Role of Discretionary Analysis in the Adjudication of Applications for Special Immigrant Juvenile Status and Could Permit Sweeping Discretionary Inquiries that Exceed USCIS' Statutory Authority.**

In addition to areas in which a discretionary component is clearly present under the relevant statutory authorization, the Policy Manual also claims the authority to infer the right to invoke discretion in certain petitions that have not been considered discretionary in the past. In explaining its new discretionary analysis, the Policy Manual distinguishes between immigration benefits that are subject to discretionary authority and those that are not, and provides a table listing several immigration benefits and whether discretion is involved in their adjudication. Given its absence from the table and related discussion, we would assume that USCIS does not intend to apply the discretionary analysis in Volume 1, Chapter 8 to the adjudication of applications for Special Immigrant Juvenile Status (SIJS) (Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant)—a decision of particular import and consequence for thousands of children who seek protection from abuse, abandonment, neglect, and similar harms recognized under state law. Clarifying this point by explicitly recognizing that the Form I-360 is not subject to the discretionary analysis would ensure that SIJS applicants are not needlessly subjected to delays and that their applications for protection are adjudicated consistent with the SIJS statute.

Although we do not believe the Policy Manual permits discretionary analysis of SIJS applications, in an abundance of caution we wish to lay out the reasons why treating this adjudication as discretionary is outside the scope of USCIS's authority. As with several forms of immigration relief, obtaining SIJS protection involves a multi-layered process comprising both an underlying application for relief and an application for adjustment of status. Although the Policy Manual makes clear that applications for adjustment to lawful permanent resident status will involve discretionary analysis,<sup>16</sup> it lacks clear guidance regarding the adjudication of underlying applications for SIJ relief—neither explicitly excluding them from the new discretionary analysis nor expressly including them:<sup>17</sup>

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<sup>15</sup> See, *infra*, II.C.

<sup>16</sup> See, e.g. Policy Manual, Vol. 7 (Adjustment of Status), Part F (Special Immigrant-Based (EB-4) Adjustment), Chap. 7 (Special Immigrant Juveniles), at E. (Adjudication) 4. (Decision) (“The officer must determine that the applicant meets all the eligibility requirements and merits the favorable exercise of discretion before approving the application to adjust status as an SIJ. If the application for adjustment of status is approvable, the officer must determine if a visa is available at the time of final adjudication.”), citing INA 245(a) & Part A, Adjustment of Status Policies and Procedures, Chapter 10, Legal Analysis and Appropriate Use of Discretion [7 USCIS-PM A.10].

<sup>17</sup> Special Immigrant Juvenile Status is not, for example, included among the immigration benefits in the table provided in Chapter 8, although other forms of humanitarian protection such as asylum and refugee status are

- SIJS is not included in the table summarizing immigration benefits involving discretion, although other forms of humanitarian protection such as asylum and refugee status are referenced,<sup>18</sup> but
- SIJS is similarly absent from the discussion of benefits that are *not* subject to discretion.<sup>19</sup>

While the agency notes that the table provides a “non-exhaustive overview” of immigration benefits, the omission of any reference to SIJS applications raises concern that both USCIS officers and children seeking protection will be left without a clear understanding of the procedures and criteria by which SIJS applications are to be evaluated. As will be discussed below, neither federal law nor past agency practice and policy permit a searching discretionary inquiry when adjudicating SIJS applications. Any requirement of such an analysis would run counter to the INA and TVPRA while injecting unnecessary inefficiency and confusion into the adjudication process. Accordingly, to the extent that any of these changes are maintained, we recommend that the Policy Manual be further modified to clarify that Form I-360 petitions for SIJS are not subject to the new discretionary analysis.

