November 6, 2023

Submitted via regulations.gov

Raechel Horowitz
Chief, Immigration Law Division
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Re: End SIJS Backlog Coalition's Comment on the Executive Office for Immigration Review's Proposed Rule, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," RIN 1125–AB18, EOIR Docket No. 021–0410

Dear Chief Horowitz:

The End SIJS Backlog Coalition respectfully submits this comment on the Executive Office for Immigration Review's ("EOIR") proposed rule "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure."[1] The End SIJS Backlog Coalition ("the Coalition"), a project of the National Immigration Project, is a national group of over 152 child welfare and legal services organizations and impacted youth working together to educate Congress, relevant administrative agencies, and the public about the harmful impacts of visa caps on vulnerable immigrant children, and to advocate for an end to the visa backlog for Special Immigrant Juvenile Status ("SIJS") youth.

I. Background on the SIJS Backlog and Its Impact on Removal Proceedings

SIJS is a humanitarian status that provides protections and a pathway to lawful permanent residence and eventual U.S. citizenship to immigrant children up to the age of 21 who have been abused, abandoned, or neglected by their parent(s), and where a state juvenile court has determined that it is not in their best interest to be returned to their country of origin. Starting in 2016, SIJS youth from certain countries were unable to immediately apply for green cards

[1] 88 Fed. Reg. 62242 (Sept. 8, 2023) [hereinafter "Proposed Rule"], https://www.federalregister.gov/documents/2023/09/08/2023-18199/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure.

because annual visa caps were reached—and what is known as the SIJS visa backlog began.[2] SIJS youth are subject to annual visa caps because, by statute, their visas derive from a numerically-restricted employment-based visa category. As of July 7, 2023, there were almost 120,000 youth with pending and approved SIJS petitions stuck in the SIJS backlog.[3] While historically SIJS youth from El Salvador, Guatemala, Honduras, and Mexico have been the most impacted by the visa backlog, the July 2023 numbers reflect the current reality that now SIJS youth from all countries are impacted by the backlog.[4] The Coalition believes that ending the backlog would restore the purpose of the SIJS statute, which is realizing permanent legal protection in the United States for immigrant children who have survived abuse, abandonment, and neglect. As we work toward a legislative solution, we also advocate with administrative agencies to mitigate the worst harms of the backlog.

As a Coalition that advocates for and alongside SIJS youth, we have a specific interest in the Proposed Rule because it would significantly impact SIJS youth. As described below, the Coalition particularly supports the Proposed Rule's codification of EOIR adjudicators' termination and administrative closure authority, as these procedural tools are often crucial to ensure that SIJS youth in removal proceedings are able to access adjustment of status and avoid a removal order while waiting to do so.

Some immigration judges have relied on the SIJS backlog as a reason to deny requests for adjournments or administrative closure, and instead have ordered SIJS youth removed, particularly during the time period when the Attorney General had curtailed IJs' administrative closure and termination authority through decisions in *Matter of Castro Tum*, 27 I&N Dec. 271 (A.G. 2018) and *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018). In 2022, the Biden administration's USCIS acted to support youth in the SIJS visa backlog by automatically considering those with approved SIJS petitions for discretionary deferred action.[5] However, even youth with approved SIJS petitions and deferred action are at risk of receiving a removal order due to the ongoing backlog. The issuance of a removal order—whether it can be immediately executed or not—has serious mental health impacts on SIJS youth; requires practitioners and immigration judges to spend significant resources on motions to reopen when visas ultimately become available; and undermines the humanitarian and protective purpose of the SIJS program. The components of the Proposed Rule described below are necessary to ensure that SIJS youth reach the goal of permanency set out by Congress and to relieve pressure on immigration courts, as the cases of youth in the SIJS backlog add to the immigration court's clogged dockets.

