From: Wendy Wylegala [mailto:WWylegala@supportkind.org]
Sent: Tuesday, May 31, 2016 9:49 PM
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Cc: Alice Fitzgerald <afitzgerald@supportkind.org>; Juliann Bildhauer <jbildhauer@supportkind.org>; Laurie Carafone <lcarafone@supportkind.org>; Cory Smith <csmith@supportkind.org>; Cindy Liou <CLiou@supportkind.org>; Jennifer Podkul <jpodkul@supportkind.org>
Subject: OMB Control Number 1615-0023, U.S. Citizenship and Immigration Services, Docket ID USCIS-2009-0020

Dear Madam or Sir,
Attached please find comments from Kids in Need of Defense regarding the USCIS 60-Day Notice and Request for Comments referenced above. Thank you for this opportunity to comment.

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May 31, 2016

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Chief, Regulatory Coordination Division
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via e-mail: USCISFRComment@uscis.dhs.gov

Re: OMB Control Number 1615–0023, Docket ID No. USCIS- 2009–0020
USCIS 60-Day Notice and Request for Comments: Application to Register Permanent Residence or Adjust Status, Form I–485 Supplement A, and Instruction Booklet for Filing Form I– 485 and Supplement A, Form I–485; Revision of a Currently Approved Collection.

To Whom It May Concern:

Kids in Need of Defense (KIND) submits the following comments in response to the above-referenced 60-Day Notice and request for comments on the proposed changes to Form I-485, Application to Register Permanent Residence or Adjust Status (the "Notice").[1]

Founded in 2008, KIND is the only national organization dedicated solely to the provision of pro bono legal representation and protection to unaccompanied immigrant and refugee children in immigration court removal proceedings. Since becoming operational in January 2009, KIND has trained more than 11,500 attorneys and received referrals for over 8,500 children from over 67 countries. Many of the children who find free legal services through KIND have successfully applied for adjustment of status. KIND has field offices in ten cities: Atlanta, Baltimore, Boston, Houston, Los Angeles, Newark, New York City, San Francisco, Seattle, and Washington, DC.

KIND's comments focus on how the proposed changes to Form I-485 and its instructions (hereinafter, "Proposed Form" and "Proposed Instructions" are used as appropriate) would affect immigrant and refugee children seeking to adjust status on the basis of Special Immigrant Juvenile Status (SIJS), asylum, or U or T nonimmigrant status, based on KIND's extensive experience in handling these types of cases.

A number of the proposed changes clarify or simplify aspects of the current edition of the form, and we very much appreciate USCIS' efforts in this regard. We appreciate the opportunity to

[1] 81 Fed. Reg. 18636 (March 31, 2016).

comment on this Notice and believe that our collective expertise and experience makes KIND particularly well-qualified to offer views that will benefit the public and the government. In some of our comments, we reiterate public comments previously offered by the Immigrant Legal Resource Center, American Immigration Lawyers Association, and Public Counsel in response to changes to Form I-485 proposed in March 2015, as their comments are worth repeating as to similar proposals in the current Notice.

I. Overall Comments and Suggestions

a. Shortening the Proposed Form and Proposed Instructions would Reduce Burdens for Applicants and Adjudicators

We recommend that USCIS shorten the Proposed Form and Proposed Instructions. In its length, complexity, and detail, the Proposed Form contravenes the intent of the Paperwork Reduction Act, and calls for extraneous information and legal conclusions that are not necessary to this collection of information.

The proposed changes would triple the length of Form I-485, from 6 pages to 18 pages, and would quintuple the length of the Form I-485 Instructions, from 8 pages to 40 pages. The increase in length substantially burdens applicants without adding clear benefits. Much of the added text is repetitive, seeks information that either is not relevant for adjustment purposes, or is available to USCIS through other means. The form's added length will inevitably lead to longer adjudication times and processing delays. Moreover, if the interviewing and adjudicating officers are guided by wording that is overbroad and vague, rather than questions that are faithful to the underlying statutory provisions and purposes of the form, the result will be unnecessary Requests for Evidence, and inconsistent and erroneous adjudications.

In the Proposed Instructions, USCIS should avoid giving incomplete or inaccurate explanations of complex legal issues that may arise in seeking status adjustment, particularly for child applicants. The Proposed Instructions oversimply a number of complex legal concepts, including areas of the law that have been interpreted differently by various Circuit Courts; such incomplete explanations could ultimately prove harmful to an applicant. If USCIS elects to retain such discussions in the Proposed Instructions, it should add a disclaimer stating that applicants may want to consult competent legal counsel or an accredited representative.

b. Streamlining the Proposed Certifications

The expanded certifications in the Proposed Form contain statements that are duplicative, ambiguous, and overreaching. As discussed below, redundant re-certifications of truthfulness and the unlimited release of personal and third-party information are unnecessary. We ask that USCIS examine whether the intended goals of the certifications can be met with existing regulations or more concise attestations that are less burdensome, easier to understand, and within the scope of USCIS's authority.

c. **Accommodating the Realities of Children who are Victims of Crimes**

The Proposed Form and Proposed Instructions are lacking in accommodations for the particular hardships faced by children who may be victims of domestic violence, human trafficking, or other crimes. Applicants seeking to adjust status based on SIJS, asylum, or U or T nonimmigrant status would be disproportionately burdened by many proposed changes. Such applicants would face a magnified burden of questions on inadmissibility, even where many of the questions would be superfluous in that certain grounds of inadmissibility do not apply to children or victims of crime. Certain documents called for in the Proposed Instructions would be expensive or difficult for many applicants to obtain, yet the information they contain is already available to USCIS and/or is not necessary to adjudication – e.g., juvenile court orders submitted to USICS with Form I-360. KIND requests that USCIS keep in mind the particular vulnerabilities of children and victims of domestic violence, human trafficking, and other crimes, and seek to mitigate unnecessarily heightened thresholds were feasible.

I. Comments on Proposed Form I-485

Part 1: Information About You

- **Page 2, Part 1, item 13, Alternate and/or Safe Mailing Address.**

The Proposed Form makes the option of including a safe mailing address available only to VAWA self-petitioners and T nonimmigrant status, U nonimmigrant stats, and SIJS applicants.

Recommendation: Permit all applicants the option to provide a safe mailing address, regardless of the underlying basis for their adjustment of status application.

- **Page 2, Part 1, items 14, 15, Passport Number, Travel Document Number**

These items lack the clarifying term "if any" which is used throughout the Proposed Form; see, e.g., items 9, 18, and 21 of this section. Many applicants will not have a Passport Number or Travel Document Number. Moreover, these two questions may be overlooked because they are located under the section header "Alternative and/or Safe Mailing Address."

Recommendation: Add the Proposed Instruction "(if any)" to both questions, and visually clarify that these questions are not limited to those completing Item 13.

