THE VARIOUS PROBLEMS AND INSTABILITIES WITH THE IMPLEMENTATION OF THE SPECIAL IMMIGRANT JUVENILE STATUS STATUTE

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I. INTRODUCTION

Special Immigrant Juvenile Status ("SIJS") is a form of immigration relief created by Congress to protect vulnerable noncitizen children.[1] This protection offers a path to lawful permanent residency for juveniles who the courts determine have a history of abuse, neglect, or abandonment by one or both parents; and who are in the United States without lawful immigration status.[2] Most other forms of immigration relief are adjudicated by a federal immigration agency, the United States Citizenship and Immigration Services ("USCIS").[3] However, SIJS involves an additional unique step where the juvenile must ask a state court to make factual determinations on their history of abuse, neglect, or abandonment.[4] The juvenile cannot proceed with their Special Immigrant Juvenile ("SIJ") petition and apply for relief from USCIS until the child obtains a SIJS predicate order from their appropriate state juvenile court.[5] Even after the state court issues a predicate order, USCIS is ultimately the entity who reserves the authority to determine if SIJ relief is appropriate for the juvenile applicant.[6] During this last step, "USCIS'[s] adjudication of the SIJ petition includes review of the petition, the juvenile court order(s), and supporting evidence to determine if the petitioner is eligible for SIJ classification."[7]

[1] *See Policy Manual: Part J – Special Immigrant Juveniles, Chapter 1 – Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 8, 2022), https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1.

[2] *See id.*

[3] *See Chapter 4: Special Immigrant Juvenile Status (SIJS)*, KIDS NEED DEF. (Apr. 2015), https://supportkind.org/wp-content/uploads/2015/04/Chapter-4-Special-Immigrant-Juvenile-Status-SIJS.pdf.

[4] *See id.*

[5] *See id.*

[6] *See Policy Manual: Part J – Special Immigrant Juveniles, Chapter 2 – Eligibility Requirements*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 8, 2022), https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2.

[7] *See id.*

In addition to its peculiar structure, the growing number of young noncitizens applying for Special Immigrant Juvenile Status represents the need for critical relief and reflects the overall significance within this area of immigration law. Throughout the fiscal years of 2010 to 2014, USCIS received 16,652 SIJ petitions, while in fiscal years 2015 to 2019, USCIS received 95,901 petitions, which is a 495% increase from the previous four-year period.[8]

While the stated goal of SIJS is to provide immigration protection and relief to children who have received a predicate order from their state court, this goal is often unattained.[9] Due to complicated nuances within SIJS, including the worldwide annual visa limits, the federal interpretation of the SIJS statute, and state governments' implementation of the predicate order process, noncitizen youths are presented with significant barriers to obtaining relief.[10] Moreover, immigration law and policy are highly susceptible to the changes of each presidential administration. Most notably documented in the last few years, SIJS has been at the mercy of the President's broad power to set immigration policy.[11] Because the President has the power to issue Executive Orders, presidential administrations can create immigration laws, decide how to enforce those laws, and grant administrative relief to undocumented individuals, which drastically shifts immigration law and policy over the course of various administrations.[12]

This Note begins with an analysis of the legislative history of the SIJS statute and the particularities of SIJS, including the nuanced statutory requirements a juvenile must meet in order to apply for SIJS. Next, it provides a brief overview of visa caps, namely, how employment-based immigration operates and how it applies to individuals approved for SIJ

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[8] *Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) By Fiscal Year, Quarter and Case Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (2010-2022), https://www.uscis.gov/sites/default/files/document/data/I360_sij_performancedata_fy2020_qtr2.pdf.

[9] *See Special Immigration Juvenile Status Manual, 3rd Edition (2017)*, SAFE PASSAGE PROJECT, https://www.safepassageproject.org/wp-content/uploads/2018/12/SIJS-Manual-Summer-2017.pdf.

[10] *See* Immigration and Nationality Act, § 201, 8 U.S.C. § 1151 (explaining the worldwide level of immigration and the number of visas the United States is permitted to grant each year);

> [R]ecognizing that immigrant children need not only protection from state courts but also lawful status in the United States, some states have extended the jurisdictional age to 21 contemporaneously with mandating detailed findings of fact and law that track federal SIJS requirements. Other states with jurisdiction to 21 do not explicitly refer to SIJS in their statutes. USCIS has consistently attempted to roll back SIJS protections by imposing impermissible requirements and narrowly interpreting the law through regulations, internal memoranda, case adjudication and decision-making practices.

see also Predicate Order State-by-State Age-Out Analysis, PROJECT LIFELINE (2021), https://projectlifeline.us/resources/state-by-state-analysis/.

[11] *See The President's Broad Legal Authority to Act on Immigration*, NAT'L IMMIGR. L. CTR. (Aug. 2014), https://www.nilc.org/wp-content/uploads/2015/11/president-legal-authority-2014-08-20.pdf.

[12] *See id.*

relief. Section Three includes legal analyses covering the reliance on state courts and the inconsistent interpretation of SIJS, an overview of the misuse of the consent function, ways the Trump administration impacted the SIJS statute, and an explanation of how the backlog adversely affects those with approved SIJS applications. Section Four explores the various issues juveniles face once their SIJ application is granted and why the immigration system's susceptibility to political change causes problems and concerns. Finally, Section Five includes this Note's proposal calling for clarification on SIJS's statutory implementation, including specific suggestions for rectifying issues involving SIJS recipients originating from countries with a visa cut-off date, removing SIJS from the fourth visa preference category, and allowing those who are receiving SIJ relief to access work authorization.

II. BACKGROUND

A. Legislative History

Congress created SIJS in 1990 to be included in the Immigration and Nationality Act ("INA")[13] with the goals of protecting immigrant children who have been abused, neglected, or abandoned, and creating a pathway for these children to achieve lawful permanent resident ("LPR") status (i.e., obtain a green card) and eventually citizenship.[14] Since then, there have been significant developments on obtaining SIJS, most notably in the years of 1990, 1998, and 2008.[15] The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991[16] recognized that vulnerable juveniles

[13] *See Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 10, 2019), https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act ("[T]he Immigration and Nationality Act (INA) was enacted in 1952. The INA collected many provisions and reorganized the structure of immigration law. The INA is contained in the United States Code (U.S.C.). The U.S. Code is a collection of all the laws of the United States. Title 8 of the U.S. Code covers 'Aliens and Nationality.'").

[14] *See* Rachel Leya Davidson & Laila L. Hlass, *"Any Day They Could Deport Me" – OVER 44,000 IMMIGRANT CHILDREN TRAPPED IN SIJS BACKLOG*, THE END SIJS BACKLOG COALITION & THE DOOR 3-5 (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.

[15] *See* Amy Joseph, Amy Pont, & Cristina Romero, *CONSENT IS NOT DISCRETION: THE EVOLUTION OF SIJS AND THE CONSENT FUNCTION*, 34 GEO. IMMIGR. L. J. 263, 270 (2020) ("[S]IJS was initially created in 1990 without any reference to either consent or discretion. Consent was first inscribed into the SIJS determination with the 1998 Appropriation Act but later reined in with the 2008 TVPRA.").

[16] Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733.

needed long-term protection, so Congress added considerations for those who met the requirements for SIJS to be paroled into the country,[17] and thus modified the original SIJ relief in the INA.[18] On August 12, 1993, the Immigration and Naturalization Services ("INS") "issued the 1993 Rule, which implemented the 1991 Amendments and clarified eligibility criteria for SIJS."[19] Under the 1993 Rule, a regulation to include special immigrants was enacted to "alleviate hardships experienced by some dependents of U.S. juvenile courts by providing qualified aliens with the opportunity to apply for special immigrant classification and LPR status with [the] possibility of becoming citizens of the United States in the future."[20] After the 1993 Rule, the Immigration and Nationality Technical Corrections Act of 1994 expanded SIJS eligibility from the "youth who had been declared dependent on a juvenile court (and deemed eligible for long-term foster care) to those 'whom such a court has legally committed to, or placed under the custody of, an agency or department of a State' (and deemed eligible for long-term foster care)."[21]

> Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 - Title I: Judicial Naturalization Ceremonies Amendments - Judicial Naturalization Ceremonies Amendments of 1991 - Amends the Immigration and Nationality Act, as amended by the Immigration Act of 1990, to grant eligible Federal and State courts exclusive jurisdiction to administer naturalization oath of allegiance ceremonies during the 45-day period beginning on the date on which the Attorney General certifies to the court that an applicant is eligible for naturalization if the court has notified the Attorney General prior to the date of certification of eligibility of the days scheduled for oath ceremonies.

Id.

[17] *See Humanitarian or Significant Pub. Benefit Parole for Individuals Outside of the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 9, 2022), https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states ("Individuals who are outside of the United States may be able to request parole into the United States based on urgent humanitarian or significant public benefit reasons.").

[18] *See* Joseph, Pont, & Romero, *supra* note 15, at 278.

[19] *Id.* at 279.

> Under the 1993 Rule, in order to be eligible for SIJS, a young person must have been under twenty-one years old; unmarried; declared dependent on a US juvenile court in accordance with state dependency laws and jurisdiction; eligible for long-term foster care; and the subject of a determination that it would not be in the young person's best interests to be returned to their country of origin or that of their parents. A key recurring feature of the Rule was its emphasis on deference to state law. We see this in the INS' expansion of SIJS eligibility up to age twenty-one to accommodate for varying state definitions of juveniles and its tying of dependency determinations to respective state laws.

Id.

[20] Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 43844 (Aug. 12, 1993) (codified at 8 C.F.R. §§ 101, 103, 204, 205, 245).

[21] Joseph, Pont, & Romero, *supra* note 15, at 283; *see also* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305.