SIJS youth merit additional protections given the harms the State Department caused them for almost seven years by issuing incorrect visa bulletins. Earlier this year the government revealed,

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[2] *See* Dep't of State, Visa Bulletin (May 2016), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2016/visa-bulletin-for-may-2016.html.
[3] Data provided in September 2023 by U.S. Citizenship and Immigration Services ("USCIS"), on file with the undersigned (giving numbers of youth with pending and approved SIJS petitions waiting for an available visa through July 7, 2023).
[4] *See* Dep't of State, Visa Bulletin (Nov. 2023), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-november-2023.html (showing final action date of January 1, 2019 for all countries in the EB-4 category).
[5] *See* USCIS, Policy Alert, Special Immigrant Juvenile Classification and Deferred Action (Mar. 7, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf.

via Federal Register notice, that it had incorrectly calculated visa availability in the EB-4 category for nearly seven years.[6] This error has only exacerbated the barriers facing SIJS youth, especially those in removal proceedings. During the nearly seven years this error was embedded in the monthly visa bulletin, SIJS youth in removal proceedings from El Salvador, Guatemala, and Honduras were prejudiced. Their final action dates were wrongly calculated to suggest that visa availability was more remote in time than it would have been if the law had been applied correctly. This government error contributed to immigration judges' denial of continuances and other postponements for many SIJS youth.[7] Some youth from these three countries who were awaiting visa availability received removal orders.

The Coalition urges EOIR to consider small modifications to the Proposed Rule that would further protect SIJS youth in the backlog. Specifically, we offer comments and suggested changes to the provisions regarding mandatory and discretionary termination, administrative closure, and *sua sponte* reopening that consider those provisions' effects on SIJS youth in removal proceedings. We believe these changes are particularly warranted to help mitigate the harm of the nearly seven-year error, which has left certain SIJS youth without access to adjustment of status and in removal proceedings for longer than necessary, and to avoid further harm to this vulnerable group while they wait for visa availability.

II. The Coalition's Comments on the Proposed Rule

A. The Coalition Applauds EOIR's Rejection of the 2020 Rule and Restoration of Important Procedural Fairness Tools That Provide Essential Protections for SIJS Youth in the Backlog

The Coalition strongly supports EOIR's decision to restore longstanding procedures that were in place prior to the final rule titled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure" published on December 16, 2020.[8] We commend EOIR on the re-introduction of important procedural tools that help ensure fairness in immigration proceedings. All individuals in removal proceedings, including SIJS youth, should be afforded these safeguards. SIJS youth are on a pathway to permanent legal status, and the Proposed Rule presents an opportunity to remove potential barriers to reaching this goal.

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[6] *See* Dep't of State, Employment-Based Preference Immigrant Visa Final Action Dates and Dates for Filing for El Salvador, Guatemala, and Honduras, 88 Fed. Reg. 18252 (Mar. 28, 2023), https://www.govinfo.gov/content/pkg/FR-2023-03-28/pdf/2023-06252.pdf.

[7] *See Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (stating that "good cause [for a continuance] does not exist if the [noncitizen's] visa priority date is too remote to raise the prospect of adjustment of status above the speculative level"); *Garcia v. Barr*, 960 F.3d 893, 897 (6th Cir. 2020) (finding an appeal of continuance that was denied by the immigration judge and the BIA moot where the youth with SIJS had already been removed to home country).

[8] 85 Fed. Reg. 81588 (Dec. 16, 2020), https://www.federalregister.gov/documents/2020/12/16/2020-27008/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure.

B. Comments and Recommended Changes to Specific Provisions of the Proposed Rule That Have High Impact on SIJS Youth in the Backlog

Our comments below discuss three of the Proposed Rule's provisions that have tremendous impacts on SIJS youth in the backlog: (1) the provisions on termination, (2) the provisions on administrative closure, and (3) the provisions on *sua sponte* reopening. Below we discuss why each of these provisions is important for SIJS youth and suggest amendments that would provide additional protection to SIJS youth and further congressional intent behind the SIJS program.

