

No. 26-1608

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

ZOILA CARCHI-NARVAEZ, *et al.*,

Petitioners,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

**ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS**

(BIA No. Interim Decision #4175;

Matter of Z-R-C-N-, 29 I&N Dec. 523 (BIA 2026))

**BRIEF OF *AMICI CURIAE* THE DOOR, SAFE PASSAGE PROJECT,
END SIJS BACKLOG COALITION, AND KIDS IN NEED OF DEFENSE
IN SUPPORT OF PETITIONERS AND GRANT OF THE PETITION**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit LAR 26.1.1, The Door, Safe Passage Project, End SIJS Backlog Coalition—a project of the National Immigration Project of the National Lawyers Guild (“National Immigration Project”), and Kids in Need of Defense hereby disclose that each has no parent corporations, and no publicly held company owns 10% or more of their outstanding membership units. No publicly owned company not a party to this appeal has a financial interest in the outcome of this litigation.

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STATEMENT OF INTEREST

Amici curiae The Door, the End SIJS Backlog Coalition—a project of the National Immigration Project, Safe Passage Project, and Kids in Need of Defense (“KIND”) serve and represent immigrant children who depend on Special Immigrant Juvenile Status (“SIJS”). A ruling here could impact every child whom a state juvenile or family court has already found to have been abused, neglected, abandoned, or similarly harmed, and for whom that court determined it would not be in the child’s best interest to return to his or her country of origin. *See* 8 U.S.C. § 1101(a)(27)(J). Only after those judicial findings, and only after United States Citizenship and Immigration Services (“USCIS”) independently reviews them, does a child obtain SIJS—a classification that is, by design, difficult to attain and reserved for the most vulnerable. *See Osorio-Martinez v. Att’y Gen.*, 893 F.3d 153, 163 (3d Cir. 2018).

Amici are non-governmental organizations dedicated to protecting the interests of children, immigrants, and special immigrant juveniles.¹ Each is engaged in the representation of children, and/or advocacy on behalf of immigrant children and youth at both a policy and individual level. The Board of Immigration Appeals’

¹ No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. The brief was submitted with an accompanying motion for leave to file as *amici curiae*.

precedential decision in this case drastically curtails the protections Congress made available to abused, neglected, or abandoned immigrant children.

SUMMARY OF ARGUMENT

For children and youth found eligible for SIJS due to a history of abuse, neglect, abandonment, or similar harm, the final protection Congress affords through adjustment of status to lawful permanent residency has become a protection deferred. Before they can apply to adjust status, children and youth must wait years for a visa number—a delay caused by statutory visa caps, not through any fault of their own. This case concerns two such children whom an immigration judge ordered removed. The minor Petitioners hold approved Form I-360 SIJS petitions and moved to reopen removal proceedings to seek adjustment of status once a visa becomes available. The Board of Immigration Appeals denied the motion as “too speculative” due to an apparent four-year delay in visa availability. If affirmed, that rule would operate as a categorical bar to reopening for an entire population of children Congress acted deliberately to protect—for no reason other than the length of a waiting list created without them in mind.

The Board’s rule cannot be reconciled with the statute, with precedent, or with the SIJS program’s purpose. First, the Board’s ruling undermines Congress’s intent in creating the SIJS program and its plenary power to regulate immigration. Second, an approved SIJS petition establishes *prima facie* eligibility; the arrival of a current

priority date is not speculative but certain, delayed only by the queue. *See* 8 U.S.C. § 1255(a); *Matter of Avetisyan*, 25 I&N Dec. 688, 696 (BIA 2012). This Court has described children in Petitioners’ position as “a hair’s breadth from being able to adjust their status,” *Osorio-Martinez*, 893 F.3d at 174, and reopening removal proceedings requires only a “reasonable likelihood” of relief, *Shardar v. Att’y Gen.*, 503 F.3d 308, 313 (3d Cir. 2007), a standard that SIJS beneficiaries more than surpass. Third, in declining to *sua sponte* reopen Petitioners’ removal proceedings, the Board never engaged with the very findings that define SIJ eligibility—Petitioners’ approved Form I-360 and the state court’s determinations that each Petitioner was abused, neglected, or abandoned and could not safely be returned home—an omission that independently warrants reversal.