Parts 3 Through 5: Additional Information About Applicant, Information About Your Parents, Information About Your Marital History

USCIS proposes eliminating Form G-325A, and soliciting employment history, parental information, and marital history on Form I-485. However, pursuant to 8 CFR 245.2(a)(3)(i), USCIS currently requires Form G-325A only from an applicant who has reached his or her 14th birthday at the time of filing Form I-485. Currently, when the under-14 applicant subsequently

reaches age 14, USCIS will issue a Request for Evidence (RFE) seeking the Biometrics Fee and Form G-325A—which must be filed anew even if the child filed a copy while under 14. Accordingly, incorporating information from Form G-325A would render large sections of Form I-485 burdensome for child applicants under the age of 14.

Also, the Proposed Form seeks a level of detail that is burdensome if not impossible for many minor children and trauma victims to satisfy, without furnishing additional information necessary to the adjudication.

Recommendation: USCIS should designate Part 3 through Part 5 for completion by applicants 14 and over only. We provide recommendations on individual questions below, in case USCIS elects not to adopt this recommendation.

Part 3: Additional Information About Applicant

- **Pages 4-5, Part 3, Address History, items 6, 8, and 10**

Reporting precise dates of residence would be impracticable for many minor children, trauma survivors, and other applicants who did not control their place of residence. Detail at that level is not necessary to adjudication.

Recommendation: Eliminate the mask that requires the format "mm/dd/yyyy," and permit applicants to omit days and provide their best estimate of the month.

- **Pages 5-6, Part 3, Employment history, Items 11-22.b.**

These proposed items call for a level of detail that is not necessary to adjudication; furthermore, making these items compulsory for applicants under age 14 would be inefficient. The preamble to Employment History instructs, "Provide the most recent employment first," but **item 14.b.** is pre-filled with "Present." These instructions are inconsistent for any applicant formerly but not currently employed.

At **items 14, 18, and 22**, reporting precise dates of employment would be impracticable for minor children, trafficking survivors, and other applicants who did not control or elect their place of employment. Likewise, **items 11-12, 15-16, and 19-20** call for details on the employer's name and address that may not be available to many applicants, and is not necessary to adjudication.

Recommendations: Have the responses be filed by applicants 14 and older. Delete the prefilled answer "Present" from 14.b; eliminate the mask that requires the format "mm/dd/yyyy," and permit applicants to omit days and provide their best estimate of the month. Permit applicants to provide employer information that is reasonably available.

Part 4: Information About Your Parents

- **Page 6, Part 4, Items 1.a.-16**

Minor children separated from parents, particularly children abused, neglected or abandoned by parents, may not have access to parental information such as place of birth, given name, and other information called for in items 1-16.

Recommendation: Have these questions answered by applicants 14 and older.

Part 7: Biographic Information

- **Page 8, Part 7, Items 1, 3, 4, and 6**

Race and ethnicity do not have bearing on adjudication, and in other contexts, collection of such information is voluntary. Item 1 singles out the category "Hispanic or Latino," then groups numerous ethnicities into a single category, "Not Hispanic or Latino." Especially for children, height, weight, and hair color may change in the interval between filing the form and presenting at the Application Support Center (ASC) biometrics appointment, creating artificial inconsistencies.

Recommendation: Delete these questions because comparable information is collected at ASC biometrics appointments. Alternatively, delete Item 1, and provide an option to specify other races or ethnicities, optionally. Give an instruction acknowledging that the referenced characteristics may change.

Part 8: General Eligibility and Inadmissibility Grounds

- **Page 8, Part 8, Items 1-13:** "Have you EVER been a member of, involved in, or in any way associated with any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world including any military service?"

The change from "since your 16th birthday" in the current edition of Form I-485 to "EVER" in the Proposed Form makes the proposed wording overbroad, in disregard of statutory exemptions for a child being involuntarily enrolled in or associated with an organization or group without full knowledge or understanding of the organization's or group's tenets, purpose(s) and/or goal(s).

The phrase "involved in, or in any way associated with" is vague and overbroad, as is the use of a long list of disparate terms plus a catch-all ("similar group"); varying interpretations and arbitrary adjudications are likely to result. In Items 5, 9, and 13, "Dates of Involvement of Membership" is unclear and possibly an error; a month and day may not be knowable.

Recommendation: Expressly limit the scope of the question to groups in which the applicant had a membership or affirmative voluntary association, after the age of 16. Delete, at a minimum, "involved in, or in any way associated with," "fund," "society," and "similar group." Reword "Dates of Involvement of Membership" and remove the mask which requires months and days.

- **Preamble to Items 14 -80: "Choose the answer that you think is correct. If you answer "Yes" to any questions (or if you answer "No," but are unsure of your answer), provide an explanation of the events and circumstances in the space provided in Part 13. Additional Information."**

"Choose the answer that you think is correct" and "if you answer 'No' but are unsure of your answer" are misleading directives, as the applicant will be required to certify the truthfulness of his answers. In contrast to the past practice of requiring an explanation only for a "Yes" answer, the proposed directive adds ambiguity to the application process by requiring an explanation for certain "No" answers, and by falsely suggesting that an applicant is "unsure" of any "No" answer as to which he chooses to provide an explanation. The directive also appears to limit the explanation to "the space provided in Part 13."

Recommendation: If USCIS uses the proposed wording of this directive, it will require qualifying language in the Applicant's Statement at Part 10 to indicate that the answers to items 14 through 80 are thought to be correct. In the alternative, replace this preamble with, "If your answer is 'Yes' to any question, provide an explanation of the events and circumstances according to the instructions provided in Part 13. Additional Information. You may also provide an explanation that you determine to be appropriate for any question to which you answered 'No.'"

- **Page 10, Part 8, Item 25**, "Have you EVER used any illegal drugs or abused any legal drugs?"

The terms "drugs," "used," and "abused" make this question vague and overbroad. Having used (but not abused) an illegal drug does not implicate health-related grounds of inadmissibility. The issue of drug abuse is a determination properly made by a civil surgeon, not by the applicant or others lacking expertise.

Recommendation: Delete this question as it is duplicative of other information. In the alternative, ask if a medical professional has determined that the applicant is currently an abuser or addict of any "controlled substances as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)."

- **Page 10, Part 8, under "Criminal Acts and Violations,"** "For Item Numbers 26.-46., you must answer 'Yes' to any question that applies to you, even if your records were sealed or otherwise cleared, or even if anyone, including a judge, law enforcement officer, or attorney, told you that you no longer have a record. You must also answer

'Yes' to the following questions whether the action or offense occurred here in the United States or anywhere else in the world. If you answer 'Yes' to Item Numbers 26.-46., use the space provided in **Part 13. Additional Information** to provide an explanation that includes why you were arrested, cited, detained, or charged; where you were arrested, cited, detained, or charged; when (date) the event occurred; and the outcome or disposition (for example, no charges filed, charges dismissed, jail, probation, community service)."