1. The Coalition Applauds the Rule's Express Recognition of Termination Authority but Proposes that the Rule Be Amended to Clarify that SIJS Youth Are Eligible for Termination Regardless of Priority Date

(Proposed 8 CFR §§ 1003.1(m), 1003.18(d))

The Coalition supports the Proposed Rule's express recognition of immigration judges' and the BIA's termination authority, and the decision to specifically list non-exclusive grounds for termination. However, as discussed below, the Coalition proposes adding additional language to the termination provisions to recognize that an approved SIJS petition—regardless of priority date—should also be grounds for termination, and to promote procedural fairness.

a. EOIR Should Recognize Special Immigrant Juvenile Status as a Basis for Mandatory Termination

(Proposed 8 CFR §§ 1003.1(m)(1)(i), 1003.18(d)(1)(i))

The Coalition appreciates the Proposed Rule's provision on mandatory termination and its list of specified events that trigger mandatory termination. The Coalition urges EOIR to expressly recognize the approval of an SIJS petition during removal proceedings as a ground for mandatory termination, regardless of whether the SIJS youth has a current priority date. This additional termination ground is appropriate given that, once SIJS is granted, the individual is deemed to have been paroled by operation of law, *see* INA § 245(h)(1), an individual charged with deportability obtains an automatic waiver of certain common grounds of deportability, *see* INA § 237(c), and a number of common grounds of inadmissibility, including being present without admission or parole and entry without proper documents, do not apply, *see* INA § 245(h)(2)(A). Requiring termination upon the grant of SIJS in certain circumstances would align with congressional intent to allow SIJS recipients to "to remain in the country pending the outcome of their adjustment of status application." *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011). It would also significantly reduce the immigration court backlog—particularly as the number of youth in the SIJS backlog will continue to grow until a legislative solution is reached.[9]

b. Alternatively, EOIR Should Recognize Special Immigrant Juvenile Status as a Basis for Discretionary Termination Regardless of Priority Date

[9] USCIS, Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year, Quarter, and Case Status, Fiscal Years 2010 - 2023 (Aug. 2023), https://www.uscis.gov/sites/default/files/document/data/i360_sij_performancedata_fy2023_qtr3.pdf (showing 38,070 SIJS petitions received in the first three quarters of FY 2023, compared with 1,646 petitions received in FY 2010).

(Proposed 8 CFR §§ 1003.1(m)(1)(ii), 1003.18(d)(1)(ii))

While the Coalition believes that the above recommended addition to the Proposed Rule's mandatory termination ground would best honor congressional intent behind the SIJS program, in the alternative we propose the below language (indicated by yellow highlighted text) to the discretionary termination provision.

The Coalition appreciates that one of the existing bases for discretionary termination under the Proposed Rule is being the beneficiary of deferred action. This provision is important and the Coalition supports it. Under the Biden administration's current policy, the vast majority of individuals with approved SIJS petitions are recipients of deferred action and thus would benefit from this proposed language. However, the Coalition urges EOIR to add a standalone ground for termination based on the approval of the SIJS petition itself—rather than require a separate grant of deferred action—for several reasons. First, the deferred action program for SIJS youth has been in existence for only a year, whereas the SIJS backlog has existed since 2016. Given that the deferred action program was created by policy rather than regulation, it could be modified by a new administration—at which point it is possible that no SIJS youth would benefit from the discretionary termination language as currently drafted in the Proposed Rule. Second, USCIS's decision to grant SIJS-based deferred action is entirely discretionary and there is no ability to appeal a negative deferred action determination, or even to correct errors in the deferred action decision making process. Thus some youth are excluded from SIJS-based deferred action even though they have an approved SIJS petition and are eligible to adjust status once a visa becomes available. Immigration judges should have the authority to consider discretionary termination for all youth in the SIJS backlog, regardless of whether they have received a grant of deferred action. Third, our Coalition is aware of cases where SIJS youth simply did not receive a deferred action adjudication one way or the other. Because there is currently no mechanism by which a person can affirmatively apply for SIJS-based deferred action if USCIS does not grant it, we are concerned that SIJS youth whose cases remain unadjudicated for deferred action at USCIS will not be able to benefit from deferred action-based termination.

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1003.18(d) Termination.[10] Immigration judges shall have the authority to terminate cases before them as set forth in paragraphs (d)(1) and (2) of this section. . . .