In 1998, requirements for SIJ relief became more restrictive compared to previous amendments.[22] The 1998 Appropriation Act implemented limits as to how each state court, Secretary of the Department of Homeland Security ("DHS"), and the Secretary of the Department of Health and Human Services ("HHS") determine eligibility and "prohibited juvenile courts from determining the custody status or placement of a child who is in the custody of the federal government, unless the Attorney General . . . . specifically consents to the court's jurisdiction."[23] The SIJS statute was amended for federal immigration authorities to become involved when the immigrant child is in federal government custody because such authorities were not involved before this point.[24] This means that since 1998, the federal government (at the time, the Attorney General, and then later DHS) must consent to the juvenile court order before USCIS grants SIJS.[25] Seven years later, the Reauthorization of the Violence Against Women Act of 2005 was enacted to provide protection for minors against domestic violence and from their abusers and to "improve the ability of abused, abandoned, or neglected SIJS children to safely apply for SIJS."[26] Immigrant youth could seek protection under this Act by showing that they were no longer compelled to contact the parent responsible for the abuse and could seek protection from their abusers independently.[27]

In 2008, the William Wilberforce Trafficking Victims Protection and Reauthorization Act ("TVPRA") was enacted with the intention of protecting minors by promoting security and stability for the juvenile without requiring the individual to be placed in a state/federal institution or to be placed in the foster care system.[28] Prior eligibility requirements were limited to "immigrant children who have suffered harm from both of their parents in the form of abuse, abandonment, or neglect."[29] Over the years, there have been major advancements made by the TVPRA's amendments to the INA.

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[22] Kavel Joseph, Kendall Niles, Tolulope Adetayo, & Leslye Orloff, *Appendix B: Special Immigrant Juvenile Status Legislative History*, NAT'L IMMIGR. WOMEN'S ADVOC. PROJECT, 2-3 (Dec. 19, 2017), http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-B-SIJS-Legislative-History.pdf.

[23] *Policy Manual: Part J – Special Immigrant Juveniles, Chapter 1 – Purpose and Background*, *supra* note 1; *see also* Dep'ts of Com., Just., and State, the Judiciary, and Related Agencies 1998 Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460-61 (Nov. 26, 1997), 8 U.S.C. § 1101(a)(27)(J) (1999).

[24] *See Policy Manual: Part J – Special Immigrant Juveniles, Chapter 1 – Purpose and Background*, *supra* note 1.

[25] *See id.*

[26] Joseph, Niles, Adetayo, & Orloff, *supra* note 22; *see also* Reauthorization of the Violence Against Women Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960.

[27] *See id.*

[28] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; *see also* Joseph, Niles, Adetayo, & Orloff, *supra* note 22.

[29] Joseph, Niles, Adetayo, & Orloff, *supra* note 22.

The most significant changes include: (1) expanded eligibility to include children whom a state court has placed under the custody of an individual person or entity chosen by a state court;[30] (2) age-out protections so SIJS could not deny anyone, based solely on age, who was under twenty-one years old on the date they properly filed their SIJ petition, regardless of the petitioner's age at the time of adjudication;[31] (3) Secretary of Homeland Security now consents to the grant of SIJS by DHS instead of expressly consenting to the state court order;[32] and (4) added a timeframe for adjudication stating that the Secretary of Homeland Security shall adjudicate SIJ petitions within 180 days of filing.[33] Additionally, although the 2008 TVPRA amendment expanded eligibility requirements for long-term foster care, this amendment, in turn, means that the immigrant child must demonstrate that reunification with one or both parents were not practical due to abuse, abandonment, or neglect.[34]

Most recently, on March 7, 2022, USCIS announced a final rule in an attempt "to align the SIJ classification with existing federal statutes and clarify SIJ eligibility criteria and evidentiary requirements to improve the efficiency and effectiveness of the program."[35] In this final rule, DHS enacted numerous amendments pertaining to: (1) 8 C.F.R. § 204.11, Special Immigrant Juvenile Classification under part 204; (2) 8 C.F.R. § 205.1, Automatic Revocation under part 205; and (3) 8 C.F.R. § 245.1, Eligibility under part 245.[36] Revisions to the three sections include clarification to the following: "the definitions of key terms, such as 'juvenile court' and 'judicial determination'; what constitutes a qualifying juvenile court order for SIJ purposes; what constitutes a qualifying parental reunification determination;

[30] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act § 235(d)(1)(A); *see also* Immigration and Nationality Act § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i) (stating that this can be custody or placement in a wide variety of state court proceedings in which family, juvenile, probate or other state courts issue court orders regarding the custody, care, or placement of children).

[31] *See* Joseph, Niles, Adetayo, & Orloff, *supra* note 22; *see also* William Wilberforce Trafficking Victims Protection Reauthorization Act § 235(d)(6).

[32] *See* Joseph, Niles, Adetayo, & Orloff, *supra* note 22; *see also* William Wilberforce Trafficking Victims Protection Reauthorization Act § 235(d)(1)(A); *see also* Immigration and Nationality Act § 101(a)(27)(J)(iii)(I) (this amendment eliminates the need for any federal government agency involvement or service in state court proceedings in which immigrant child is seeking SIJS findings).

[33] *See* Joseph, Niles, Adetayo, & Orloff, *supra* note 22; *see also* William Wilberforce Trafficking Victims Protection Reauthorization Act § 235(d)(2).

[34] *See* Jessica R. Pulitzer, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J.L. & GENDER 201, 213 (Oct. 1, 2014).

[35] *Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 13, 2022), https://www.uscis.gov/working-in-US/eb4/SIJ.

[36] Special Immigrant Juv. Petitions, 87 Fed. Reg. 13,066 (2022); *see also* 8 C.F.R. § 204.11 (2022); *see also* 8 C.F.R. § 205.1 (2022); *see also* 8 C.F.R. § 245.1 (2022).

DHS's consent function; and applicable bars to adjustment, inadmissibility grounds, and waivers for SIJ-based adjustment to LPR status."[37]

Congress also included certain protections against the deportation of juveniles when SIJS was enacted, stating that grounds for deportation "shall not apply to a special immigrant based upon circumstances that exist before the date the alien was provided such special immigrant status."[38] After issues regarding deportability, admissibility, and eligibility were spotted in the first enactment of the 1990 Act, in 1991 Congress provided that "in determining the [SIJS beneficiary's] admissibility as an immigrant," grounds of excludability "shall not apply," meaning that juveniles can apply for SIJS if they do not have valid travel documents, if they have not maintained status or unauthorized employment, and all other ways an immigrant could be removed from the United States.[39] These amendments created the legal framework necessary to effectuate the purpose of SIJS by waiving grounds of deportability for SIJ beneficiaries, removing barriers for adjustment of status, and exempting juveniles from grounds of inadmissibility. In addition to the INA amendments, when discussing SIJ protections, the TVPRA notably created a subsection titled "Permanent Protection for Certain At-Risk Children," which provides further evidence that Congress intended SIJS beneficiaries to be permanently protected from removal.[40]

B. Particularities of SIJS

To be eligible for SIJ relief, the applicant must meet all of the statutory requirements.[41] The requirements specify that the applicant must: (1) be under twenty-one years of age; (2) be currently living in the U.S.; (3) be unmarried both at the time the SIJ petition is filed and at the time USCIS makes a decision on the petition; (4) have a valid juvenile court order issued by a state court in the U.S. which finds that the juvenile is a dependent on the court, or in the custody of a state agency, department, or an individual/entity appointed by the court; (5) be that the juvenile is not able to reunify with one or both of their parents because of abuse, abandonment, neglect, or a similar basis under law; (6) be that it is not in the juvenile's best interest to return to their country of nationality or last habitual residence; (7) be eligible for USCIS consent, meaning the juvenile has sought the state court order to obtain relief from abuse, neglect, abandonment, or a similar basis under state

[37] Special Immigrant Juv. Petitions, 87 Fed. Reg. 13,066 (2022).

[38] Immigration Act of 1990, Pub. L. No. 101-648, § 153(b), 104 Stat. 5006, 8 U.S.C. § 1227(c).

[39] Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 302(d)(2)(A), (B), 105 Stat. 1733, 1744-45.

[40] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d), 122 Stat. 5044.

[41] *See Special Immigrant Juveniles*, *supra* note 35.

law and not primarily to obtain an immigration benefit; and (8) have written consent from HHS or the Office of Refugee Resettlement ("ORR") to the court's jurisdiction if the juvenile is currently in the custody of HHS, and the state court order also changes the juvenile's custody or placement.[42]

On March 7, 2022, USCIS announced policy updates for special immigrant juveniles and provided information regarding the TVPRA's most recently modified SIJS statute.[43] Currently, a child may obtain SIJS if:

> (1) [They] ha[ve] been declared dependent on a juvenile court or has been committed to the custody of a state agency, department, individual or entity; (2) because reunification with one or both parents is not viable due to abuse, neglect, abandonment or a similar state law basis; (3) it has been determined that it would not be in the child's best interest to return to [their] home country; and (4) the Secretary of Homeland Security consents to the grant of SIJ status.[44]

It is important to note that "[o]nly state courts can make determinations based on state law about abuse, neglect, or abandonment, family reunification and the best interest of the child."[45] If the state court makes these factual determinations, the court grants an individual an order to certify eligibility requirements, referred to as the "SIJS predicate order."[46] The individual applying for SIJ relief must fill out the SIJ petition ("Form I-360"), then apply for Adjustment of Status Application ("Form I-485") to obtain LPR status of the United States.[47] Form I-360 and Form I-485 are typically, but not necessarily, filed simultaneously with USCIS, but Form I-360 is the petition in which USCIS either grants or denies one's application for SIJ relief.[48] If granted, it follows that the SIJS recipient receives a green card and LPR status through Form I-485.[49]

Critically, although a grant of SIJS provides a path to a green card, certain nationalities may not have a green card immediately available when SIJS is granted by USCIS. Because SIJS is included in the employed-based

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[42] Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J); *see also* 8 C.F.R. § 204.11 (2022); *see also Policy Manual: Part J – Special Immigrant Juveniles, Chapter 2 – Eligibility Requirements*, *supra* note 6.

[43] *See* Hillary Richardson, Maria Blumenfeld, & Kathleen M. Vannucci, *USCIS Policy Updates for Special Immigrant Juveniles: A Practice Advisory for State Court Practitioners*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 7, 2022), https://immigrantjustice.org/sites/default/files/content-type/resource/documents/2017-01/USCIS%20Policy%20Updates%20SIJS%20Practice%20Advisory.1.12.17.pdf.

[44] Immigration and Nationality Act § 101(j); *see also* William Wilberforce Trafficking Victims Protection Reauthorization Act § 235(d).