**A. “Consent” provisions in the SIJS statute do not authorize sweeping discretionary analysis of applications for SIJS classification.**

SIJS was created by Congress through the Immigration Act of 1990 and refined through subsequent legislation and policy to protect eligible children from being removed from the United States to an unfit or abusive parent, or other circumstances in the child’s country of origin that are contrary to the child’s best interests.<sup>20</sup> SIJS is unique among forms of immigration relief in its segmented process, which

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included. The Policy Manual includes within its table of immigration benefits “Petition to classify an alien as an employment-based immigrant” and notes that such benefits are subject to discretion. The table cites to statutory authority for “Immigrant Petition for Alien Workers (Form I-140).” The Policy Manual discusses employment-based immigration and classifications separately from Special Immigrant Juvenile Status. See Vol. 6 - Immigrants, Part E - Employment-Based Immigration & Part F - Employment-Based Classifications, as compared to Part J - Special Immigrant Juveniles. Thus, while visas for SIJS are processed under the fourth employment-based preference (EB-4), it does not appear that SIJS classification would be deemed an employment-based classification for purposes of discretionary analysis, although the Policy Manual lacks clarity to this end.

<sup>18</sup> See Policy Manual, Vol. 1, Part E, Chap. 8.A, Table.

<sup>19</sup> See *id.* (noting, e.g. that a Petition to classify an alien as a nonimmigrant worker (with some exceptions); Petition to classify an alien as a family-based immigrant (with some exceptions); Registration, Naturalization; Recognition as an American Indian born in Canada; Removal of Conditions on Permanent Residence (with some exceptions); and Application for a Certificate of Citizenship do not involve discretion; see *also* Vol. 1, Part E, Chap. 8.A. (“Certain immigration benefits are not discretionary”), citing as an example INA 316 (naturalization)).

<sup>20</sup> See, e.g., Immigration and Nationality Act, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005-06 (1990) (codified at 8 U.S.C. § 1101(a)(27)(J) (2006)); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162 (Jan. 5, 2006), at Sec. 826; William Wilberforce Trafficking Victims Protection Reauthorization Act 2008 (TVPRA), Pub. L. No. 110-457, §235, 112 Stat. 5044; 8 U.S.C. § 1101(a)(27)(J).

involves first, a state court determination that a child's reunification with one or both of her parents is not viable and that return to the child's country of origin is not in her best interests, second, a child's submission of an application for SIJS (Form I-360) to USCIS, and third, an adjustment of status when an EB-4 visa is available. This process was deliberately created by Congress to allow for state courts, with expertise and experience in child welfare matters, to make decisions about a child's dependency or custody, rather than federal immigration entities.<sup>21</sup>

Thus, USCIS does not itself make findings about whether a child has been abused, abandoned, or neglected, but looks to the decision of a state court.<sup>22</sup> While federal law initially required that USCIS "expressly consent" to a juvenile court's order before granting SIJS,<sup>23</sup> the TVPRA amended federal law to provide that, rather than consenting to the state court's order, "the Secretary of Homeland Security consents to the *grant* of special immigrant juvenile status."<sup>24</sup> Consistent with the statute, such consent is generally granted once eligibility requirements for SIJS are met.<sup>25</sup> SIJS classification thus is not discretionary in nature, but follows from the applicant's proof of eligibility criteria.

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<sup>21</sup> 76 Fed. Reg. 54978, 54980 ("State law is a question that lies within the expertise of the juvenile court, applying relevant State law."); *see* Perez-Olano v. Gonzalez, 248 F.R.D. 236 (C.D. Cal. 2008) ("Congress has plenary power over immigration," and "State courts have general jurisdiction over child welfare matters.").

<sup>22</sup> *See, e.g.*, Policy Manual, Vol. 6, Part J, Chap. 2 ("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, abandonment, or a similar basis under state law."); *id.* at Vol 6, J.2.D ("USCIS relies on the expertise of the juvenile court in making child welfare decisions and does not reweigh the evidence to determine if the child was subjected to abuse, neglect, abandonment, or a similar basis under state law. In order to exercise the statutorily mandated DHS 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>23</sup> *See* Dept. of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, P.L.105-119 (NOV. 26, 1997), at Sec. 113 (... "in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status"), <https://www.govinfo.gov/content/pkg/PLAW-105publ119/pdf/PLAW-105publ119.pdf>.

