Advisory Council on Immigration Issues in Family Court Memorandum #1A

To: **Family Court Judges, Chief Clerks and Non-judicial Staff**

From: **Advisory Council on Immigration Issues in Family Court**

Re: **Supplemental Guidance on Guardianship Matters and Applications for Special Immigrant Juvenile ("SIJ") Findings**

Date: **May 7, 2018**

The Advisory Council on Immigration Issues in Family Court was created by Chief Administrative Judge Lawrence Marks in 2015. In January 2017, the Council prepared and distributed a memorandum entitled *Guidance on Guardianship Matters and Applications for Special Immigrant Juvenile ("SIJ") Findings* (SIJ Guidance Memo). The goal of the SIJ Guidance Memo was to assist Family Court jurists and non-judicial staff regarding issues related to guardianship proceedings and requests for the State court special findings required by Federal law for juveniles to obtain SIJ Status.

Beginning in early 2017, the United States Citizenship and Immigration Services (USCIS) has deemed a large and increasing number of Family Court orders insufficient to establish the SIJ findings required of a State court. This change in USCIS responses to SIJ applications has transpired without any change in the Federal law, rules or regulations that govern SIJ matters. In addition, the responses also depart significantly from previous USCIS adjudication practices where SIJ orders with identical language had for many years been deemed sufficient and resulted in SIJ Status approvals. There is, consequently, understandable uncertainty about what impact the increased number of rejected applications has on State law SIJ-related practice. This Supplemental Memorandum provides information and guidance related to the question of that impact.

Background

SIJ Status is available to children who can provide an order from a state "juvenile" court showing the following: (1) they are under 21; (2) they are unmarried; (3) they are either dependent on a juvenile court, or have been placed by a juvenile court under the custody of a state agency or department, or have been placed by a State or juvenile court under the custody of an individual or entity; (4) they are not able to reunify with one or both parents due to abuse, neglect, abandonment or a similar basis; and (5) it is not in their best interests to return to their country of origin.[1]

As noted in the first SIJ Guidance Memo, the family court has a discrete yet vital role in these children's pursuit of SIJ Status: the family court does not and cannot grant SIJ Status or any immigration benefit; however, only a state "juvenile court" such as a family court, and not a federal court, can make the necessary pre-cursor findings that accompany the SIJ application made to USCIS.[2]

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[1] 8 U.S.C. § 1107(a)(27)(J). A juvenile court is any court with jurisdiction to make "judicial determinations about the custody and care of juveniles." *See* 8 C.F.R. §204.11(a).

[2] *Id.* *See also* U.S. Citizen and Immigration Services Memorandum "Trafficking Victims Protection Reauthorization Act of 2008: Special immigrant Juvenile Status Provisions" (March 24, 2009), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf.

USCIS Responses to SIJ Status Applications

When USCIS determines that a Family Court SIJ Order is sufficient, and when a variety of other criteria are met, USCIS will typically grant SIJ Status to the applicant child.

When USCIS deems a Family Court SIJ Order insufficient, they can return it to the child with a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID). An RFE, which typically precedes the issuance of a NOID, seeks additional evidence, often including an amended SIJ Order, to address specific concerns. Child applicants have 90 days to respond to an RFE. A NOID indicates USCIS' intent to deny the SIJ petition, and provides the child with 30 days to contest the grounds for the anticipated denial. USCIS can also issue a Notice of Intent to Revoke (NOIR), which indicates the intent by USCIS to revoke a previously granted application for SIJ Status.

Since early 2017 there has been a stark and dramatic increase in the number of children who are receiving RFEs, NOIDs and NOIRs. USCIS' bases for determining SIJ Orders insufficient have included the following:

- Insufficient description of the facts underlying the determination of abuse, neglect, abandonment or a similar basis;
- Insufficient facts to support the determination that it is not in the child's best interests to return to her country of origin;
- Insufficient citation to the State law under which specific findings are made;
- Insufficient basis for finding that guardianship constitutes "dependency" on the Family Court;
- Insufficient basis for finding that the Family Court acts as a "juvenile court" when making guardianship determinations for minors ages 18, 19 and 20;
- Insufficient basis for finding that the Family Court has jurisdiction to reunify minors with their parents once the minor reaches age 18; and,
- Insufficient basis for finding that the death of a parent constitutes a "similar basis" under State law.

Family Court Guidance

In response to these unanticipated changes in USCIS practice, Family Court practitioners and jurists can make additional efforts to ensure that SIJ Orders utilize suitable and sufficient factual context and legal citation, including for cases where an SIJ Order has already been issued and practitioners are seeking an Amended Order from the Family Court.[3]

[3] The Family Court maintains jurisdiction over motions for Amended SIJ Orders and *nunc pro tunc* Orders even where the minor has turned 21 since the original SIJ Order was issued. *See In re Juan R.E.M.*, 154 A.D.3d 725 (2nd Dept. 2017) (Appellate Division holds motions to amend SIJ Orders can be filed after minor turns 21 so long as guardianship order was issued prior to minor turning 21). *See generally In re Emma M.*, 74 A.D.3d 968 (2nd Dept. 2010) (Appellate Division overturns Family Court's denial of *nunc pro tunc* special findings motion).