[45] Richardson, Blumenfeld, & Vannucci, *supra* note 43.

[46] *See Chapter 4: Special Immigrant Juvenile Status (SIJS)*, *supra* note 3.

[47] *See id.*

[48] *See Special Immigrant Juveniles*, *supra* note 35.

[49] *See id.*

immigration category, SIJS applicants are "[s]ubject to annual limitations for how many green cards per country of origin can be issued, causing the SIJS backlog."[50] If the juvenile is coming from a retrogressed country—a country that exceeds its statutory limit of seven percent per-country[51]—the juvenile is unable to adjust their status unless the Visa Bulletin is current.[52] The Visa Bulletin is published by the U.S. Department of State to provide updates summarizing the availability of immigrant visas throughout each month.[53] As of September 2022, individuals applying for visas from El Salvador, Guatemala, Honduras, and Mexico exceed the seven percent per-country cap and remain on the Visa Bulletin, so there are no visas available for individuals from those countries of origin.[54] More specifically, throughout fiscal year 2019, there were only 10,076 green cards available for those eligible for SIJS.[55] Therefore, individuals from the four countries exceeding the seven

[50] Jasmine Aguilera, *A Years-Long Immigration Backlog Puts Thousands of Abused Kids in Limbo*, TIME (Dec. 16, 2021, 11:25 AM), https://time.com/6128025/abused-immigrant-kids-sijs-backlog/.

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> When the demand for visas exceeds the number of visas available for issuance, backlogs will occur. This is the phenomenon commonly referred to as retrogression . . . . Section 201 of the INA sets an annual minimum Family-sponsored preference limit of 226,000, while the worldwide annual level for Employment-based preference immigrants is at least 140,000. Section 202 sets the per-country limit for preference immigrants at 7% of the total annual Family-sponsored and Employment-based preference limits, i.e., a minimum of 25,620. The annual per-country limitation of 7% is a cap, meaning visa issuances to any single country may not exceed this figure.

See Brief Explanation of Retrogression, IMMIGR. SUPPORT SERVS., https://immigrationsupport.com/wp-content/uploads/Whatisretrogression.pdf (last visited Nov. 6, 2022);

> Congress sets limits on the number of immigrant visas that can be issued each year. . . . Demand for visa numbers by applicants with a variety of priority dates can fluctuate from one month to another, with an inevitable impact on cut-off dates. Such fluctuations can cause cut-off date movement to slow, stop, or even retrogress. Visa retrogression occurs when more people apply for a visa in a particular category or country than there are visas available for that month. Retrogression typically occurs toward the end of the fiscal year as visa issuance approaches the annual category, or per-country limitations.

Visa Retrogression, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 8, 2018), https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/visa-retrogression; *see also Visa Bulletin For October 2022*, U.S. DEP'T STATE – BUREAU CONSULAR AFFS. (Sept. 1, 2022), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-october-2022.html (explaining that Section 203(b) of the INA prescribes that individuals seeking employed-based visas in the fourth preference category are subject to 7.1% of the worldwide level).

[52] *See* Dalia Castillo-Granados, *A Long Wait for Special Immigrant Juveniles Means a Risk of Deportation*, AM. BAR ASS'N (Feb. 23, 2021), https://www.americanbar.org/groups/public_interest/immigration/generating_justice_blog/a-long-wait-for-special-immigrant-juveniles-means-a-risk-of-depo/.

[53] *See Visa Bulletin For October 2022*, *supra* note 51.

[54] *See id.*

[55] Ryan Baugh, *U.S. Lawful Permanent Residents: 2019*, U.S. DEP'T HOMELAND SEC. (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/lawful_permanent_residents_2019.pdf.

percent per-country cap have faced difficulties acquiring adequate protection for years because those specific countries maintain a presence on the Visa Bulletin.[56] This has caused a significant backlog for juveniles applying for SIJ relief because SIJS beneficiaries must wait months or years to obtain a visa, which puts them at risk of deportation.[57] Due to the fact that immigration judges handle deportation proceedings, a juvenile could potentially face deportation if they have been approved for SIJS but are left without any form of status, like possessing LPR status or access to work authorization.[58]

C. Employment-Based Immigration and Establishing a "Visa Cap" for Special Immigrant Juveniles

Various federal statutes collectively establish a "visa cap" for SIJs, but for the purposes of this Note, the most important statutes applicable here are 8 U.S.C. §§ 1151(d), 1152(a)(2), and 1153(b)(4).[59] These sections offer important clarity: 8 U.S.C. § 1151(d) defines the worldwide level of employment-based immigrants for each fiscal year,[60] 8 U.S.C. § 1152(a)(2) outlines the levels of immigrants allowed per country for family-sponsored and employment-based immigrants,[61] while 8 U.S.C. § 1153(b)(4) summarizes the preference allocation for employment-based immigrants regarding certain special immigrants.[62] The number of special immigrants allowed to obtain a visa each year varies because the number of visas available per year is calculated from the previous fiscal year.[63]

Those applying for SIJS are applying for an Employment-Based Visa in the fourth preference category, also known as an EB-4 visa.[64] Throughout the employment-based visa classification system, there are a total of five preference categories, including a yearly numerical limit for each.[65] The five preference categories are: (1) Priority Worker and Persons of Extraordinary

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[56] *Id.*

[57] *See* Castillo-Granados, *supra* note 52.

[58] *See* Aguilera, *supra* note 50.

[59] Immigration and Nationality Act §§ 201(d), 202(a)(2), & 203(b)(4), 8 U.S.C. §§ 1151(d), 1152(a)(2), & 1153(b)(4)).

[60] *Id.* § 201(d).

[61] *Id.* § 202(a)(2).

[62] *Id.* § 203(b)(4).

[63] *See id.* §§ 201(d), 202(a)(2), 203(b)(4) ("[T]he worldwide level of employment-based immigrants under this subsection for a fiscal year is equal to (A) 140,000 plus, (B) the number computed under, (2)(A) this paragraph for fiscal year 1992 is zero, (2)(B) this paragraph for fiscal year 1993 is the difference (if any) between the worldwide level established under paragraph (1) for the previous fiscal year and the number of visas issued under § 1153(b) of this title during the fiscal year…").

[64] *See Special Immigrant Juveniles*, *supra* note 35.

[65] *See How the United States Immigration System Works*, AM. IMMIGR. COUNCIL (Sept. 14, 2021), https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works.

Ability (E1); (2) Professionals Holding Advanced Degrees and Persons of Exceptional Ability (E2); (3) Skilled Workers, Professionals, and Unskilled Workers (E3); (4) Certain Special Immigrants (E4); and (5) Immigrant Investors (E5).[66] Overall, as laid out in INA § 201(d), the numerical limit for total permanent employment-based immigrants to receive a permanent employment-based visa is 140,000 per year.[67] The 140,000 visas available are apportioned among the five preference categories, the first three categories individually obtaining 28.6% of the available employment-based visas, while the fourth and fifth categories each receive 7.1% of the visas.[68] The total number of 140,000 visas per year includes the immigrant receiving the visa "plus their eligible spouses and minor unmarried children," meaning the actual number of employment-based immigrants is less than 140,000 each year.[69] Applicants for an EB-4 visa are not limited to only those seeking SIJ relief, but also include "certain 'special immigrants' including religious workers, employees of U.S. foreign service posts, former U.S. government employees, and other classes of foreign nationals."[70] The yearly numerical limit to those seeking LPR status through an EB-4 visa is determined by calculating 7.1% of the worldwide employment based preference level (e.g., in 2019 this limit was 10,076 for fourth preference category).[71]

In addition to individuals seeking EB-4 visas, there is also a limit placed on the number of individuals able to receive green cards per country of origin.[72] The per-country visa caps are "numerical limits on the issuance of green cards to individuals from certain countries."[73] Of the 140,000 employment-based green cards to be issued each year, "only [seven percent] of those green cards can go to individuals from a single country annually."[74] If the number of individuals "being sponsored from a single country is greater than [seven percent] of the annual available total, a backlog forms, and the excess approved petitions are not considered until a visa becomes available and their petition falls within the initial [seven percent] per-country cap."[75]

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[66] *Employment-Based Immigration Visa*, U.S. DEP'T STATE, (Aug. 27, 2021), https://travel.state.gov/content/visas/en/immigrate/employment.html.

[67] *Id.*; Immigration and Nationality Act §§ 201(d).

[68] *Visa Bulletin For October 2022*, *supra* note 51.

[69] *How the United States Immigration System Works*, *supra* note 65.

[70] *Id.*

[71] *Visa Bulletin For October 2022*, *supra* note 51.

[72] Carla N. Argueta, *Numerical Limits on Permanent Employment-Based Immigration: Analysis of the Per-Country Ceilings*, CONG. RSCH. SERV. (July 28, 2016), https://sgp.fas.org/crs/homesec/R42048.pdf.

[73] *Per-Country Cap Reform – Priority Bill Spotlight,* FWD.US (Sept. 14, 2022), https://www.fwd.us/news/per-country-cap-reform-priority-bill-spotlight/.

[74] *Id.*

[75] *Id.*

For those attempting to obtain EB-4 visas, as of September 2022, El Salvador, Guatemala, Honduras, and Mexico are the countries that are considered to be retrogressed because more than seven percent of individuals originating from those four countries are currently being sponsored to come into the U.S., so after the seven percent cap is reached, everyone else is placed in the backlog.[76] As of April 2021, there are currently more than 44,000 juveniles from El Salvador, Guatemala, Honduras, and Mexico who remain in the backlog, are waiting for employment-based green card availability, and are prevented from applying for LPR status due to the federal statutory limits.[77]

III. LEGAL ANALYSIS

A. Reliance on State Courts and the Inconsistent Ways in which State Courts Interpret Issues

Eligibility for SIJ predicate orders—an essential step in obtaining SIJ relief—is determined by state courts, which creates several problems as each state interprets its authority differently.[78] Because each state court abides by its own state laws, eligibility for SIJS varies and has historically created numerous inconsistencies across applications and eligibility requirements.[79] One major inconsistency involves state court's recognition of the age of majority, which is the threshold of adulthood declared in law.[80] After Congress enacted the Child Status and Protection Act ("CSPA") in 2002,[81] the INA recognized that SIJ relief is accessible to "unmarried persons under twenty-one years old" and allows "youth older than eighteen but younger than twenty-one to apply for SIJS."[82] This raises discrepancies and confusion because many state courts recognize the age of majority to be eighteen years of age, and they are thus unable to exercise jurisdiction to anyone over the age of eighteen.[83] As of September 2022, thirty-six states extend jurisdiction to juveniles applying for SIJS at the age of eighteen, but the state court's

[76] *See id.*; *see also How the United States Immigration System Works*, *supra* note 65.