<sup>24</sup> 8 U.S.C. § 1101(a)(27)(J)(iii) (emphasis added). Separate requirements govern consent in the context of children in the federal immigration custody with ORR, for whom "specific consent" from HHS is required before a state court may render a decision on a child's custody. *See* 8 U.S.C. 1101(a)(27)(J)(iii)(I).

<sup>25</sup> *See* Policy Manual, Vol. 6, Part J, Chap. 4.F.1 ("SIJ classification may not be granted absent the consent of the Secretary of Homeland Security. DHS delegates this authority to USCIS. Therefore, USCIS approval of the SIJ petition is evidence of DHS consent. USCIS notifies petitioners in writing upon approval of the petition."); 76 Fed. Reg. at 54979 (Sept. 6, 2011) ("DHS consent is simply consent to the grant of SIJ status and not consent to the dependency order serving as a precondition to the grant of SIJ status."); *see also* Flores Zabaleta v. Nielsen, 367 F. Supp. 3d 208, 216 (S.D.N.Y. 2019) (concluding that the TVPRA contracted, rather than expanded, the agency's consent function).

**B. The Policy Manual’s new discretionary analysis provisions must be considered collectively with other recent and pending policy changes that seek to broaden USCIS’ discretionary authority and narrow eligibility for SIJS, contrary to the statute.**

The introduction of the Policy Manual’s new discretionary analysis comes amid other recent and pending policy changes that may significantly alter the way in which applications for SIJS will be evaluated by USCIS. Among these are a proposed SIJS rule that was reopened for public comment in 2019 after nearly 8 years without agency action (Proposed SIJS Rule).<sup>26</sup> The agency’s recent promulgation of policies in this area without reference to the discretionary analysis here reinforces the notion that such analysis does not apply to SIJS adjudications. Nevertheless, recent policy updates leave open the possibility of more sweeping inquiries and greater burdens for applicants, with troubling effect. For example, the Policy Manual was recently modified to reflect language and reasoning from Administrative Office of Appeals decisions adopted in 2019,<sup>27</sup> stating that USCIS will “look[] to the nature and purpose of the juvenile court proceedings and whether the court order was sought in proceedings granting relief from abuse, neglect, or abandonment beyond an order with factual findings to enable a person to file a petition for SIJ classification.”<sup>28</sup>

Such Policy Language, and provisions in the reopened proposed SIJS rule,<sup>29</sup> go beyond the SIJS statute and run counter to the framework crafted by Congress to draw upon state courts’ expertise in making determinations about children’s custody, dependency, and best interests.<sup>30</sup> As the Proposed SIJS Rule

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<sup>26</sup> 84 Fed. Reg. 55250 (Oct. 16, 2019), reopening public comment period on “Special Immigrant Juvenile Petitions,” 76 Fed. Reg. 54978 (Sept. 6, 2011).

<sup>27</sup> See USCIS, USCIS Clarifies Special Immigrant Juvenile Classification to Better Ensure Victims of Abuse, Neglect and Abandonment Receive Protection (Oct. 15, 2019) (“Through these adopted decisions, USCIS clarifies that it requires evidence of a court’s intervention to provide relief from abuse, neglect or abandonment beyond a statement that the juvenile is dependent on the court. This level of intervention from the court serves as an indicator as to whether the SIJ classification is sought for its intended purpose of relief from parental abuse, neglect or abandonment and not primarily to obtain an immigration benefit. Many juvenile court orders already contain this level of detail.”); see also 84 Fed. Reg. 55250 (Oct. 16, 2019), reopening the public comment period on the proposed rule titled “Special Immigrant Juvenile Petitions,” initially published for public comment on September 6, 2011 (76 Fed. Reg. 54978).

<sup>28</sup> Policy Manual, Vol. 6, Part J, Chap. 2.D.

<sup>29</sup> See 76 Fed. Reg. 54978 (authorizing in Proposed § 204.11(c)(1)(i) & (ii) the use of “other permissible discretionary factors,” and asserting that “the alien has the burden of proof to show that discretion should be exercised in his or her favor). The Proposed SIJS Rule also states that “[e]very alien must obtain the consent of the Secretary of Homeland Security to the classification as a special immigrant juvenile.” *Id.* § 204.11(c)(1). This use of “must obtain” suggests an additional burden or affirmative act is required of an applicant to obtain consent, although the Proposed SIJS Rule states elsewhere that “[a]pproval by USCIS of the SIJ petition also will constitute the granting of consent on behalf of the Secretary,” Proposed § 204.11(c)(iii).