The phrase "answer 'Yes' to any question that applies to you" literally instructs all applicants to check every "Yes" box. A blanket instruction regarding "your records" is given, yet is irrelevant to many questions in the group. The decision to make an arrest, citation, etc. lies with a law enforcement officer, so an applicant should be asked to explain the circumstances rather than "why" one was arrested, cited, etc.

Recommendation: Reword "any question that applies to you." Retain the existing instruction that traffic violations need not be disclosed.

- **Page 10, Part 8, Item 26**, "Have you EVER been arrested, cited, charged, or detained for any reason by any law enforcement official (including but not limited to any U.S. immigration official or any official of the U.S. Armed Forces or U.S. Coast Guard)?"

Expressly confirming that the question covers immigration arrests is a welcome clarification. However, the phrase "for any reason" renders the question vague and overbroad, and seeks information not relevant or necessary to adjudicating the application. Because many arrests, citations, charges, and detentions fall outside the scope of any grounds of inadmissibility, the question is likely to elicit information about law enforcement contacts that occurred "for any reason" yet have no bearing on the applicant's actual eligibility for status adjustment.

Recommendation: Revise the question to be contiguous in scope with statutory grounds of inadmissibility, and replace the phrase "for any reason" with "on the basis of an alleged criminal or immigration violation."

- **Page 10, Part 8, Item 27,** "Have you EVER committed a crime of any kind (even if you were not arrested, cited, charged with, or tried for that crime)?"

This question is overly broad and may include minor offenses that do not give rise to grounds of inadmissibility.

Recommendation: In lieu of this proposed question, retain the question used in the current Form I-485, but revised as follows: "Have you EVER, in or outside the United States knowingly committed any crime of moral turpitude or a controlled substance offense for which you have not been arrested?" or use a comparable formulation contiguous with the scope of grounds of inadmissibility.

- **Page 10, Part 8, Item 28,** "Have you EVER pled guilty to or been convicted of a crime or offense (even if the violation was subsequently expunged or sealed by a court, or if you were granted a pardon, amnesty, a rehabilitation decree, or other act of clemency)? NOTE: If you were the beneficiary of a pardon, amnesty, or rehabilitation decree, or other act of clemency, provide documentation of that post-conviction action."

This question is overbroad and may include minor offenses that do not give rise to grounds of inadmissibility. It may also require disclosures that violate federal and state laws that protect confidentiality and/or victims' rights.

Recommendation: Change "a crime or offense" to a "crime involving moral turpitude or controlled substance crime." Delete "if the violation was subsequently expunged or sealed by a court, or."

- **Page 10, Part 8, Item 29**, "Have you EVER been ordered punished by a judge or had conditions imposed on you that restrained your liberty (such as a prison sentence, suspended sentence, house arrest, parole, alternative sentencing, drug or alcohol treatment, rehabilitative programs or classes, probation, or community service?)"

This question may include civil penalties that do not give rise to grounds of inadmissibility. The phrase "had conditions imposed on you that restrained your liberty" sweeps in an enormous range of circumstances, such as a child's being sent to detention or required to engage in community service by picking up trash at school.

Recommendation: Delete this question. In the alternative, after "by a judge," insert the phrase "for committing a crime involving moral turpitude or a violation or conspiracy or attempt to violate any law or regulation relating to a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)," or otherwise revise the question to bring its scope within the grounds of inadmissibility.

- **Page 10, Part 8, Item 30,** "Have you EVER been in a criminal proceeding (including pre-trial diversion, deferred prosecution, deferred adjudication, or any withheld adjudication)?"

The question is overbroad, and would call for a "Yes" answer and explanation from witnesses who testified in any criminal proceeding, including confidential grand jury proceedings. As to persons who were defendants in criminal proceedings, the question is duplicative of Item 26.

Recommendation: Delete the question, or at minimum, change "in" to "a defendant in."

- **Page 10, Part 8, Item 31,** "Have you EVER violated (or attempted or conspired to violate) any controlled substance law or regulation of a state, the U.S., or a foreign country?"

Recommendation: Limit this question to controlled substances "as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)," consistent with the statutory scope of this ground of inadmissibility.

- **Page 10, Part 8, Item 32,** "Have you EVER been convicted of two or more offenses (other than purely political offenses) for which the combined sentences to confinement were five years or more?"

This question lacks clarity on what a "purely political offense" is. It also calls for information that is duplicative of responses to questions such as 26, 28, and 29. Also, instead of the statutory term "aggregate," this question uses "combined."

Recommendation: Delete this question as it is repetitive.

- **Page 10, Part 8, Item 33,** "Have you EVER illicitly (illegally) trafficked or benefited from the trafficking of any controlled substances, such as chemicals, illegal drugs, or narcotics?"

The phrase "benefited from the trafficking of" renders the question unclear and overbroad. For example, it could require for a "Yes" answer from any member of the public who enjoyed a fireworks display produced by a criminal syndicate. Additionally, the phrase "such as chemicals, illegal drugs, or narcotics" renders the phrase "controlled substances" vague and ambiguous.

Recommendation: Retain the formulation that currently appears on Form I-485 in Part 3, Item 3(d) on Page 3: "Have you EVER illicitly trafficked in any controlled substance, or knowingly assisted, abetted, or colluded in the illicit trafficking of any controlled substance?" Any addition should be consistent with the scope of INA 212(a)(2)(C).

- **Page 10, Part 8, Item 35,** "Are you the spouse, son, or daughter of a foreign national who illicitly trafficked or aided (or otherwise abetted, assisted, conspired, or colluded) in the illicit trafficking of a controlled substance, such as chemicals, illegal drugs, or narcotics and you obtained, within the last five years, any financial or other benefit from the illegal activity of your spouse or parent, although you knew or reasonably should have known that the financial or other benefit resulted from the illicit activity of your spouse or parent?"

This question is overbroad and exceeds the scope of the relevant grounds of inadmissibility, which pertain not to a "foreign national" but to an "alien" who is "inadmissible" for reasons of illicit trafficking in a controlled substance. Some child migrants have been abused, neglected, or abandoned by "foreign national" parents who may have been involved in trafficking activities, causing the child to escape and seek immigration relief in the United States. Evaluating what he or she "reasonably should have known" may be unreasonably difficult for many children.

Recommendation: Revise this question to be contiguous in scope with INA 212(a)(2)(C)(ii).

- **Page 10, Part 8, Item 36,** "Have you EVER engaged in prostitution or are you coming to the United States to engage in prostitution?"
- **Page 10, Part 8, Item 37**, "Have you EVER directly or indirectly procured (or attempted to procure) or imported prostitutes or persons for the purposes of prostitution?"
- **Page 10, Part 8, Item 38**, "Have you EVER received any proceeds or money from prostitution?"