[77] Aguilera, *supra* note 50.

[78] *See* Pulitzer, *supra* note 34, at 222.

[79] *See id.* at 213.

[80] *See Age of Majority by State 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/age-of-majority-by-state ("The age of majority is defined as the age a person is considered a legal adult.").

[81] *Child Status Protection Act (CSPA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 13, 2020), https://www.uscis.gov/green-card/green-card-processes-and-procedures/child-status-protection-act-cspa; *see also* Child Status Protection Act, Pub. L. No. 107-208 (2002).

[82] Pulitzer, *supra* note 34, at 215.

[83] *Id.*

predicate orders must be issued before the juvenile turns eighteen years old.[84] If an eligible individual resides in a state where the state court does not possess the authority to legally recognize individuals over the age of eighteen as a child, the eligible individual will not have the opportunity to apply for SIJS relief.[85] Therefore, individuals eligible for SIJS under the INA may nevertheless be blocked from obtaining relief.[86] SIJS's burdensome reliance on state courts therefore leaves the implementation of federal immigration relief to the vagaries of varying state laws, which means "SIJS [federal] law itself is subject to varying [state law] interpretations."[87]

The revised SIJS eligibility classifications which include the provisions of TVPRA now require state courts to establish that "reunification with one or both parents is not viable due to abuse, abandonment, neglect, or a similar basis."[88] This unravels additional discrepancies with SIJS because historically, state courts interpreted the stipulation to mean that a child is eligible for SIJS as long as it is proven that one parent has committed abuse.[89] State courts read the language of the statute to either consider that: (1) preventing reunification with one parent is possible if there is the possibility of reuniting with another parent; or (2) mandating SIJS applicants to show that both parents have participated in the abuse.[90] This confusion between the interpretations of the SIJS statute from state courts and the interpretations of SIJS codified by varying state law causes state courts to overreach and eliminate immigration protection relief to individuals who could receive relief in another state.[91] Because state courts are engaging in the type of

[84] *See Predicate Order State-by-State Age-Out Analysis*, *supra* note 10 (the analysis shows that New York, California, and ten other states have expanded jurisdiction in family court to the age of twenty-one, but still only thirty-six states end jurisdiction for juvenile state court at eighteen).

[85] *See* Pulitzer, *supra* note 34, at 215.

[86] *See id.* at 216.

[87] *See id.*

[88] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d), 122 Stat. 5044; *see also* Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

[89] In re Karen C, 111 A.D.3d 622, (N.Y. App. 2013); In re Welfare of D.A.M, 2012 WL 6097225 (Minn. App. 2012).

[90] *See* Meghan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, AM. BAR ASS'N (July 14, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent/.

[91] *See id.*

> To address these inconsistencies, USCIS should promulgate rules implementing the 2008 amendments or issue an official legal memorandum articulating its policy on the validity of one-parent SIJS petitions. In its commentary to the proposed regulations, USCIS seemed to recognize the "one or both parents" language to mean "expanded eligibility" for SIJS. But without an explicit recognition of the validity of one-parent SIJS cases, there is the risk

review and decision-making function that belong in the hands of USCIS, there is a "haphazard application of SIJS relief across state lines."[92] If, instead, USCIS reviewed SIJS eligibility and determined that relief is available to those who are unable to reunite with their parents, one set of standards would exist instead of the various interpretations currently implemented throughout state courts.

B. Misuse of the Vague Consent Function as Exemplified in the Trump Administration's Efforts in Undermining the Reach and Impact of SIJS

In a November 2019 Policy Alert, USCIS updated its Policy Manual and provided "guidance on the statutorily-mandated USCIS consent function."[93] With this provision, USCIS could deny consent if it determined that a state court did not sufficiently find that the requirements of abuse, neglect, and abandonment were met.[94] Following the class action lawsuit of *Saravia v. Barr*,[95] as of March 18, 2021, USCIS updated their policy guidance regarding the SIJS classification.[96] According to the policy guidance update stemming from *Saravia*,[97] USCIS will not:

> (1) [R]efuse to consent to a request for SIJ classification because the state court did not sufficiently consider evidence of the petitioner's gang affiliation when it decided whether to issue a dependency order or when it determined that it was not in the best interest of the child to return to their home country; (2) [u]se [its] consent authority to reweigh the evidence the juvenile court considered when it issued the dependency order; or (3) [r]evoke a petition for SIJ classification because the state court did not consider the petitioner's gang affiliation when it made its best interest determination.[98]

In *Saravia*, the plaintiff and the government agreed to settlement providing "certain rights to Class Members with respect to their applications for certain

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> that even more state court judges will close the door to eligible youth before their petitions can be considered by USCIS.

Id.

[92] *Id.*

[93] *Policy Alert from USCIS, USCIS Special Immigrant Juvenile Classification, PA-2019-08*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 19, 2019), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20191119-SIJ.pdf.

[94] *See* Joseph, Niles, Adetayo, & Orloff, *supra* note 22.

[95] Saravia v. Barr, Case No. 3:17-cv-03615 (N.D. Cal. 2021) (holding that denial of immigration benefits to minors violates U.S. Constitution, TVPRA, and other laws).

[96] *See USCIS Updates Policy Guidance for Special Immigrant Juvenile Classification*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 18, 2021), https://www.uscis.gov/news/news-releases/uscis-updates-policy-guidance-for-special-immigrant-juvenile-classification.

[97] *See Saravia*, Case No. 3:17-cv-03615.

[98] *USCIS Updates Policy Guidance for Special Immigrant Juvenile Classification*, *supra* note 96.

immigration benefits, including applications for asylum, Special Immigrant Juvenile status, or T or U nonimmigrant visas."[99] Although *Saravia* deals with gang affiliation, the outcome is consistent with SIJ relief because the class of noncitizen, unaccompanied minors, were detained by ORR and were denied immigration benefits.[100] Therefore, this Note asserts that the *Saravia* decision violated the U.S. Constitution, the TVPRA, and other laws.[101]

During the Trump administration, in February 2018, despite the INA deeming the age of majority to be eighteen years old, the USCIS issued guidance leading to the denial of applications for individuals who applied for SIJS after they turned eighteen years of age ("Over-18 Denial Policy").[102] This policy change took place in early 2018 and continued until 2020, meaning that, for over two years, individuals who were eighteen years of age were being denied SIJS when the statute clearly states that one can meet eligibility if they are not over the age of twenty-one years old.[103] Even though USCIS stopped applying this policy, this caused thousands of SIJS cases to be unlawfully denied.[104] The denial of these SIJS cases was legally unfounded because the CPSA and the INA declared a child to be a "person who is both unmarried and under twenty-one years old."[105] In turn, the cases that were supposed to be decided within the TVPRA mandated adjudication timeframe, which provided that SIJ petitions be adjudicated by USCIS within 180 days,[106] instead took years to decide.[107]

Additionally, throughout the Trump administration, various implementations were initiated that drastically affected the reach of SIJS. Throughout 2016 to 2018, there was a trend in the rate of issuing "Notices of Intent to Deny" which increased "from [two percent] of all adjudicated applications receiving these notices to [sixteen percent]."[108] Similarly, the

[99] *See Saravia*, Case No. 3:17-cv-03615.

[100] *See id.*

[101] *See id.*

[102] Akela Lacy, *Donald Trump's Anti-Immigrant Agenda Faces Another Setback in Court*, THE INTERCEPT (Mar. 21, 2019, 9:15 AM), https://theintercept.com/2019/03/21/special-immigrant-juvenile-status-trump/.

[103] *Id.*

[104] *See* Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL'Y INST. (2020), https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency.

[105] *Child Status Protection Act (CSPA)*, *supra* note 81; *see also* Child Status Protection Act, Pub. L. No. 107-208 (2002).

[106] *Policy Manual: Part J – Special Immigrant Juveniles, Chapter 4 – Adjudication*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 8, 2022), https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4.

[107] *See Re-Opening Our Doors To Vulnerable Immigrant Youth: Recommendations on U.S. Immigration Policy Impacting Young People*, DOOR'S LEGAL SERVS. CTR. (2020), https://door.org/wp-content/uploads/The-Door-Recommendations-on-U.S.-Immigration-Policy-Impacting-Young-People-12.12.2020.pdf.

[108] Davidson & Hlass, *supra* note 14, at 35-36.

Trump administration started to require applicants to send their SIJS applications through the form "Request for Evidence"—a notice that was sent out two percent of the time in 2016 and rose to thirty-five percent of the time for all adjudicated cases in 2018.[109] Although both notices have somewhat declined during the Biden administration, these policy changes not only negatively impact legal service providers and USCIS officials, but they "further delay final decisions therefore extending cases in immigration courts as well."[110]

C. Backlog Problems Absent Benefits such as Work Authorization and Protections from Deportation

The humanitarian crises in the four retrogressed countries of El Salvador, Guatemala, Honduras, and Mexico are causing thousands of at-risk juveniles to seek protection in the United States.[111] Of the 30,557 unaccompanied immigrant children apprehended at the Southwest border in fiscal year 2020, about ninety-six percent came from El Salvador, Guatemala, Honduras, and Mexico collectively, with seven percent, twenty-seven percent, fifteen percent, and forty-seven percent coming from each country, respectively.[112] The country-specific visa caps have created extensive backlogs, which force individuals to wait much longer than others solely because they are coming from a retrogressed country.[113] For example, through fiscal year 2020 through April 2021, children from the retrogressed countries are waiting more than four years on average from applying for SIJS to obtain their green cards.[114] The individuals eligible for SIJ relief coming from the four retrogressed countries are already qualified and deemed eligible to receive SIJS by state courts and USCIS, but are not able to obtain LPR status specifically due to their countries of origin and the limited number of visas available.[115] Not only does this implication expose at-risk juveniles to many of the harms that SIJS was intended to protect against,[116] but it also directly impacts youth from specific countries where the greatest need for

[109] *Id.*

[110] *Id.*

[111] *See How the United States Immigration System Works*, *supra* note 65.