(1) Removal, deportation, and exclusion proceedings—

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(ii) Discretionary termination. In removal, deportation, or exclusion proceedings, immigration judges may, in the exercise of discretion, terminate the case where at least one of the requirements listed in paragraphs (d)(1)(ii)(A) through (G) of this section is met.

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[10] The same proposed language would apply to the corresponding BIA regulation on discretionary termination, proposed 8 CFR § 1003.1(m)(1)(ii).

(C) The noncitizen is a beneficiary of Temporary Protected Status, Special Immigrant Juvenile Status (regardless of the priority date of the approved petition), deferred action, or Deferred Enforced Departure.

c. EOIR Should Add Language Applicable to All Termination Provisions to Promote Procedural Fairness

In addition to adding the SIJS-specific language to the termination grounds described above, the Coalition urges EOIR to add two provisions to the termination regulations that will promote fundamental fairness. First, the regulations should specify that immigration judges and the BIA must give the parties notice and an opportunity to respond before terminating a case—whether terminating under the mandatory provision or the discretionary provision. Providing notice and an opportunity to be heard furthers basic procedural fairness and guards against errors and oversights.

Second, the regulations should provide that immigration judges and the BIA may not terminate a case if the noncitizen objects to termination, unless termination is required by law (*e.g.* if the respondent is a U.S. citizen). For example, there could be a situation where an immigration judge is considering terminating a case because the respondent has an approved SIJS petition and/or deferred action, but the respondent opposes termination because they wish to pursue their strong cancellation of removal claim in court. Termination over the noncitizen's objection in this scenario should not be permitted. Instead, respondents who wish to pursue relief in immigration court for which they are eligible should be given the opportunity to pursue that relief.

2. The Coalition Supports the Rule's Express Authorization of Administrative Closure but Proposes Adding Specific Factors.

(Proposed 8 CFR §§ 1003.1(*l*); 1003.18(c))

The Coalition strongly supports the Proposed Rule's express recognition of immigration judge and BIA administrative closure authority. Administrative closure, along with termination, is a crucial tool to ensure that those pursuing immigration relief outside of immigration court are able to meaningfully access the relief available to them by law and to ensure they are not issued removal orders while they wait for events outside of their control to occur. Administrative closure can be an important tool for young people as they pursue state juvenile court actions necessary to obtain the findings that are a prerequisite to filing an SIJS petition. Administrative closure is also a crucial mechanism for young people to avoid a removal order while their SIJS petition is pending with USCIS, and in some cases while they await visa availability.

The Coalition suggests that EOIR add language to the proposed regulation to (1) expressly recognize that administrative closure can be appropriate to await visa availability, and (2) clarify that delays outside of the control of the party seeking administrative closure should not be viewed negatively when considering the anticipated duration of the closure. The proposed amended language is reflected below in yellow highlighted text.

With regard to the first suggestion, adding language about awaiting visa availability would add additional protections from removal to SIJS youth in the backlog. During the Trump

administration, some SIJS youth were able to obtain postponements while their SIJS petitions were pending, but once the SIJS petitions were approved, some immigration judges would find that postponements were no longer warranted due to the lack of immediate visa availability. Adding express language to the regulation recognizing that administrative closure can be appropriate to await a visa would protect against this outcome in the future. Moreover, adding this language would be consistent with current EOIR policy, which expressly recognizes that administrative closure can be appropriate, in cases where a visa petition has been approved, "while waiting for the visa to become available."[11]

With regard to the second suggestion, the Coalition proposes clarifying that lengthy anticipated duration outside of the control of the party should not weigh against granting administrative closure. For SIJS youth in the backlog, regardless of how diligently they pursue relief, they have no control over how long it takes USCIS to adjudicate the SIJS petition. Indeed, even though Congress mandated that USCIS adjudicate SIJS petitions within 180 days, *see* 8 U.S.C. § 1232(d)(2), USCIS routinely violates that requirement and there have been numerous lawsuits challenging SIJS petition adjudication delays.[12] More fundamentally, given that the SIJS backlog now affects youth from all countries, every young person pursuing SIJS must currently wait years for a visa to become available. This time in the backlog is completely outside SIJS youths' control and should not be a reason to either deny a request for administrative closure or to recalendar a case that was previously administratively closed.