<sup>30</sup> See KIND, Public Comment on DHS Docket No. USCIS–2009–0004, U.S. Citizenship and Immigration Services, Department of Homeland Security, Special Immigrant Juvenile Petitions; Reopening of Comment Period, at 7 (“More problematic, by authorizing the use of ‘other permissible discretionary factors,’ and asserting that ‘the

has yet to be finalized, it is unclear how the Policy Manual's provisions related to consent will be interpreted or modified in the future. The addition of new discretionary analysis provisions in the Policy Manual in this context—and without a clear acknowledgment that they do not apply to Form I-360 adjudications—risks inconsistency and inquiries that are contrary to the SIJS statute. While we recommend more generally that the Policy Manual be modified to clearly state that SIJS applications are exempt from discretionary analysis, we urge at a minimum that such analysis not be applied to SIJS adjudications before pending regulations impacting this form of relief are finalized and made public, and the public has an opportunity to meaningfully consider these changes collectively.

**C. The application of the Policy Manual's new discretionary analysis to SIJS applications would risk retraumatizing vulnerable children and erect new barriers to accessing protection.**

The application of discretionary analysis to SIJS applications would pose dire consequences for due process and the safety and well-being of unaccompanied children, erecting barriers to protection that could retraumatize children and result in their return to harm. Volume 1.E.8 of the Policy Manual advises that while “there is no exhaustive list of factors that officers must consider”<sup>31</sup> discretionary factors could include, for example, “[t]he applicant or beneficiary’s ties to family members in the United States and the closeness of the underlying relationships.” PM 1.E.8.C.2. If applied in the context of SIJS applications, such analysis could result in questioning of children about particularly sensitive and potentially confidential information related to prior abuse, abandonment, or neglect. Such inquiries are precisely those Congress allocated to state courts, and USCIS relitigating them would threaten to retraumatize child survivors of abuse, neglect, and violence, for whom it is often difficult to recount and revisit painful experiences from which they are still healing. A searching analysis would also create new and unknown evidentiary burdens,<sup>32</sup> potentially requiring children to compile and present documentation or information on a wide range of topics, including information that may be protected by state privacy and confidentiality laws. Such analysis threatens to hinder children’s ability to access lifesaving protection for which they are statutorily eligible and heightens the risk that children will be returned to harm. It is inconceivable that Congress would enact a form of humanitarian protection grounded in a state court’s determination that a child has been abused, abandoned, or neglected and that “it would not be in [a child’s] best interest to be returned” to the child’s country of origin only to allow USCIS officers to reevaluate or dispense with such findings as a matter of discretion. Sweeping

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alien has the burden of proof to show that discretion should be exercised in his or her favor,’ the Proposed Rule purports to transform the narrow statutory consent function into an open-ended exercise of discretion. Proposed § 204.11(c)(i), (ii).”)

<sup>31</sup> PM 1.E.8.

<sup>32</sup> See, e.g., Policy Manual, Vol. 1, Chap. 8.A (stating that for benefits requiring the favorable exercise of discretion “the benefit requestor has the burden of demonstrating eligibility for the benefit sought and that USCIS should favorably exercise discretion.<sup>61</sup> Where an immigration benefit is discretionary, meeting the statutory and regulatory requirements alone does not entitle the requestor to the benefit sought.”)

authority of this kind cannot be reasonably “inferred from the statutory language,”<sup>33</sup> and the Policy Manual should make clear that it does not exist in the context of SIJS adjudications.