[112] *U.S. Border Patrol Southwest Border Apprehensions by Sector*, U.S. CUSTOMS & BORDER PROTECTION https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters/usbp-sw-border-apprehensions (last visited Oct. 10, 2022).

[113] *See* Davidson & Hlass, *supra* note 14, at 5.

[114] *See id.* at 14.

[115] *See id.* at 5.

[116] *See Policy Manual: Part J – Special Immigrant Juveniles, Chapter 1 – Purpose and Background*, *supra* note 1.

SIJS-based visas arises due to the crises occurring in those countries.[117] This creates various harms for migrant youths, including the fact that they "cannot work lawfully, cannot access federal financial aid for college, struggle to age out of foster care into independent adulthood, and often find themselves at risk of homelessness, trafficking, wage theft, and deportation—the exact harms that SIJS was created to protect these children from."[118]

This backlog does not just negatively impact the juveniles in need of SIJ relief, but this backlog has also been shown to have an increasingly obstructive impact on the immigration court system.[119] Those with approved SIJS petitions from the retrogressed countries "[a]re disproportionately in immigration court 'removal proceedings,' where ICE attorneys are seeking their deportation, as compared to children from other countries."[120] Of the SIJS beneficiaries who originated from Honduras, "[ninety-two percent]. . . .who applied for green cards in or after May 2016 were in immigration court deportation proceedings."[121] While in May 2016, ninety percent of SIJS beneficiaries from Guatemala with pending green card applications were in removal proceedings, and eighty-four percent of SIJS beneficiaries from El Salvador with pending green card applications were in removal proceedings.[122] These numbers are astonishingly high when compared to the twenty-seven percent of SIJ beneficiaries originating from non-backlogged countries with pending green card applications involved in the immigration court deportation proceedings.[123]

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[117] *See* Brad Reynolds, *REFORMING AND CLARIFYING SPECIAL IMMIGRANT JUVENILE STATUS*, 47 J. Legis. 112 (2021).

> Most applicants for SIJ status hail from the "Northern Triangle" countries of El Salvador, Honduras, and Guatemala, and have travelled thousands of miles, often alone and in dangerous conditions, to seek protection in the United States that one or both of their parents are unable or unwilling to provide them in their country of origin, typically from gangs.

Id.

> A rise in migrants coming from a region of Central America …—comprised of El Salvador, Guatemala, and Honduras—has cast a spotlight on a long-suffering part of the world. Governments in the region have made some efforts to mitigate the poverty, violence, and corruption that are driving citizens away, but the problems remain widespread.

Amelia Cheatham, *Central America's Turbulent Northern Triangle*, COUNCIL FOREIGN RELS. (Oct. 1, 2019), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle.

[118] Davidson & Hlass, *supra* note 14, at 18.

[119] *See Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Jan. 18, 2022), https://trac.syr.edu/immigration/reports/675/#:~:text=The%20situation%20in%20many%20respects,or%20just%20under%205%20years.

[120] Davidson & Hlass, *supra* note 14, at 6.

[121] *Id.*

[122] *Id.*

[123] *Id.*

IV. OTHER CONSIDERATIONS AND PROBLEMS

A. Broad Issues When a Juvenile is Granted Special Immigrant Juvenile Status

When one is determined eligible for SIJS, classification as a SIJ permits the individual to apply for LPR status in the United States.[124] When an individual's SIJS petition is approved, it does not protect the individual from deportation—meaning it is not a defense to removal.[125] The fact that SIJS beneficiaries in removal proceedings risk deportation because a visa is not currently available leaves unaccompanied children vulnerable to future harm. Additionally, SIJS does not allow for employment authorization, which in turn does not qualify a SIJ beneficiary for a social security number.[126] Not administering employment authorization to SIJ beneficiaries is unusual because other similar forms of humanitarian-based immigration relief award employment authorization before granting them LPR status.[127] Those granted humanitarian-based immigration relief are granted employment authorization through the I-360 petition,[128] which is the same petition SIJS applicants use to request SIJS.[129] Because other forms of humanitarian-based relief use the same petition as SIJS applicants and are granted more protection via employment authorization through the same I-360 petition, there are many questions and concerns as to why SIJS beneficiaries cannot be awarded the same protection.

B. The Issues with the Immigration System Being Susceptible to Political Change

Over the four years of the Trump administration, there were over four hundred changes to immigration policies and numerous presidential executive actions implemented within immigration laws, which ultimately changed the entire immigration system.[130] Some of these changes were small and did not impact immigration laws, while others were detrimental to the wellbeing of immigrants because the changes affected their opportunity to

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[124] *See Chapter 4: Special Immigrant Juvenile Status (SIJS)*, *supra* note 3.

[125] *See* Wendy Wayne, *Report*, AM. BAR ASS'N (Feb. 22, 2021), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/103a-midyear-2021.pdf.

[126] *See id.*

[127] *See id.*

[128] *See I-360 Petition for Amerasian, Widow(er), or Special Immigrant*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/i-360 (Feb. 10, 2022).

[129] *See* Immigration and Nationality Act § 204(a)(1)(K), 8 U.S.C. § 1154(a)(1)(K).

[130] Muzaffar Chishi & Jessica Bolter, *The "Trump Effect" on Legal Immigration Levels: More Perception than Reality*, MIGRATION POL'Y INST. (Nov. 20, 2020), https://www.migrationpolicy.org/article/trump-effect-immigration-reality.

stay in the U.S. and adjust their legal status.[131] Overall, the changes affected the livelihood of human beings seeking relief in the United States.

The Trump administration enacted regulations that eliminated the ability for individuals with certain nationalities to travel into the U.S., which caused refugee resettlement to decline precipitously.[132] Specifically, the Trump administration enacted "Trump's Zero Tolerance" policy in 2018 which separated thousands of children from their parents.[133] Near the end of his presidency, part of Trump's response to COVID-19 pertaining to immigration policy was conducted under Title 42, which prohibited the entry of any individual seeking asylum.[134] Title 42 forced the individuals seeking asylum from the Southern border to stay in Mexico via the Migrant Protection Protocols ("MPP"), which vastly affected minors arriving at the border without a parent or guardian figure.[135]

At the start of the George W. Bush administration, the number of individuals in the immigration legal system stood at 149,338.[136] Although the number of individuals in the system has continued to increase throughout the years, after the Trump administration eliminated prosecutorial discretion, the numbers of those in Immigration Court skyrocketed.[137] When Trump assumed office, around 500,000 people had deportation cases pending before Immigration Courts while at the start of 2021, the number stood at nearly 1.3 million—nearly two and a half times the level when Trump took office four years prior.[138] Although the elimination of prosecutorial discretion affects all immigrants within the system, it unfortunately had a significant effect on juvenile cases due to the sensitivity of their claims, including the possibility of the juvenile aging out of SIJS eligibility.[139] More specifically, from October 2021 to February 2022, where age is recorded, thirty-one-percent of new Immigration Court cases are between the ages of zero to seventeen at

131 *See id.*

132 *See id.*

133 *Trump Administration's "Zero Tolerance" Immigration Enforcement Policy*, CONG. RES. SERV. (Feb. 26, 2019), https://trac.syr.edu/immigration/library/P15410.pdf.

134 *See A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Oct. 15, 2021), https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border.

135 *See id.*

136 *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, *supra* note 119.

137 *See id.*

138 *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Jan. 19, 2021), https://trac.syr.edu/immigration/reports/637/.

139 *See* Castillo-Granados, *supra* note 52.

the time DHS issued the Notice to Appear.[140] Because prosecutors no longer had access to prosecutorial discretion, immigration judges were limited in their ability to terminate removal proceedings or ability to administratively close cases.[141] This had a direct effect on children seeking humanitarian relief due to the age limitations of the minors eligibility for such relief, which in turn did not provide the immigration judges with sufficient time to effectively peruse the cases of individuals applying for SIJS or children asylum claims.[142] Lastly, due to the influx of cases, there has not been enough legal service providers to adequately represent those in removal proceedings, causing more than half of children in removal proceedings to appear before the court without any legal representation.[143]

V. PROPOSAL

A. Issues to be Solved Within State Interpretations versus Federal Interpretations

The inconsistencies between state interpretations and federal interpretations of relevant legislation can be resolved if Congress were to remove the state court procedures and standards and permit the federal system to take over the SIJS process, as they already do with all other forms of immigration relief.[144] As previously stated, there are numerous issues within the SIJS statute, but one of the glaring issues that needs to be addressed, and which encompasses most of the problems, is how SIJ eligibility is dependent on the findings of the state court.[145] Not only are there evident inconsistencies between the age requirements of the SIJS statute and the state laws, but the requirements to identify abuse, neglect, and abandonment differ between states.[146] Additionally, lawyers in multiple states have reported that some judges, especially in rural counties, are

[140] *One-Third of New Immigration Court Cases Are Children; One in Eight Are 0-4 Years of Age*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Mar. 17, 2022), https://trac.syr.edu/immigration/reports/681/; *Notice to Appear Policy Memorandum*, U.S. CITIZENSHIP & IMMIGR, SERVS. (last updated June 14, 2021), https://www.uscis.gov/laws-and-policy/other-resources/notice-to-appear-policy-memorandum (identifying the Notice to Appear as the "document that instructs an individual to appear before an immigration judge" and which is "the first step in starting removal proceedings against them").

[141] *See* Castillo-Granados, *supra* note 52.

[142] *See id.*

[143] *See id.*

[144] *See* Gregory E. Catangay, *Abandoning the Status Quo: Towards Uniform Application of Special Immigrant Juvenile Status*, 20 UC DAVIS J. JUV. L. & POL'Y 39, 44 (2016).