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1003.18(c)(3)[13]
(3) Standard for administrative closure and recalendaring. . . . In all other cases, in deciding whether to administratively close or to recalendar a case, an immigration judge shall consider the totality of the circumstances, including as many of the factors listed under paragraphs (c)(3)(i) and (ii) of this section as are relevant to the particular case. The immigration judge may also consider other factors where appropriate. No single factor is dispositive. Accordingly, the immigration judge, having considered the totality of the circumstances, may grant a motion to administratively close or to recalendar a particular case over the objection of a party. Although administrative closure may be appropriate where a petition, application, or other action is pending outside of proceedings before the immigration judge, such a pending petition, application, or other action is not required for a case to be administratively closed. Administrative closure may also be appropriate while waiting for a visa to become available in cases where the noncitizen is the beneficiary of an approved visa petition and will seek adjustment of status.
(i) As the circumstances of the case warrant, the factors relevant to a decision to administratively close a case include:

[11] Memorandum from David L. Neal, EOIR Dir., Administrative Closure, DM 22-03, at 3 (Nov. 22, 2021), https://www.justice.gov/eoir/book/file/1450351/download.
[12] *See, e.g.*, *Moreno-Galvez v. Jaddou*, 52 F.4th 821 (9th Cir. 2022); *Casa Libre/Freedom House v. Mayorkas*, No. 222CV01510ODWJPRX, 2023 WL 4872892 (C.D. Cal. July 31, 2023); *see also* USCIS data on pending SIJS petitions, https://www.uscis.gov/sites/default/files/document/data/I360_SIJ_Congressional_FY23Q3.pdf (showing that, as of June 30, 2023, 2,443 SIJS petitions had been pending 180 or more days).
[13] The same proposed language would apply to the corresponding BIA regulation on administrative closure, proposed 8 CFR § 1003.2(*l*)(3).

(A) The reason administrative closure is sought;
(B) The basis for any opposition to administrative closure;
(C) Any requirement that a case be administratively closed in order for a petition, application, or other action to be filed with, or granted by, DHS;
(D) The likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing, or that the noncitizen states in writing or on the record at a hearing that they plan to pursue, outside of proceedings before the immigration judge;
(E) The anticipated duration of the administrative closure, except that delays outside of the moving party's control should not factor against granting administrative closure, regardless of the length of the anticipated duration;
(F) The responsibility of either party, if any, in contributing to any current or anticipated delay; and
(G) The ultimate anticipated outcome of the case.

3. **The Coalition Supports the Rule's Restoration of *Sua Sponte* Reopening Authority** (Proposed 8 CFR §§ 1003.2(a), 1003.23(b)(1))

The Coalition applauds the Proposed Rule's restoration of long-standing *sua sponte* reopening authority of immigration judges and the BIA. *Sua sponte* reopening is a crucial tool for SIJS youth with removal orders to be able to access adjustment of status. Due to the previous administration's policies restricting immigration judges' ability to postpone or terminate cases for individuals pursuing SIJS relief or awaiting a visa, and to the nearly seven-year State Department error in restricting the visas of SIJS youth from El Salvador, Guatemala, and Honduras, a number of SIJS youth were ordered removed because they lacked a current priority date. Most of these youth are well beyond the 90-day deadline for statutory motions to reopen. Without a mechanism for reopening the removal proceedings, most have no access to the adjustment of status process—despite Congress's intent to eliminate barriers to adjustment for SIJS youth. *See* INA § 245(h) (exempting Special Immigrant Juveniles youth from common inadmissibility grounds, creating a generous waiver for many other inadmissibility provisions, and providing that Special Immigrant Juveniles are deemed to have been paroled). *Sua sponte* reopening is thus a crucial vehicle for ensuring that SIJS youth have access to the adjustment of status process and to partially remedy harms caused by prior unlawful interpretations of law.

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We appreciate the opportunity to comment on this important rule. Thank you for considering our views as a Coalition of practitioners and youth who are directly impacted by regulations such as these.

Sincerely,

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