**D. The use of discretionary analysis in the context of SIJS applications is inconsistent with provisions of the Policy Manual recognizing the vulnerability of applicants for SIJS.**

The use of discretionary analysis in the SIJS context would be inconsistent with Policy Manual provisions acknowledging the unique hardships experienced by SIJS applicants. For example, the Policy Manual “recognizes the vulnerable nature of SIJ petitioners” and advises that the agency “generally conducts interviews of SIJ petitioners only when an interview is deemed necessary. . . .” USCIS generally does not require an interview if the record contains sufficient information and evidence to approve the petition without an in-person assessment.” PM 6.J.4.C.2. It further provides that “[g]iven the vulnerable nature of SIJ petitioners and the hardships they may face because of the loss of parental support, USCIS strives to establish a child-friendly interview environment if an interview is scheduled. During an interview, officers avoid questioning the petitioner about the details of the abuse, neglect, or abandonment suffered, because these issues are handled by the juvenile court. Officers generally focus the interview on resolving issues related to the eligibility requirements, including age.” *Id.* The discretionary analysis provided for in PM 1.E.8 would run directly contrary to this guidance, and if applied to SIJS applications, would require officers to engage in the very questioning of SIJS applicants that the Policy Manual otherwise disfavors. The Policy Manual should be modified to clearly exempt such adjudications from discretionary analysis to ensure consistency and appropriate treatment of vulnerable children by the agency.

**E. Discretionary analysis could result in the denial of applications for SIJS relief even before a child’s eligibility for such protection is considered.**

Although the Policy Manual provides that discretionary considerations will typically follow an evaluation of an applicant’s eligibility for a given form of immigration benefit, it notes that “[i]t is legally permissible to deny an application as a matter of discretion without determining whether the requestor is otherwise eligible for the benefit. However, the record is essentially incomplete if USCIS denies an application, petition, or request in its exercise of discretion without making a determination concerning eligibility.” PM 1.E.8.B.4. This provision presents troubling due process concerns and the possibility that a child’s application for protection could be rejected as a matter of discretion, even when a child’s deportation would be contrary to the child’s best interests and pose a potential threat to the life and safety of the child. Such a result would make a mockery of the TVPRA’s protections, which were enacted “to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution and other life threatening circumstances” and to fulfill “a special

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<sup>33</sup> Pursuant to the Policy Manual, discretionary authority may be provided for explicitly by statute or be “less explicit and must be inferred from the statutory language.” USCIS Policy Manual, Vol. 1 Policies and Procedures, Chapter 8, Discretionary Analysis, at A. Applicability.

obligation to ensure that these children are treated humanely and fairly.”<sup>34</sup> The Policy Manual should be amended to clarify that when discretionary analysis applies, it remains a component of the eligibility determination, rather than a heightened standard or opportunity to reexamine elements that have already been established, and that discretionary denials may never be issued absent a full eligibility evaluation in order to protect due process and preserve the record, particularly in the context of applications for humanitarian protection such as SIJS.

## Conclusion

We urge your attention to three important and inter-related concepts. First, discretionary authority conferred by statute does not permit the agency to ignore Congress’s clear intention to make benefits available to individuals, nor does it authorize an adjudicator to probe far and wide to find a reason to deny an application. Second, the exercise of discretion should be proportionate both to the benefit sought and to the particular circumstances of an individual, such that adverse factors relevant in an adult’s application may play little or no role in judging a child’s request for a benefit. Third, the confusion and lack of clarity exhibited in the guidance, particularly with respect to inferring the power to exercise discretion, as may be the case with Special Immigrant Juvenile Status, represents a wholly new and dangerous approach to immigration adjudications that will have a profound effect on KIND’s clients. Without further clarification and discussion from USCIS—including a vigorous engagement with stakeholders—we fear that all of these problems will lead to more denials, significant uncertainty, and inevitably litigation that taxes both the government’s and the public’s resources.

We ask USCIS to withdraw its revisions to discretionary determinations and engage with KIND and other stakeholders to develop guidance that ensures that good judgment prevails. To the extent some of these changes remain, we urge further revisions directed to adjudication of SIJS, as set forth above.

Sincerely,

A handwritten signature in blue ink that reads "Maria M. Odom". The signature is written in a cursive, flowing style.

Maria M. Odom

Vice President for Legal Programs

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<sup>34</sup> 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).