[145] *See id.*

[146] *See id.*

unfamiliar with SIJS, which has complicated state court processes.[147] These complications within state court's have impacted the age eligibility requirements, and has led to some juveniles aging out of eligibility to qualify for SIJ relief.[148] Although states hold the power to interpret SIJ eligibility and decide if the individual meets the requirements for SIJ relief, granting SIJ relief ultimately resides within the federal immigration courts.[149]

Ensuring that the eligible immigrant child can obtain a working permit, a green card, or possibly citizenship is all decided by the Attorney General, an immigration judge, or a USCIS adjudications officer.[150] Allowing the primary purpose inquiry through USCIS's consent function permits the agency to reconsider the state court's decision—holding the discretionary power within USCIS.[151] Unfortunately, that is not enough to ensure the goal of SIJS is adequately upheld. Because state courts are involved in significant portions of the decision-making process and the federal immigration courts hold the power in the finalization process, this distorts Congress's intent to provide federal immigration relief for minors.[152] There are hesitations to this approach because USCIS's consent function has expanded to the justification of *de novo* review of state court findings, meaning that USCIS is able to make discretionary determinations when examining the predicate orders "[t]hat form the basis of SIJS petitions and which orders are considered sufficient bases for SIJS."[153] Regardless of USCIS's expanded discretionary component, the federal system should overtake the SIJS process because of

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[147] *See* Andrew Rodriguez Calderón, *These Young People Were Told They Could Stay in the U.S. They Might Get Deported Anyway*, MARSHALL PROJECT (Jan. 28, 2021), https://www.themarshallproject.org/2021/01/28/these-young-people-were-told-they-could-stay-in-the-u-s-they-might-get-deported-anyway.

[148] *See id.* ("In one Georgia case, a juvenile court judge requested that a lawyer bring a letter from the USCIS stating that the judge was allowed to make a ruling. In the time it took the USCIS to write the letter, the young person aged out of eligibility.").

[149] *See* Catangay, *supra* note 144.

[150] *See* Immigration and Nationality Act § 245(a), 8 U.S.C. § 1255(a).

> The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification…may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence.

Id.

[151] *See* INS General Counsel Opinion 95-11, CO 215.2 and 232.1 (June 30, 1995).

[152] *See* Catangay, *supra* note 144.

[153] *See* Joseph, Niles, Adetayo, & Orloff, *supra* note 22, at 268; *see also Ensuring Process, Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications*, CITIZENSHIP & IMMIGR. SERV. OMBUDSMAN (Dec. 11, 2015), https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015_2.pdf (explaining that INS and USCIS have expanded the consent function to justify *de novo* review).

its extensive experience in processing all other forms of immigration relief,[154] and its ability to interpret laws consistently, unlike the state courts.[155]

B. How to Correct the Negative Implications of SIJS Beneficiaries Originating from Visa Retrogressed Countries

If a state court finds that a juvenile meets the eligibility requirements for protection and relief under SIJS, the juvenile should be protected and granted LPR status to ensure their safety. When an eligible minor is granted SIJ relief, the individual should be placed on a path to obtain a work permit, green card, and eventually U.S. citizenship.[156] Congress created SIJS specifically to safeguard a child from their unfit parents and provide them with stable relief through security and protections afforded by U.S. citizenship.[157] Since obtaining SIJS is subject to the immigration quota system, there are only a certain number of green cards available to those seeking SIJ relief.[158] Before 2016, the year the SIJS backlog emerged,[159] the individuals applying for SIJS were typically able to obtain a green card (i.e., LPR status) as soon as their application for SIJS (Form I-360) was approved by the state court.[160] As explained above, the number of individuals coming from Mexico, El Salvador, Guatemala, and Honduras has been steadily increasing, which generates a more significant backlog within the Visa Bulletin.[161] This backlog puts individuals seeking adjustment of status through Form I-485 on a waitlist solely due to their country of origin.[162] With only 140,000 employment-based green cards issued per year and only 7.1% of those green cards in the EB-4 category, there is currently a two to three year backlog for those eligible for SIJ relief.[163]

Congress originally created Special Immigrant Juvenile Status to provide humanitarian protection to the eligible individuals, but abiding by the current backlog has tainted the initial goal behind the enactment of such

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154 *See* Catangay, *supra* note 144.

155 *See* Pulitzer, *supra* note 34, at 215.

156 *See Policy Manual: Part J – Special Immigrant Juveniles, Chapter 1 – Purpose and Background*, *supra* note 1.

157 *Id.*

158 *See How the United States Immigration System Works*, *supra* note 65.

159 *See* Davidson & Hlass, *supra* note 14.

160 *See* Rachel Prandini, *Special Immigrant Juvenile Status and Visa Availability*, IMMIGRANT LEGAL RES. CTR. (Jan. 2021), https://www.ilrc.org/sites/default/files/resources/special_immigrant_juvenile_status_visa_availability_0.pdf.

161 *See Visa Bulletin For October 2022*, *supra* note 51.

162 *See* Prandini, *supra* note 160.

163 *Visa Bulletin For October 2022*, *supra* note 51.

protection.[164] Additionally, Congress previously mandated that SIJ applications are to be decided by the USCIS within 180 days of the filing of the I-130 relief form, but this process has become exacerbated due to the backlogs from retrogressed countries.[165] The main issue with this backlog is that the individuals who are deemed eligible and coming from the retrogressed countries are left with legal uncertainties and without proper permanent protection.[166] As of April 2020, approximately 26,000 individuals were approved for SIJS relief, but still have not received a green card.[167] This means that despite being eligible for green cards, the immigrant children must remain effectively undocumented for years.[168] The individuals affected by the backlog live in constant fear of detainment or removal proceedings.[169] Additionally, because the juveniles have no protected status, these individuals are unable to legally work and cannot receive federal financial aid.[170]

1. Granting Deferred Action to SIJ Beneficiaries

This Note proposes that all individuals with an approved SIJ application be granted deferred action if a visa is not immediately available. Congress must pave the path for SIJS the same way it has done for multiple other protected classes in the immigration legal system.[171] Deferred action is when "[a]n immigration official makes a formal decision not to take action to remove someone from the U.S., even though that person may be removable, such as for being here [in the U.S.] without lawful status."[172] Furthermore, according to USCIS, deferred action is an "'act of prosecutorial discretion' to defer removal of a noncitizen from the United States for a certain period of time" so that individual is "[e]ligible to apply for employment

[164] *See End the SIJS Backlog – A Campaign to Uphold the Promise of Permanent Protection for Special Immigrant Juveniles*, END SIJS BACKLOG, https://www.sijsbacklog.com/ (last visited Oct. 28, 2022).

[165] *See id.*

[166] *See id.*

[167] Rodriguez Calderón, *supra* note 147 (describing SIJ applications outpace young immigrants from obtaining green cards, which currently is leaving 26,000 in limbo).

[168] *Id.*

[169] *See End the SIJS Backlog – A Campaign to Uphold the Promise of Permanent Protection for Special Immigrant Juveniles*, *supra* note 164.

[170] *See id.*

[171] *See Chapter 4: Special Immigrant Juvenile Status (SIJS)*, *supra* note 3.

[172] *Deferred Action & Work Permits for Young People with Special Immigrant Juvenile Status (SIJS)*, IMMIGRANT LEGAL RES. CTR. (Mar. 2022), https://www.ilrc.org/sites/default/files/resources/deferred_action_sijs_march_202244.pdf.

authorization under 8 CFR § 247a.12(c)(14)."[173] By granting SIJS recipients deferred action, a formal declaration that DHS will not seek to remove an individual for a specific time or under particular circumstances,[174] the federal government could provide humanitarian protection to all SIJS beneficiaries and halt the unjust legal situation taking place when a visa is not immediately available.[175] Deferred action would protect SIJS beneficiaries from deportation and grant the additional benefit of receiving work authorization to those who show economic necessity for employment.[176] Deferred action has been implemented in the past for the Deferred Action for Childhood Arrivals ("DACA") program and for abused spouses of U.S. citizens/LPRs who are eligible for protection under the Violence Against Women Act ("VAWA").[177] When a green card is not immediately available, the President's administration can grant deferred action and provide individuals with green cards so they are able to receive protection and stability.[178] Additionally, SIJ beneficiaries are not the only protected class of immigrants that suffer the consequences of the system being backlogged, but SIJS recipients have not been afforded the relief that deferred action provides.[179] Other classes of immigrants affected by visa backlogs include VAWA beneficiaries and U-Visa holders (i.e., victims of serious crimes), but these subsets have been granted deferred action or permitted a work visa for employment authorization if the individual can show economic necessity.[180]

It should be noted that more recently, on March 7, 2022, and now in effect as of May 6, 2022, USCIS published a new policy alert pertaining to SIJS, which requires USCIS "[t]o consider deferred action (and related employment authorization) for noncitizens classified as [SIJ] who are

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[173] *Frequently Asked Question About USCIS's Deferred Action Policy*, END SIJS BACKLOG (July 25, 2022), https://nipnlg.org/PDFS/2022_16May_CoalitionFAQs-USCIS-SIJS-Deferred-Action-Policy.pdf; *see also Policy Manual: Part J – Special Immigrant Juveniles, Chapter 4 – Adjudication*, *supra* note 106.

[174] *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 19, 2021), https://www.uscis.gov/DACA.

[175] *See End the SIJS Backlog – A Campaign to Uphold the Promise of Permanent Protection for Special Immigrant Juveniles*, *supra* note 164.

[176] *See* 8 C.F.R. § 274a.12(c)(14) (2021).

[177] Castillo-Granados, *supra* note 52.

[178] *See Deferred Action for Childhood Arrivals (DACA): An Overview*, AM. IMMIGR. COUNCIL (Sept. 30, 2021), https://www.americanimmigrationcouncil.org/research/deferred-action-childhood-arrivals-daca-overview; *see also id.*

[179] Castillo-Granados, *supra* note 52.