Practitioners and jurists can address many of the issues raised in USCIS responses through reference to New York statutory law and appellate case law in Orders and Amended Orders; many are also addressed by the new GF-42 form.[4] For example:

- The insufficiency of the basis for factual findings, and the insufficiency of State law citations, may be addressed by ensuring, as indicated on the new GF-42, that sufficient factual and statutory bases are provided for the Order generally, as well as for each finding.
- The basis for guardianship constituting "dependency" is recognized across the State, and may be addressed through citations to determinations by the three appellate divisions that have reached this issue.[5]
- The basis for New York Family Courts acting as a "juvenile court" for youth ages 18, 19 and 20 in guardianship cases may be addressed through the use of the language in the opening paragraph and Note in the new GF-42[6] –
    - *This Court, after examining the motion papers, supporting affidavits, pleadings and prior proceedings in this matter, and/or hearing testimony, finds, in accordance with its jurisdiction to determine custody and guardianship of minors up to the age of 21 under Article 6, §13, of the New York State Constitution, section 115 of the Family Court Act and §_____ of the [check applicable box]: □ Family Court Act □ Social Services Law □ Domestic Relations Law □ Surrogate's Court Procedure Act □ Other [specify].*
    - *NOTE [Guardianship cases]: Family Court Act §657(c) provides that an order of guardianship under Family Court Act §661 conveys "the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child.*
- The basis for the Family Court's jurisdiction to reunify minors up to age 21 with their parents can be addressed through citation to the numerous statutory provisions which grant the Family Court that power in various contexts.[7]

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[4] The GF-42 is the SIJ Order form posted on the New York State Unified Court System website. *See* New York State Unified Court System General Form G-42 ("Special immigrant Juvenile Status – Order"), *available at* nycourts.gov/forms/familycourt/general. A copy of the new GF-42 is attached to this memorandum. Note that the GF-42 is a form designed to assist practitioners and jurists in preparing effective SIJ Orders; there is no requirement that New York State courts use this specific form when preparing SIJ Orders.

[5] *See*, *e.g.*, *Matter of Antowa McD.*, 50 A.D.3d 507 (1st Dept. 2008); *Matter of Trudy Ann W.*, 73 A.D.3d 793 (2nd Dept. 2010); *Matter of Keilyn GG.*, 159 A.D.3d 1295 (3rd Dept. 2018).

[6] There are numerous proceedings, including guardianships, where the Family Court exercises its jurisdiction over the custody and care of minors up to age 21, including permanency hearings for abused and neglected children in State care, minors who wish to return to State care after their 18th birthday, permanency hearings for destitute children who are in State care, and minors in State care pursuant to juvenile delinquency proceedings. N.Y. Fam. Ct. Act Articles 3; 6; 10-A; 10-B; 10-C.

[7] *See, e.g.*, Family Court Act §§ 1087(a) (including, under definition of "child," minors between 18 and 21 who have consented to continuation in foster care or to trial discharge status); 1089-a (permitting award of custody and guardianship of minor up to age 21 to any relative or respondent parent at permanency hearing); 355.5 (authorizing return to parent of minors up to age 21 who are placed with a commissioner of social services or office of children and family services). Family Court Act § 661(a) similarly grants the Family Court the power in guardianship matters to place minors up to age 21 in the care and custody of parents from whom they had been separated. *See Matter of Marisol N.H.*, 115 A.D.3d 185 (2nd Dept. 2014) (Family Court has jurisdiction over guardianship matter where mother was proposed guardian for children ages 19, 18, and 16 from whom she had been separated).

- The determination of "death" as a similar basis can be supported by citation to relevant statutory and appellate case law, and an explicit description of how the death of a parent or parents creates challenges similar to those that arise from abandonment by a parent.[8]

Conclusion

New York has for many years recognized the Family Court's jurisdiction over motions seeking SIJ Orders; the consistency of issuing SIJ findings with Family Court goals of permanency, stability and safety; and the important but limited role that SIJ findings play in the ultimate decision by USCIS on whether a child will be granted SIJ Status and permitted to stay in the U.S.[9] Our State courts consequently have an ongoing obligation to issue requested SIJ Orders and Amended SIJ Orders when consistent with State law and when supporting evidence is presented, regardless of any changes in how USCIS approaches applications for SIJ Status.

[8] *See, generally,* Family Court Act Article 10-C ("Destitute Children"). *See also Matter of Luis R. v. Elena G.*, 120 A.D.3d 581(2nd Dept. 2014); *Matter of Jose YY.*, 158 A.D.3d 200 (3rd Dept. 2018).

[9] *See*, *e.g.*, *Matter of Marcelina M.-G.*, 112 A.D.3d 100 (2nd Dept. 2013); *Matter of Marisol N.H.*, 115 A.D.3d 185 (2nd Dept. 2014).