Items 36, 37, and 38 exceed the statutory grounds of inadmissibility which are limited to the past 10 years. The questions are overlapping, and taken together, they place disproportionate focus on heavily stigmatized conduct that can be a product of human trafficking or coercion, and they lengthen the form. Because item 36 asks about <u>both</u> past and future conduct, a "Yes" answer would inappropriately stigmatize, for example, an applicant who was in the past was forced to engage in prostitution but has no intention of doing so in the future; he or she would also be forced to repeat a "Yes" answer to item 38 for the exact same conduct covered by item 36, resulting in needless re-stigmatization.

Recommendation: Delete "are you coming to the United States to engage in prostitution?" Merge the three items into a single question limited to the past 10 years, such as, "Have you within the past 10 years engaged in prostitution, or procured or attempted to procure persons for prostitution, or received any proceeds or money from prostitution?"

- **Page 11, Part 8, Item 42,** "Have you EVER induced by force, fraud, or coercion (or otherwise been involved in) the trafficking of persons for commercial sex acts?"
- **Page 11, Part 8, Item 43,** "Have you EVER trafficked a person into involuntary servitude, peonage, debt bondage, or slavery? Trafficking includes recruiting, harboring, transporting, providing, or obtaining a person for labor or services through the use of force, fraud, or coercion."
- **Page 11, Part 8, Item 44**, "Have you EVER knowingly aided, abetted, assisted, conspired, or colluded with others in trafficking persons for commercial sex acts or involuntary servitude, peonage, debt bondage, or slavery?"

"Trafficking" is a term that is often confused with smuggling and other concepts (such as drug trafficking and weapons trafficking). The definition of human trafficking also varies between different state laws and federal law. In particular, INA § 212(a)(2)(H)(i) specifically addresses this ground of inadmissibility as covering "a trafficker in severe forms of trafficking in persons, as defined in Section 103" in the Trafficking Victims Protection Act in 22 USC § 7102(9). This definition of trafficking listed here is also incomplete, as the definition in 22 USC §7102(9) of a "severe form of trafficking in persons" is:

a) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

b) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Items 42, 43, and 44 attempt to break down this legal definition but do not do it accurately. The additional partial explanation of "trafficking" in item 43 confuses the matter. The legal terms "involuntary servitude," "peonage," "debt bondage," "slavery," and "commercial sex acts" are incorporated into the legal definition of a "severe form of trafficking in persons." Furthermore, the form could be shortened by consolidating the three questions into a single item citing the proper legal definition.

Recommendation: Combine and clarify the three items to read, "Have you ever induced (or aided or conspired with others in the inducement of) someone to engage in commercial sex through force, fraud, or coercion, or used force, fraud, or coercion to induce someone to work against their will?"

- **Page 11, Part 8, Item 45,** "Are you the spouse, son or daughter of a foreign national who engaged in the trafficking of persons and have received or obtained, within the last five years, any financial or other benefits from the illicit activity of your spouse or your parent, although you knew or reasonably should have known that this benefit resulted from the illicit activity of your spouse or parent?"

Some child migrants have been abused, neglected, or abandoned by parents who may have been involved in trafficking activities, causing the child to escape and seek immigration relief in the United States. Evaluating what they "reasonably should have known" may be unreasonably difficult for many children, and consistent with that, the statute exempts "a son or daughter who was a child at the time he or she received the benefit described" – so, too, should the question. Additionally, the word "trafficking" should be clarified again to be the definition of a "severe form of trafficking in persons" as defined in 22 USC §7102(9) in accordance with the discussion regarding Page 11, Part 8, Item 42-44 above.

Recommendation: Revise this question consistent with the scope of INA 212(a)(2)(H)(ii) and (iii), and clarify the term "trafficking" in accordance with the discussion regarding Page 11, Part 8, Item 42-44 above.

- **Page 11, Part 8, Items 49-50. Item 49.b.,** with reference to the activities "hijacking, sabotage, kidnapping, political assassination, or use of a weapon or explosive to harm another individual or cause property damage" as enumerated at Item 49.a., asks, "Have you EVER participated in, or been a member of, a group or organization that did any of the above?"

"Participated in" is overly broad, and may include attenuated and/or involuntary affiliations with groups whose range of activities may be unknown to the applicant. "Property damage" is extremely broad, and encompasses activity that does not give rise to inadmissibility.

Recommendation: Delete "participated in, or" and replace "property damage" with "substantial damage to property," consistent with the statutory provision.

- **Page 12, Part 8, Items 51.a.-51.f. The preamble to these items asks, "Are you the spouse or child of an individual who EVER:"**

However, the underlying statutory provision, INA 212(a)(3)(B)(i)(IX), specifies "if the activity causing the alien to be found inadmissible occurred within the last 5 years." The statute also provides an exception for certain spouses and children, INA 212(a)(3)(B)(ii).

Recommendation: Revise the preamble to these items, to limit the scope to the past 5 years and to allow for the statutory exception.

- **Page 13, Part 8, Item 61**, "Have you EVER received public assistance in the United States from any source, including the U.S. Government or any state, country, city or municipality (other than emergency medical treatment)?"

The overbreadth of this item, juxtaposed with a second related question at item 62, would have a chilling effect on immigrants' access to those limited public benefits to which they are entitled, by suggesting an interpretation broader than the legal meaning of "public charge." Only current or past receipt of public cash assistance programs can be considered by the agency in determining whether the applicant is likely to be considered a public charge. Likewise, the phrase "any source, including" is at odds with the term "public assistance," and may have a chilling effect on immigrants' access to needed private support or services.

Recommendation: Insert the word "cash" between "public" and "assistance" or enumerate the applicable public assistance programs. Delete the phrase "any source, including."

<u>Part 10: Applicant's Statement, Contact Information, Certification and Signature</u>

- **Page 14, Part 10, Item 1.b. "The interpreter named in Part 11 read to me every question and instruction on this application and my answer to every question in _____, a language in which I am fluent and I understood everything."**

It is problematic to request that an applicant affirm that the interpreter (someone else) has read the entirety of the form, and that the applicant thereby understood the entirety of the form. Where an applicant's limited English language proficiency required the use of an interpreter, the applicant may not be aware of any omissions or errors in the interpretation.

Recommendation: Revise this language in a way that does not require the applicant to affirm that someone else has properly read the entire form and that the applicant has understood the entirety of the form.

- **"Furthermore, I authorize the release of any information from any of my records that USCIS may need to determine my eligibility for the immigration benefits I seek."**

This modification may conflict with state and federal privacy and confidentiality provisions. While an applicant may generally "authorize the release of any information from any" records to USCIS, the applicant cannot herself circumvent state or federal law with these authorizations. In some states, a juvenile court, not the child applicant, is the entity that has the power to authorize disclosures of otherwise confidential information and documents.[2] Additionally, this certification does not adhere to HIPAA requirements under federal law.