[180] *See id.*

ineligible to apply for adjustment of status to [LPR] solely due to visa unavailability."[181] In this policy update, USCIS's highlights include:

> Provides that USCIS automatically conduct deferred action determinations for noncitizens with SIJ classification who cannot apply for adjustment of status solely because an immigrant visa number is not immediately available, explains that USCIS considers deferred action on a case-by-case basis to determine whether the noncitizen with SIJ classification warrants a favorable exercise of discretion, provides that a grant of deferred action to a noncitizen with SIJ classification is for a period of 4 years, and explains that a noncitizen with SIJ classification who has been granted deferred action by USCIS may apply for, and be granted, employment authorization for the period of deferred action, by filing an Application for Employment Authorization (Form I-765), indicating category (c)(14).[182]

Although the new policy update is hopeful and shows that USCIS is attempting to further congressional intent in protecting the most vulnerable immigrant juveniles, it is not a solidified victory due to its implications. The biggest concerns with the updated USCIS Policy Manual are that deferred action will be granted on a case-by-case basis because it is a policy matter. The fact that USCIS will use deferred action on a case-by-case basis raises concerns due to the discretion USCIS has when deciding if the SIJS applicant qualifies for work authorization. Although there will be more detailed information about what specific factors USCIS will consider when the policy starts,[183] in the policy update, USCIS describes their case-by-case discretionary determination by stating, "USCIS may generally grant deferred action if, based on the totality of the facts and circumstances of the case, the positive factors outweigh the negative factors."[184] Given that it is discretionary, this means that USCIS can terminate the grant of deferred action and "revoke the related employment authorization at any time as a matter of discretion."[185] Additionally, the fact that this is only a policy matter means that this update could be removed by the next presidential administration. Because of these concerns, this Note's proposal pertaining to deferred action remains the same, regardless of this policy update.

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[181] *Policy Memorandum, Special Immigrant Juvenile Classification and Deferred Action*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 7, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf.

[182] *Id.*

[183] *See Deferred Action & Work Permits for Young People with Special Immigrant Juvenile Status (SIJS)*, *supra* note 172.

[184] *Policy Manual: Part J – Special Immigrant Juveniles, Chapter 4 – Adjudication*, *supra* note 106.

[185] *Id.*

2. Eliminate Per-Country Visa Caps or Increase the Number of Visas Available

In order to uphold Congress's intent when enacting SIJS, there must be an elimination of per-country visa caps for individuals attempting to obtain green cards through SIJS, so those approved for SIJS are protected and can remain in the U.S. to pursue permanent resident status. Furthermore, the federal government should not be able to remove SIJ beneficiaries from the U.S. as they await status adjustments. It is clear from the history, purpose, and statutory text of the SIJS statute that Congress intended to allow SIJ beneficiaries to remain protected in the U.S. while waiting to adjust their status.[186] Federal law maintains that juveniles with an approved SIJ application have no protection from removal unless a visa is immediately available, which results in the vulnerability of SIJ grantees based solely on their country being a retrogressed county.[187] The current legislative framework does not allow SIJS beneficiaries to apply for LPR status when they need to adjust status and leaves them in difficult legal situations during the most vulnerable time of their lives.[188] The humanitarian protections enacted by Congress are meaningless if the federal government removes the juvenile simply because they, through no fault of their own, originate from a retrogressed country and are forced to wait years before being eligible to apply for adjustment of status.

Currently, the federal government can place SIJ beneficiaries in removal proceedings due to the numerical quotas for per-country visa caps placed on the five preference categories for employment-based visas.[189] The INA limits individuals coming from a specific country to obtain a yearly maximum of seven percent to use all the employment-based green card admissions.[190] The visa caps implemented for individuals coming from

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[186] *See* Davidson & Hlass, *supra* note 14.

[187] *Part II: Special Immigrant Juvenile Status for Children and Youth Under Juvenile Court Jurisdiction – Chapter 3*, IMMIGRANT LEGAL RES. CTR. (June 2018), https://www.ilrc.org/sites/default/files/resources/sijs-5th-2018-ch_03.pdf (explaining that a Special Immigrant Juvenile from a retrogressed country must wait until a visa is available before they are able to submit their application for permanent residency).

[188] *Id.*

[189] *See* Julia Gelatt, *Explainer: How the U.S. Legal Immigration System Works*, MIGRATION POL'Y INST. (Apr. 2019), https://www.migrationpolicy.org/content/explainer-how-us-legal-immigration-system-works#:~:text=Under%20the%20per%2Dcountry%20cap,visas%20in%20a%20given%20year.

> For the capped preference categories in the family and employment streams, U.S. law imposes a limit on how many immigrants from any particular country can receive green cards in a given year. Under the per-country cap set in the Immigration Act of 1990, no country can receive more than 7 percent of the total number of employment-based and family-sponsored preference visas in a given year.

Id.

[190] *See* Immigration and Nationality Act § 202(a)(2), 8 U.S.C. § 1152(a)(2).

specific countries unfairly discriminates against individuals based explicitly on their country of origin.[191] Section 202(a)(1)(A) of the INA states, "[n]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[192] However, because there are visa caps allowing only seven percent of each country's population to obtain a visa in the U.S., Section 202(a)(1)(A) of the INA does, in fact, give preference and priority to the first seven percent entering the U.S. from a specific country of origin.[193] Only a small percentage of the annual visa supplies are available to juveniles attempting to adjust status through SIJS.[194] Therefore, the visa backlog is adversely impacting youth from the retrogressed countries of El Salvador, Guatemala, Honduras, and Mexico because these countries are also where the greatest need for SIJS-based visas arise.[195] Eliminating the per-country visa cap for SIJ beneficiaries would create a more equitable system and allow SIJ beneficiaries to remain protected in the U.S. while receiving the benefits of being LPRs.

Section 202 of the INA, the provision providing for numerical limitations of individuals from certain countries, was enacted in 1965.[196] Some argue that the current visa backlog is not caused by the per-country visa caps but rather caused by the overall number of employment-based green cards available.[197] Ira Kurzban, a respected and experienced immigration lawyer, stated that "[t]here are simply not enough visas for the demand. . . . The answer is not to fight over the few visas given each year; the answer is to have a larger number of visas to the benefit of the U.S. economy. . . . Simply, we need more visas."[198] Therefore, if the federal law was lifted and the number of visas available for employment-based green cards was to increase, SIJS beneficiaries experiencing various forms of discrimination and possible removal from the U.S. would not exist, and vulnerable juveniles can remain protected within the U.S. by concurrently applying for the LPR and Employment Authorization applications.

Immigrant advocates have consistently pushed to remove per-country visa caps and have recently made developments within the House of Representatives. On June 1, 2021, U.S. Representatives Zoe Lofgren (D-

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191 *See Part I: Introduction and Overview – Chapter 1*, IMMIGRANT LEGAL RES. CTR. (June 2018), https://www.ilrc.org/sites/default/files/sample-pdf/sijs-5th-2018-ch_01.pdf; *see also id.* § 202(a)(1)(A).

192 Immigration and Nationality Act § 202(a)(1)(A).

193 *Part I: Introduction and Overview – Chapter 1*, *supra* note 191.

194 *See Visa Bulletin For October 2022*, *supra* note 51.

195 *See id.*

196 Immigration and Nationality Act § 202.

197 *See* Ira Kurzban, *Ira Kurzban on the Fairness for High-Skilled Immigrants Act of 2019*, LEXIS NEXIS LEGAL NEWSROOM, (Aug. 21, 2019).

198 *Id.*

CA) and John Curtis (R-UT) introduced the bipartisan Equal Access to Green Cards for Legal Employment Act of 2021 (EAGLE Act).[199] This bill addresses numerous issues on all categories of employment-based visas, but proposes explicitly to eliminate the per-country visa cap for all individuals seeking employment-based immigrant visas.[200] Additionally, the EAGLE Act "allows certain aliens to obtain lawful permanent resident status if the alien: (1) is in the United States as a nonimmigrant, (2) has an approved immigrant visa petition, and (3) has waited at least two years for a visa."[201] The EAGLE Act is a renewed version of the Fairness for High-Skilled Immigrants Act,[202] which passed through the House and Senate with unanimous consent, meaning the EAGLE Act should enjoy broad bipartisan support as well.[203] Those who introduced this bill have been advocates for immigrants' rights and have been strong supporters of the EAGLE Act precisely due to the bill's per-country cap eliminations, which would reduce the backlog and make obtaining permanent LPR status within the employment-based immigration system more efficient and fair.[204]

C. Remove SIJS from EB-4 Visa Category

Those classified with SIJS should be removed from the fourth preference category in employment-based visas and should be afforded the same protections as other individuals seeking humanitarian-based immigration relief. There are only around 10,000 EB-4 visas available each fiscal year, and those considered eligible for EB-4 visas are not limited to special immigrant juveniles.[205] EB-4 visas are available to all categories of "Certain Special Immigrants" including juveniles, religious workers, and various other forms of special immigrants.[206] Out of the 112,533 SIJ petitions received by USCIS over the fiscal years between 2010-2019, only 6,897 of those have been denied, rendering a majority of the petitions approved by

[199] Equal Access to Green Cards for Legal Employment Act of 2021 (EAGLE) Act, H.R. 3648, 117th Cong. (2021).

[200] *See id.*

[201] *Id.*

[202] *See* Fairness for High-Skilled Immigrants Act, H.R. 1044, 116TH Cong. (2019-2020).

[203] *See Per-Country Cap Reform – Priority Bill Spotlight*, *supra* note 73.

[204] *See id.*

[205] *See Employment-Based Immigration Visa*, *supra* note 66.

[206] *Permanent Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 26, 2022), https://www.uscis.gov/working-in-the-united-states/permanent-workers.

USCIS.[207] Additionally, for the past six years, those applying for SIJS make up more than fifty percent of the entire EB-4 visa limit each fiscal year.[208]

SIJ beneficiaries should be removed from the EB-4 visa category because they compete with other special immigrants who qualify for an EB-4 visa, which is limited to 7.1% of the worldwide employment-based visas.[209] These limits placed on EB-4 visas were set more than thirty years ago and have no connection to the intent and humanitarian needs of those eligible for SIJS.[210] For decades, no SIJS recipient was affected by "employment-based" immigration because "the SIJS statute was historically underutilized."[211] Currently, SIJ petitioners make up more than fifty percent of the EB-4 visa applications, and there has been a drastic increase in the number of applications USCIS receives for SIJ petitions.[212] If individuals seeking protection through SIJS are removed from the fourth preference category in employment-based visas, more visas will be available for children needing protection and humanitarian relief. The INA allows the U.S. to grant up to 675,000 permanent immigrant visas per year and does not set any limits on the annual admission of U.S. citizen spouses, parents, and children under the age of twenty-one.[213] SIJ petitioners should be removed from the fourth preference category of employment-based visas and be categorized as other forms of humanitarian protections, like protections arising from VAWA, U-Visa, or T-Visa petitioners, or be designated as a deferred action policy. Although this could lead to obstacles in obtaining a direct pathway to citizenship, which SIJS currently provides, it would allow SIJ beneficiaries to receive protection from deportation and permit them to acquire employment authorization.