The stakes are high and concrete. A child denied reopening becomes removable to the country, and often to the very home, that a state court has already found, and USCIS has affirmed, is unsafe for that child. Amici respectfully urge the Court to hold that an approved SIJS petition cannot be deemed “too speculative” to support granting a motion to reopen, so that the children Congress chose to protect are not denied that chance for the sole offense of waiting their turn in line. This Court should not allow the Board to slam shut the door Congress left open for vulnerable children.

ARGUMENT

I. CONGRESS ESTABLISHED SIJS TO PROTECT ABUSED, NEGLECTED, AND ABANDONED CHILDREN, AND THE BOARD’S RULE DEFEATS THAT DESIGN

A. Congress Established Special Immigrant Juvenile Status to Protect the Welfare of Vulnerable Children

In 1990, Congress established Special Immigrant Juvenile Status “to safeguard abused, abandoned, or neglected [noncitizen] children” who fulfill certain “rigorous” statutory criteria designed to identify a “close, dependency relationship with the United States.” *Osorio-Martinez*, 893 F.3d at 158, 169 (citing 8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(c)). SIJS requires applicants to meet strict eligibility rules and may only be granted to children who are physically present in the United States, unmarried, and under the age of twenty-one; who obtain state juvenile court findings that reunification with at least one parent is not viable and return to their country of origin is not in their best interests; and who receive both approval from USCIS and consent of the Secretary of Homeland Security. *Id.* at 169.

Since the enactment of the original SIJS statute, Congress has *broadened* SIJS eligibility criteria, making clear its intent to increase protection for vulnerable immigrant children. *See* Pub. L. No. 102-232, 105 Stat. 1733 (1991) (providing that noncitizens with SIJS are “paroled into the United States”); Pub. L. No. 110-457, 122 Stat. 5044 § 235(d) (2008) (extending SIJS to children abused, neglected, or abandoned by one parent and exempting SIJS beneficiaries from common grounds of inadmissibility). Congress deemed SIJS beneficiaries “paroled into the United

States” for purposes of adjustment, 8 U.S.C. § 1255(h)(1), so that they may adjust status from within the United States regardless of their manner of entry. It exempted them from numerous grounds of inadmissibility and made others waivable “for humanitarian purposes, family unity, or when it is otherwise in the public interest.” 8 U.S.C. § 1255(h)(2)(B).² And Congress conferred access to federally funded educational programming to SIJS beneficiaries while they await adjustment of status. *See* 8 U.S.C. § 1232(d)(4)(A). The special eligibility requirements and benefits associated with SIJS “show[] a congressional intent to assist a limited group of abused children to remain safely in the country with a means to apply for LPR status.” *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011).

Until recently, federal agencies also recognized and implemented Congress’s protective purpose and its intent to create for SIJS beneficiaries the “possibility of becoming citizens of the United States in the future.” *See, e.g.*, 58 Fed. Reg. 42843, 42844 (Aug. 12, 1993) (rule implementing adjustment of status for SIJ-classified noncitizens); U.S. Citizenship & Immigr. Servs., Policy Alert: Special Immigrant Juvenile Classification and Deferred Action (Mar. 7, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual->

² “The fact that Petitioner[s]’ removal is predicated on a ground that the statute explicitly waives for SIJs, [their] inadmissibility, highlights the tension between Congressional intent and the executive branch’s actions.” *Xol-Maas v. Francis*, 2026 WL 457005, at *8 (S.D.N.Y. Feb. 18, 2026).

updates/20220307-SIJAndDeferredAction.pdf (policy update implementing consideration for deferred action for SIJS holders). Also until recently, immigration authorities recognized the effective inevitability of visa availability and treated approved SIJS beneficiaries as prima facie eligible for adjustment. *See, e.g., Francisco v. Dedos*, 2026 WL 145456, at *3 (D.N.M. Jan. 20, 2026) (noting that in 2022, DHS had moved to dismiss a SIJS petitioner’s removal proceedings recognizing that he “appears prima facie eligible to adjust status with USCIS once the Form I-360 is approved”); *see also* Mem. from Michael A. Falcone, Deputy Principal Legal Advisor for Field Legal Operations, DHS, to All OPLA Field Personnel, re: Guidance for Handling Juvenile Matters, § IV (Dec. 21, 2023), <https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/6a7dccde5403aa5f38549be3/1786629342869/Dec.+2023+OPLA+Juvenile+Guidance.pdf> (“2023 DHS Memo”).