Recommendation: Revise the statement to, "Furthermore, I authorize the release of any information from any of my records that USCIS may need to determine my eligibility for the immigration benefits I seek, except as prohibited under state or federal law."

- **"I further authorize release of information contained in this application, in supporting documents, and in my USCIS records to other entities and persons where necessary for the administration and enforcement of U.S. immigration laws."**

This would condition the filing of the application upon a limitless release of information, including sensitive, protected, or personal information, with potential to compromise the privacy, physical safety, and well-being of the applicant and other persons. Information about third persons could be broadly shared without their knowledge, and without affording them an opportunity to challenge the release or the content of the information. Through legal actions, internet postings, and media reports, the information could be exposed to the general public and to foreign governments and persecutors – all without testing the relevance and accuracy of the information. This proposed statement posits an unacceptable quid pro quo between adjudication of the application and an involuntary role in enforcement actions of an unspecified nature against unspecified "entities or persons" through the mining of data furnished in good faith by an applicant seeking a benefit for which he believes himself qualified. Children in particular are not equipped to understand the scope of this certification, and because they are particularly sensitive to the potential (warranted or not) that family members could "get in trouble," the provision will likely have a chilling effect on children's applications.

Recommendation: The paragraph quoted above should be deleted, because its inclusion would circumvent probable cause requirements and violate privacy protections.

- **"I understand that USCIS will require me to appear for an appointment to take my biometrics (fingerprints, photograph, and/or signature), and, at that time, I will be required to sign an oath reaffirming that:**
  1) **I reviewed and provided or authorized all of the information in my application;**
  2) **I understood all of the information contained in, and submitted with, my application; and**

[2] See for example, Cal. Welf & Inst. Code § 827 and 831.

3) All of this information was complete, true, and correct at the time of filing.

I certify, under penalty of perjury, that I provided or authorized all of the information in my application, I understand all of the information contained in, and submitted with, my application, and that all of this information is complete, true, and correct."

Those three enumerated undertakings are duplicative of the paragraph that follows them. This request for redundant certifications is not only confusing (particularly for children, whose grasp of temporal and causal relationships is still developing), but also undermines the certification process by implying that a certification under penalty of perjury is somehow not reliable without repetition.

In the certification proposed to be signed at the ASC, the applicant is asked to certify the accuracy of information in the form *as of the time of filing*, irrespective of later amendments if any. Facts true at the time of filing Form I-485 may change by the time of the ASC appointment (e.g., if since the time of filing, an applicant has moved, has discovered an error, or has traveled internationally). The timeframe of the requested certification must be made unambiguously clear to the applicant, particularly if the applicant is a child.

Recommendation: At the end of the phrase "...this information is complete, true, and accurate," insert "to the best of my knowledge." Although one certification at the time of filing under penalty of perjury is sufficient, if USCIS opts to require a second certification in person at the ASC, that future certification should not be recited within Part 10 over the applicant's signature. Instead, delete the text beginning with "I understand that USCIS will require me to appear for an appointment" through the paragraphs numbered 1 through 3, and place it in a standalone section under instructions specifying that the certification is to be executed at the ASC (analogous to Part 14, Signature at Interview). The ASC should continue to provide a copy of the certification at the ASC appointment. Moreover, instructions given at the ASC should be unambiguous that the applicant is certifying the truth of the application information as of the time it was filed, not at the time of the ASC appointment.

Part 11: Interpreter's Contact Information, Certification, and Signature

- **Page 15, Part 10, Items 3a.-3.h**

These new proposed questions ask the interpreter to list their mailing address. This does not take into account telephonic interpretation, in which the details requested on the Form I-485 would be unavailable and no signature can be made available.

In the "Interpreter's Certification," the last clause—"and has verified the accuracy of every answer"—should be deleted. The interpreter cannot verify an answer's accuracy, only the translation's accuracy.

Recommendation: Delete proposed Items 3a-3h for the interpreter's mailing address. Delete the clause "and has verified the accuracy of every answer" in the Interpreter's Certification.

Part 12: Contact Information, Declaration, and Signature of the Persons Preparing this Application if Other Than the Applicant

- **Page 16, Part 12, directive preceding items 8.a.-b., "By my signature, I certify, under penalty of perjury, that I prepared this application at the request of the applicant. The applicant then reviewed this completed application and informed me that he or she understands all of the information contained in, and submitted with, his or her application, including the Applicant's Certification, and that all of this information is complete, true, and correct. I completed this application based only on information that the applicant provided to me or authorized me to obtain or use."**

This language is repetitive of the practitioner's standing professional obligations, and imposes a burdensome and unnecessary process for preparing and reviewing the Form I-485. Preparers are already required, under applicable regulations, to attest to the veracity and truth of what is submitted. Under 8 CFR §103.2(a)(2), "[b]y signing the benefit request, the … petitioner … certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct." Moreover, under 8 CFR §1003.102(j)(1), "[t]he signature of a practitioner on any filing [or] application … constitutes certification by the signer that the signer has read the filing [or] application … and that, to the best of the signer's knowledge, information, and belief, formed after inquiry reasonable under the circumstances, the document is well-grounded in fact …." An attorney who engages in frivolous behavior or who knowingly or with reckless disregard makes a false statement of material fact or law is subject to disciplinary sanctions including disbarment or suspension. *See generally* 8 CFR §1003.101−108.

Any concerns about fraud detection and prevention are more than adequately covered in the existing regulations cited above. Moreover, it is beyond the authority of USCIS to stipulate a specific review procedure for attorneys and their clients and require that it be followed. The Preparer's Certification, therefore, unnecessarily intrudes on the rights of applicant and their legal representatives to determine their own legitimate procedures in the preparation of the form.

Recommendation: KIND suggests USCIS to revise the "Preparer's Certification" to read as follows:

> By my signature, I certify, under penalty of perjury, that I prepared this application at the request of the applicant (or, if appropriate, the next friend of an applicant lacking competence) based only on information that the applicant provided to me or authorized me to obtain or use. The applicant (or next friend) reviewed this completed application and informed me that he or she understands all of the information contained in, and

submitted with, the application, and that all of this information is complete, true, and correct.

II. Comments on Proposed General Instructions

- **Pages 2-3, "Who May File Form I-485?" or "Who May Not Be Eligible to Adjust Status?"**

A prospective applicant may be unaware that he can be placed into removal proceedings if his application to adjust status is denied.

Recommendation: Prominently include a brief warning that, in some circumstances, an applicant may be placed in removal proceedings if the application is denied or filed by an applicant who is not eligible for adjustment.

- **Page 4, "General Instructions," Signature.**

The Proposed Instructions permissively state that "If you are under 14 years of age, your parent or legal guardian may sign the application on your behalf." Many child applicants, especially those who survived violence, do not have positive relationships with parents, and may rely on a custodian, foster caretaker, next friend, or other trusted adult rather than a "legal guardian." Note that in some instances, USCIS has rejected applications where a child under 14 signed on his or her own behalf.