D. Allow SIJS Beneficiaries to Access Work Authorization

SIJ beneficiaries should be able to access work authorization so each juvenile can easily obtain the benefits that come with work authorization, so they have the opportunity to transition into independent adults. Currently,

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[207] *Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) By Fiscal Year, Quarter and Case Status*, *supra* note 8.

[208] *See Check-In with DOS's Charlie Oppenheim: December 19, 2019*, AM. IMMIGR. LAWYERS ASS'N (Dec. 23, 2019), https://www.aila.org/File/Related/14071499bn.pdf.

[209] *Permanent Workers*, *supra* note 206.

[210] *See* Deborah Gonzalez, *Sky Is the Limit: Protecting Unaccompanied Minors by Not Subjecting Them to Numerical Limitations*, 49 ST. MARY'S L. J., 555, 558 (2018).

[211] Davidson & Hlass, *supra* note 14; *see also* Laila Hlass, *Minor Protections: Best Practices for Representing Immigrant Children*, 47 N.M. L. REV. 247, 252 (2017).

[212] *See Check-In with DOS's Charlie Oppenheim: December 19, 2019*, *supra* note 208.

[213] *See USCIS Updates Policy Guidance for Special Immigrant Juvenile Classification*, *supra* note 96; *see also* Immigration and Nationality Act, § 201, 8 U.S.C. § 1151 (explaining the worldwide level of immigration and the number of visas the United States is permitted to grant each year).

due to USCIS's policy, SIJ youth are unable to apply for Employment Authorization ("EAD") if they do not have a pending Form I-485, Application to Register Permanent Residence or Adjust Status.[214] Under this policy, SIJS beneficiaries "can apply for EADs only when they apply for green cards, which in turn requires an available visa number."[215] Because an EAD is work authorization, and one of the few forms of government-based identification available to juveniles who lack permanent immigration status, without an EAD and with no access to applying for the Form I-485, SIJS beneficiaries are left without any form of state identification.[216] This policy creates consequences for youths with approved SIJS petitions because USCIS's policy on work authorization forces them into a years-long limbo: unable to work, without state identification, little to no access to higher education programs, no means to obtain essential services and opportunities, and unable to receive the permanency and stability that SIJS was designed to provide.[217]

Currently, only one court has held that children who have been granted SIJS are eligible for work authorization as parolees since the individuals have been paroled for humanitarian purposes.[218] The U.S. District Court for the Western District of Missouri ruled that DHS and USCIS misread legislation governing the SIJS program because SIJS is only to adjust immigration status and may not adjust for purposes of eligibility of work authorization.[219] There, the court explained that SIJS is designed for young migrants who had been abandoned, abused, or neglected by parents/guardians, and provides humanitarian protection enabling them to apply for work permits.[220] The District Court found that although INA § 245(h)(1) expressly states SIJS beneficiaries are deemed paroled for purposes of adjustment, this does not

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[214] *See* 8 C.F.R. § 247a.12(c)(9) (2021) (stating the classes of aliens authorized to accept employment, USCIS states, "An alien who has filed a complete application for adjustment of status to lawful permanent resident…").

[215] *Left in Limbo: Why Special Immigrant Juveniles Need Employment Authorization*, KIDS NEED DEF. (Jan. 13, 2022), https://supportkind.org/resources/left-in-limbo-why-special-immigrant-juveniles-need-employment-authorization/; *see also* 8 C.F.R. 274a.12(c)(9) (2021); *see also Concurrent Filing of Form I-485*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 10, 2020), https://www.uscis.gov/green-card/green-card-processes-and-procedures/concurrent-filing-of-form-i-485 (stating if SIJS visas numbers are available, individuals may concurrently apply for SIJS, SIJS LPR status, and employment authorization).

[216] *See Left in Limbo: Why Special Immigrant Juveniles Need Employment Authorization*, *supra* note 215.

[217] *See id.*

[218] *See* Godinez, et al. v. U.S. Department of Homeland Security, et al., No. 20-008280-CV-W-GAF (W.D. Mo.2021).

[219] *See id.*

[220] *See* LAW OFFICES OF JAY S. MARKS, LLC, MIGRANT YOUTHS CAN SEEK WORK PERMITS UNDER SPECIAL STATUS (Feb. 12, 2021), https://marksjustice.com/migrant-youths-can-seek-work-permits-under-special-status/.

make them ineligible from being considered to be paroled for other purposes.[221] Although USCIS has not issued any statements regarding the District Court's holding in expanding eligibility for work authorization to SIJ beneficiaries, the ruling provides guidance when arguing that SIJS beneficiaries are permitted to obtain work authorizations, regardless of adjustment status, and ultimately protect beneficiaries from removal.[222]

VI. CONCLUSION

When first enacted in 1990, SIJS was created by Congress to protect vulnerable immigrant juveniles who had been abused, neglected, or abandoned by one or both of their parents by providing them with humanitarian protection.[223] If established that the child cannot reunite with one or both of their parents and if the return to their country of origin would conflict with their best interests, SIJS would provide protection from removal and a pathway to permanent residency.[224] SIJ relief requires juveniles to overcome various obstacles that do not exist when applying for any other form of immigration relief. Acquiring SIJS differs from all other forms of immigration relief because after establishing eligibility, the SIJ applicant must receive approval from their state court to establish that they meet the requirements of abuse, neglect, and abandonment.[225] After approval from the applicable state court, the SIJ applicant can apply to adjust to LPR status through USCIS.[226]

The legislative history of the SIJS statute is complex due to numerous amendments over the years,[227] but Congress's intention of enacting SIJS has remained the same: to provide humanitarian protection and a pathway to LPR status for at-risk juveniles.[228] The goal of SIJS has been undermined due to inconsistencies between state law definitions of abandonment,[229] neglect, and abuse; federal statutes limiting the number of visas available to SIJs per

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[221] *See* Martin Gauto & Sarah Bronstein, *Court Finds Special Immigrant Juveniles Eligible for Work Authorization*, CLINIC LEGAL (Mar. 22, 2021), https://cliniclegal.org/resources/childrens-issues/special-immigrant-juvenile-status/court-finds-special-immigrant.

[222] *See id.*

[223] *See USCIS Updates Policy Guidance for Special Immigrant Juvenile Classification*, *supra* note 96.

[224] *See* Immigration and Nationality Act § 101(j), 8 U.S.C. 1101(j); *see also* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d), 122 Stat. 5044.

[225] *See Chapter 4: Special Immigrant Juvenile Status (SIJS)*, *supra* note 3.

[226] *See USCIS Updates Policy Guidance for Special Immigrant Juvenile Classification*, *supra* note 96.

[227] Joseph, Pont, & Romero, *supra* note 15, at 268.

[228] *See* Catangay, *supra* note 144.

[229] *See* Pulitzer, *supra* note 34, at 203.

country and per year;[230] and various presidential administrations altering and ultimately distorting eligibility for individuals attempting to receive SIJ relief.[231] These issues result in the federal government depriving qualified juveniles the benefits and protections SIJS is intended to ensure.

Due to the extensive backlog and the federal statutes placing limitations on the number of green cards available to individuals from certain countries, thousands of SIJS grantees are waiting for visas to become available, which delay their chances to seek adjustment of status.[232] The humanitarian crises in the four retrogressed countries of El Salvador, Guatemala, Honduras, and Mexico are causing thousands of at-risk juveniles to seek protection in the United States.[233] Because the numbers of individuals coming from the retrogressed countries are so high, and only seven percent of green cards can go to individuals from a single country annually, juveniles from the retrogressed countries seeking SIJ relief are unable to adjust status and must wait years for visas to become available.[234] This harms migrant youths because they are unable to lawfully work and are vulnerable to deportation, all due to the limited number of visas available.[235] The federal government undermines the purpose of SIJS because, when enacted over thirty years ago, the history, purpose, and statutory text Congress wrote was clearly intended to allow SIJs to remain in the U.S. while waiting to adjust their status.[236]

This Note proposes multiple avenues in which the current inconsistencies within SIJS can be resolved. The issues involving inconsistent state interpretations can be resolved if Congress removed the state court's role and allowed USCIS to take over the SIJS process. Under current protocol, if the state court finds that the juvenile meets all the requirements for SIJS, regardless of the juvenile's country of origin, the SIJ beneficiary should be granted adjustment of status to LPR. This Note's proposed solution could either entail DHS granting the SIJ beneficiary deferred action, through eliminating per-country visa caps, or increasing the overall number of visas available for immigrants seeking employment-based relief. Due to the limited number of visas available each fiscal year within the EB-4 category, this Note proposes that SIJs be removed from the EB-4 category, meaning more visas would concurrently become available for at-

230 *See* Immigration and Nationality Act §§ 201(d), 202(a)(2), & 203(b)(4).

231 *See Special Immigration Juvenile Status Manual, 3rd Edition (2017)*, *supra* note 9; *see also The President's Broad Legal Authority to Act on Immigration*, *supra* note 11.

232 *See Per-Country Cap Reform – Priority Bill Spotlight*, *supra* note 73; *see also* Aguilera, *supra* note 50.

233 *See Visa Bulletin For October 2022*, *supra* note 51; *see also* Aguilera, *supra* note 50.

234 *See* Castillo-Granados, *supra* note 52.

235 *See* Davidson & Hlass, *supra* note 14.

236 *See* Special Immigrant Juv. Petitions, 87 Fed. Reg. 13,066 (2022); *see also* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

risk juveniles seeking humanitarian protection. Lastly, this Note proposes that SIJ beneficiaries have access to work authorization, which would protect them from removal proceedings, allowing individuals from retrogressed countries to legally stay in the U.S. while visas become available, and permit them to receive the benefits EAD provides.