Recommendation: Include the terms "or custodian, caretaker, next friend, or other trusted adult" after "legal guardian," and clarify that an adult signature is optional and the child applicant can sign for himself, particularly when applying for adjustment as an asylee or a Special Immigrant Juvenile (SIJ).

- **Instructions on Page 5, "General Instructions: Biometric Services Appointment"**

The Proposed Instructions reference that the Proposed Form also requires applicants to confirm that, in signing the Application Service Center (ASC) appointment notice at the time of the biometrics appointment, the applicant declares that he or she reviewed and understood the application submitted, filed it willingly, that all submitted supporting documents are "complete, true, and correct." For children, who may not have the form with them or recall the details and complexity of the questions and the responses on the application, signing a certification as to the contents of a document that was prepared weeks prior to the ASC appointment could lead to confusion. Neither the applicant nor the ASC contractor has the ability or the authority to correct typographical errors on the Form I-485 at the biometric appointment. The lapse of time in filing the application and the time of the ASC appointment could also lead to other required corrections.

Recommendation: Delete this certification on the Form I-485, and remove the corresponding instructions about this new certification.

- **Instructions Page 6, Item 3, "If a question does not apply to you….type or print "N/A" unless otherwise directed….If your answer to a question which requires a numeric response is zero or none….type or print "None" unless otherwise directed.**

Variations within the Form I-485 as to the use of responses such as "N/A" or "None" lead to confusion and invite error.

Recommendation: USCIS should eliminate the use of "unless otherwise directed" and adopt a position on filling in blanks with "None" or "N/A" that is consistent across Form I-485 (and ideally, with other common USCIS forms, such as Form I-360).

- **Instructions on Page 6, "General Instructions: Alternate and/or Safe Address"**

KIND requests that USCIS further clarify that the applicants should update their "safe address" at the same time they submit a change of address form, as there have been cases in which the USCIS has sent notices about an I-485 to a prior address at which the abusive family member which have put the applicants in danger.

Recommendation: Add "If you are filing adjustment of status based on a VAWA Self-Petition, you should also update your safe address at the same time you notify USCIS that you have or plan to file a VAWA Self-Petition. When you change your safe address, you should immediately file a Form AR-11 online to reflect these changes, which can be found at https://www.uscis.gov/ar-11."

- **Instructions on Page 8, "What Evidence Must You Submit with Form I-485, 2. Government-Issued Identity Document with Photograph"**

In order to bring evidentiary requirements in line with realities of what children can access and obtain, a school identification card should be deemed sufficient to satisfy this instruction and as proof of identity at a child's biometrics appointment. This would be consistent with 8 CFR §274a.2(b)(1)(v)(B)(ii), which addresses verification of identity and employment authorization, and lists a school identification card with a photograph as an acceptable document to establish identity. The instructions in Form 821-D for Deferred Action for Childhood Arrivals also accept school-issued identification cards with a photograph to prove identity.[3] SIJ applicants, asylees, and other trauma survivors may lack a passports or consular identification (which often are lost, stolen, or not accessible or affordable to the applicant, or in some instances, were destroyed or withheld by family members). Many foreign consulates require both parents' consent to issue a child's passport or consular ID; this requirement eludes many SIJ in particular. Although many

[3] USCIS, "Form I-821D: Instructions for Consideration of Deferred Action for Childhood Arrivals, OMB No. 1615-0124expires 06/20/2016," page 5, https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf.

asylees will qualify for EADs or state identification at the time of applying to adjust status, not all will, and few SIJ-based applicants will. As a school identification card may be the only ID reasonably obtainable, USCIS should acknowledge this and allow its use when a child has no other photo identification.

Recommendation: Include the language in this section, "If you are a child under 21, you may submit a school identification card with a photograph if you do not have any other type of government-issued identity document with a photograph."

- **Page 8, Item 3, Birth Certificate.**

The Proposed Instruction states, "USCIS will only accept a long-form birth certificate which lists both parents." This requirement would defeat eligibility for many SIJ, for whom the omission of one or both parents from a birth certificate is common, consistent with lacking the protection of one or both parents. The regulations on eligibility for SIJ status require a birth certificate, but do not require the inclusion of both parents' names.

Recommendation: The instructions should end at "long form birth certificate."

- **Page 11, "What Evidence Must You Submit With Form I-485, 9. Evidence of Financial Support"**

Certain groups of people are exempt from the public charge ground of inadmissibility, or may obtain a waiver for the public charge ground of inadmissibility when applying to adjust their status. Such applicants include, but are not limited to SIJS, refugees and U and T nonimmigrant status holders. The two proposed items about public benefits are written broadly and can be confusing for applicants. It also perpetuates a longstanding concern among immigrants that receiving public benefits will undermine their ability to adjust their status or will otherwise put them at risk to be a "public charge." This misunderstanding creates a chilling effect that prevents immigrants from applying for critical benefits for themselves or the children in their care.

Recommendation: Clarify the instructions to specifically address the cash income assistance programs (TANF, SSI and state and local subsistence benefits) that may be a factor for "public charge." Also clarify that certain groups of people are exempt from being a public charge or may receive a waiver to adjust their states, such as refugees, SIJ, U and T nonimmigrant status holders, and also include the link https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge to explain things in further detail.

- **Pages 11-12, "What Evidence Must You Submit with Form I-485, 11. Certified Police and Court Records of Criminal Charges, Arrests or Convictions"**

The Proposed Instructions state, "An adjudication of juvenile delinquency is not a 'conviction' under U.S. immigration law. But if a minor is charged with a crime in a criminal court

proceeding rather than being placed in a juvenile court proceeding, the charges could be relevant. You must disclose all arrests and charges. If any arrest or charge was disclosed of as a matter of juvenile delinquency, include the court or other public record that establishes this disposition." Police records are not wholly determinative to whether a criminal conviction or juvenile disposition exists or gives rise to a ground of inadmissibility. Even where the question is about the person's conduct rather than the conviction, police records and charging documents are unreliable, as they are allegations of criminal conduct; they are not conclusive proof of such conduct. A conviction does not mean that the conviction was a result of the information contained in the arrest report or charging document, or that information alleged in those documents is accurate. When the arrestee is a minor immigrant who may have limited English language skills, police reports may involve drastic miscommunications with the arrestee that further undermines their reliability.[4]

It is inappropriate for USCIS to request state court records where state confidentiality laws may, and often do, prevent disclosure of juvenile state court files without a court order. The Department of Homeland Security is prohibited by federal regulation from obtaining and using confidential information.[5] These Proposed Instructions are not sufficiently clear that there are states with confidentiality laws that prevent disclosure of juvenile arrest and court disposition records, and that disclosure would invite violations of state juvenile confidentiality laws which may carry both civil and criminal penalties. In the context of SIJS petitions, USCIS has recognized that state confidentiality laws may prevent disclosure of documents from the juvenile court file.[6] For Deferred Action Childhood Arrivals (DACA) cases, USCIS has also officially recognized that state court files may be confidential, and disclosure may be prohibited under state law.[7] One example is the recent California bill, AB 899, which clarified the law by adding Section 831

[4] See Susan Shah, Insha Rahman, and Anita Khashu, "Overcoming Language Barriers: Solutions for Law Enforcement," Vera Institute, 2013.

[5] See 5 C.F.R. 2635.703(a) (forbidding "the improper use of nonpublic information to further [an employee's] own private interest…by knowing unauthorized disclosure.").

[6] See USCIS Memorandum, William R. Yates, "Regarding Filed Guidance on Special Immigrant Juvenile Status Petitions, Memorandum #3, HQADN 70/23 (May 27, 2004), p.5. (stating that "adjudicators must be mindful that confidentiality rules often restrict disclosure of records from juvenile-related proceedings, so seeking such records directly from the court may be inappropriate, depending on the applicable State law."); see also USCIS Policy Manual, Volume 6: Immigrants, Part H – Special Immigrant Juveniles, p. 8 (noting that "[a]n officer must be mindful of confidentiality rules that may restrict disclosure of records from juvenile-related proceedings.").

[7] *See* Form I-821D, page 4, part 4, Question 1: "Have you EVER been arrested for, charged with, or convicted of a felony or misdemeanor, including incidents handled in juvenile court, in the United States? Do not include minor traffic violations unless they were alcohol- or drug-related. [Yes] [No] If you answered 'Yes,' you must include a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest, unless disclosure is prohibited under state law"; *see also* Form I-821D Instructions, page 10, Question 12: "What evidence should I submit to demonstrate my criminal history? If you have been arrested for or charged with any felony (i.e., a Federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year) or misdemeanor (i.e. a Federal, state, or local criminal offense for which the maximum term of imprisonment authorized is one year or less but greater than five days) in the United States, or a crime in any country other than the United States, you must submit evidence demonstrating the results of the arrest or charges brought against you. If the charges against you were handled in juvenile court, and the records are from a state with laws prohibiting their disclosure, this evidence is not required…."

to the California Welfare & Institutions Code, and took effect on January 1, 2016. The law interprets the protections of the California Welfare & Institutions Code Section 827, which makes a "juvenile case file" confidential, and to protect and apply broadly not only to documents in juvenile records, but also information contained in those documents. It also clarifies that Section 827 includes protection over reports and written statements by probation officers and social workers, as well as police reports that never lead to prosecution.[8] Federal immigration officials and immigration attorneys are not listed among the specific individuals and agencies under Section 827(a)(1) that can get automatic access to juvenile court records. Additionally, those who are permitted to inspect the records are not necessarily authorized to disseminate juvenile records. USCIS should not mandate unnecessary evidence that could require immigration attorneys to violate state law.

Recommendation: Revise the Proposed Instruction subtitle in Proposed Instruction 11 to "Certified court records of criminal charges or convictions." Change the first sentence to, "You must submit certified court records for any criminal charges or convictions, if applicable, unless disclosure is prohibited under state law. If the charges against you were handled in juvenile court, and the records are from a state with laws prohibiting their disclosure, this evidence is not required. " Delete all references in this section to "certified police record," and where relevant, allow for certified copies.

- **Page 17, "USCIS Compliance Review and Monitoring"**

The compliance statement for applicants to sign reads, "By signing this application, you have stated under penalty under perjury (28 USC section 1746) that all information and documentation submitted with this application are complete, true, and correct." Children may have incomplete knowledge or lack knowledge of events and details relevant to their adjustment of status application but may provide responses in as much detail as they know to be true.

Recommendation: Edit the statement to read that "all information and documentation submitted with this application are complete, true and correct to the best of" the applicant's knowledge in the statement in the Proposed Instructions.

- **Page 20, "Additional Instructions for Family-Based Applicants: VAWA Self-Petition Form I-360"**

The Proposed Instructions say "VAWA confidentiality provisions (8 U.S.C. 1367) apply to you as the abused spouse or child of a U.S. citizen or lawful permanent resident or the abused parent of a U.S. citizen." This note could be especially confusing for abused children adjusting their

[8] 6 T.N.G. v. Superior Court (1971) 4 Cal. 3d 767, 780 (Noting that in a case that did not result in the children being made wards of the juvenile court, "[t]he police department of initial contact may clearly retain the information that it obtains from the youths' detention, but it must receive the permission of the juvenile court pursuant to section 827 in order to release that information to any third party, including state agencies.")

status from approved I-360 VAWA Self-Petitions. While it appears that the purpose is to inform applicants that VAWA confidentiality will extend throughout the pendency of the action and final appeal rights, the Proposed Instructions should clarify that the underlying I-360 petition and its contents will always remain confidential. It is important that applicants understand that the information in their petition may not be released to the abusive family member or other parties. This note also appears on page 31 for "CAA for Abused Spouses and Children" and page 33 for "HRIFA Eligibility for Abused Spouses and Children."

Recommendation: Clarify in this note, "VAWA confidentiality provisions (8 U.S.C. 1367) apply to you as the abused spouse or child of a U.S. citizen or lawful permanent resident or the abused parent of a U.S. citizen. This means that VAWA confidentiality provisions will extend through the pendency of the application and final appeal rights, and that the underlying Form I-360 petition will always remain confidential and cannot be accessed by the abusive family member." Clarify this note for the other two sections in an appropriate manner as well.

- **Pages 21-22, "Additional Instructions for Special Immigrants, Special immigrant juvenile (Form I-360)"**

The Proposed Instructions note that filing may proceed "[i]f a visa is immediately available," but many SIJ applicants will not be aware that the fourth employment-based category (EB-4) governs visa availability for them, and recently became oversubscribed for applicants from certain countries.[9]

The specified additional evidence requirements include "**evidence that you are the subject of a juvenile court order that meets USCIS requirements for classification as a special immigrant juvenile. The juvenile court [sic] must continue to be valid at the time you file Form I-485, unless: 1. You were adopted or placed in a permanent guardianship; or 2. You were the subject of a valid order that was terminated based on age (provided you were under 21 years of age at the time you filed your Form I-360).**"

The referenced court order is submitted as evidence that accompanies Form I-360; therefore, including the same court order with Form I-485 would be redundant and burdensome for the child applicant and for overburdened state court systems. KIND appreciates the clarification that the lapse of validity of a juvenile court order due to the child's age will not result in auto-revocation of the approval of Form I-360, consistent with the age-out protections of the

[9] USCIS, "Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants from El Salvador, Guatemala, and Honduras," April 16, 2016, *available at* https://www.uscis.gov/news/employment-based-fourth-preference-eb-4-visa-limits-reached-special-immigrants-el-salvador-guatemala-and-honduras.

Trafficking Victims Protection Reauthorization Act[10] and the *Perez-Olano* Settlement Agreement.[11]

Although "juvenile court" is the relevant statutory term defined by regulation (8 C.F.R. § 204.11(a)), the term has a common usage which may lead to confusion and obscure the fact that a "juvenile court" may be a dependency court, delinquency court, family court or probate court (*see, e.g.,* Cal. Code Civ. Proc. § 155(a)).

As noted earlier, some SIJ may not file their Forms I-360 and I-485 concurrently. This is especially true now because of the EB-4 visa retrogression for SIJ applicants from certain countries.[12] In situations when the Form I-485 is filed after the Form I-360, there should be no need to submit additional evidence from the state juvenile court; instead, the I-360 Approval Notice should be sufficient evidence of the applicant's eligibility to apply for adjustment of status.

Recommendation: Include that SIJS visas are allocated as part of the EB-4 category, and instruct applicants to check the Department of State's Visa Bulletin to determine if a visa is available first before filing a Form I-485. Replace the term "juvenile court" with "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles, including, e.g., a juvenile court, family court or probate court." Clarify that submission of a valid state court order is required as evidence only with Form I-360. Insert the word "order" between "court" and "must." Keep the language "You were the subject of a valid order that was terminated based on age (provided you were under 21 years of age at the time you filed your Form I-360)." Keep the language clarifying that SIJ classification is paroled but that the Form I-485 should list actual manner of entry into the country.

- **Page 23, "Additional Instructions for Human Trafficking Victims and Crime Victims, Human Trafficking victims (T Nonimmigrant, Form I-914) or qualifying relatives (Form I-914A)"**

In accordance with the regulations, these instructions should specify that if applicants do not have a passport or travel document, they instead may include a valid explanation as to why such a document is not in their possession.

[10] Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d) (6) (providing that SIJS-based I-360s cannot be denied due to "age" so long as they are filed before the applicant turns 21).
[11] Stipulation Settling Motion for Class-Wide Enforcement of Settlement ¶1, *Perez-Olano v. Holder*, No. CV 05-3604 DDP (RZx) (C.D. Cal. Mar. 4, 2015) (preventing USCIS from denying SIJS to children who lost juvenile court jurisdiction due to age).
[12] USCIS, "Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants from El Salvador, Guatemala, and Honduras," April 16, 2016, available at https://www.uscis.gov/news/employment-based-fourthpreference-eb-4-visa-limits-reached-special-immigrants-el-salvador-guatemala-and-honduras.

In addition, the Proposed Instructions require that applicants provide the reason for any departure from the United States while holding T nonimmigrant status. As long as the applicant did not depart for a trip of more than 90 days or multiple trips of more than 180 days, the applicant's reason for travel is irrelevant, and requiring an applicant to provide an explanation is ultra vires of statutory and regulatory requirements.

In assessing eligibility to apply to adjust status, it would be helpful to clarify in the instruction that the "Attorney General" referenced to determine if the investigation or prosecution is complete is the federal Attorney General of the United States, and not a State Attorney General. As a trafficking case may have been reported to state authorities and not federal authorities, applicants may not understand that they need to obtain this evidence from the U.S. Department of Justice.

Recommendation: Provide the instruction that if applicants do not have a passport or travel document, they instead may include a valid explanation as to why such a document is not in their possession. Delete "If you departed from the United States while in T-1 nonimmigrant status, you must provide the reason for each departure (if applicable). You can provide this information using the space provided in **Part 13. Additional Information** of Form I-485 or attach a separate sheet of paper." Clarify the "Attorney General" to be the federal Attorney General from the U.S. Department of Justice.

- **Page 23, "Additional Instructions for Human Trafficking Victims and Crime Victims, Crime victims (U Nonimmigrant, Form I-918) or qualifying relatives (Form I-918A)**

In accordance with the regulations, these Proposed Instructions should specify that if applicants do not have a passport or travel document, they instead may include a valid explanation as to why such a document is not in their possession.

In addition, the Proposed Instructions require that applicants provide the reason for any departure from the United States while holding U nonimmigrant status. As long as the applicant did not depart for a trip of more than 90 days or multiple trips of more than 180 days, the applicant's reason for travel is irrelevant and requiring an applicant to provide an explanation is ultra vires of statutory and regulatory requirements.

The Proposed Instructions in this section are subtitled incorrectly, "Evidence of Compliance with Reasonable Requests for Assistance in the Investigation or Prosecution of the Qualifying Criminal Activity." It then requests evidence such as a newly executed Form I-918 Supplement B, U Nonimmigrant Status Certification and other documents to detail "ongoing assistance." However, under 8 CFR 245.24(b)(5), the standard for a U nonimmigrant holder to adjust status, the applicant must show that they have not unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the applicant was granted U nonimmigrant status. Demonstrating that the applicant has not refused to provide assistance is

very different than demonstrating ongoing compliance with reasonable requests for assistance, especially if a case is already closed or the investigation was not further pursued.

The Proposed Instructions for submission of an affidavit attesting to evidence of ongoing compliance with reasonable requests for assistance in lieu of a newly executed Form I-918 Supplement B does not align with the requirements in 8 CFR § 245.24(e)(2). On page 28, following "If you submit an affidavit, it must include…," only points 1, 2, 3, and 5 relate to information that could be included in an applicant's affidavit. Point 4, referring to "court documents, police reports, news articles" and other documents, does not track the language of the regulation. It should either be deleted or included as a separate paragraph at the end of this section immediately preceding the note about assistance from persons other than the principal applicant. The language in 8 CFR § 245.24(e)(2) also indicates that the information listed in points 1, 2, 3, and 5 "should" be included "when possible" and "if applicable," and is not a requirement; therefore, the word "must" in the Proposed Instructions is creating too stringent a standard that is not in the regulations.

Recommendation: Provide the instruction that if applicants do not have a passport or travel document, they instead may include a valid explanation as to why such a document is not in their possession. Delete "If you departed from the United States while in U-1 nonimmigrant status, you must provide the reason for each departure (if applicable). You can provide this information using the space provided in **Part 13. Additional Information** of Form I-485 or attach a separate sheet of paper." Change the subtitle to "Evidence that Applicant has not Unreasonably Refused to Provide Assistance in the Investigation or Prosecution of the Qualifying Criminal Activity." Remove the requirement of needing to show "ongoing assistance." Change the language on page 28 to say "If you submit an affidavit, it can include…" Delete point 4 on Page 28 following the Proposed Instructions "If you submit an affidavit, it must include…"

KIND appreciates the opportunity comment on this Notice, and we look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

Wendy Young
President
Kids in Need of Defense (KIND)