B. SIJS Confers Procedural Protections and an Opportunity to Seek Adjustment That the Board’s Rule Would Render Illusory

In establishing the SIJS framework, Congress “marshalled” its plenary power over immigration to “protect vulnerable youth from leaving the United States and returning to a country where harm will come to them.” *Osorio-Martinez*, 893 F.3d at 176; *Joshua M. v. Barr*, 439 F. Supp. 3d 632, 665 (E.D. Va. 2020). To that end, SIJS beneficiaries receive “some of the most robust procedural safeguards accorded to noncitizens,” *Ramos-Lopez v. Bondi*, 2026 WL 1745700, at *6 (D. Md. June 17,

2026), including protection from SIJS revocation without “good and sufficient cause,” notice, and an opportunity to present evidence in opposition and to appeal. *See* 8 U.S.C. § 1155(h); 8 C.F.R. § 205.2.

Removal of SIJS beneficiaries from the United States—which strips them of both SIJ status and the opportunity to adjust status, *see* 8 U.S.C. §§ 1101(a)(27)(J), 1255(h)—“eviscerate[s]” these rights and protections and “hardly accords respect to Congress’s wide-ranging authority” over immigration. *Osorio-Martinez*, 893 F.3d at 176. District courts have thus rejected the actual enforcement of removal orders against SIJS beneficiaries who are eligible to adjust status but lack a current visa, concluding that removal would violate their due process right “in being afforded an opportunity to have [their] adjustment of status application[s] adjudicated.” *Xol-Maas*, 2026 WL 457005, at *9; *see also Walter A. v. Easterwood*, 2026 WL 836428, at *20 (D. Minn. Mar. 26, 2026); *Medina Lopez v. Raycraft*, 2026 WL 1370583, at *9 (E.D. Mich. May 15, 2026); *Del Cid v. Bondi*, 2025 WL 2985150, at *4 (W.D. Pa. Oct. 23, 2025) (government “must provide [SIJS recipients] an opportunity to pursue adjustment of status”).

If reopening is categorically denied, as the government seeks, the minor Petitioners here, both with granted SIJS petitions, would risk removal and the dire consequences that would follow. “Without a reopening or a continuance, an alien is subject to a final order of removal, despite the fact that he may have a[n] . . .

adjustment application pending before USCIS.” *Kalilu v. Mukasey*, 548 F.3d 1215, 1218 (9th Cir. 2008). Petitioners face no barrier to adjusting their status once their visa date becomes current, as they are statutorily exempt from the only grounds of inadmissibility that DHS has charged—nor does the government argue otherwise. Having been granted SIJS over a year after the entry of their final order of removal and the Board’s dismissal of their appeal, minor Petitioners had no opportunity to pursue adjustment of status while their removal proceedings were active. But without reopening, minor Petitioners remain subject to a final removal order whose enforcement would foreclose their only pathway to adjustment—the core benefit of SIJ classification—effecting a de facto revocation of their status, forcing them back into the homes where they were abused, neglected, or abandoned: the very result Congress sought to prevent.

Finally, the Board’s view of SIJS relief as speculative unless a visa number is immediately available raises serious due process concerns. Although a SIJS beneficiary is not “entitled merely by virtue of having obtained SIJ status” to a favorable exercise of discretion on adjustment, they *are* entitled to “any constitutional protections regarding their application” for adjustment or relief from removal. *See Osorio-Martinez*, 893 F.3d at 175. And “[n]othing in [this Court’s] precedent suggests . . . the happenstance that visas are not currently available is dispositive.” *Id.* “Petitioner[s] . . . have due process rights in being afforded an

opportunity to have [their] adjustment of status application adjudicated. . . .

[R]emoval from the United States while [they] enjoy[] SIJ status but ha[ve] yet to have the opportunity to apply for adjustment of status would violate due process.”

Xol-Maas, 2026 WL 457005, at *9. “[T]he Government must provide them an opportunity to pursue adjustment of status, and the way in which the Government seeks to remove them must adequately take stock of their SIJ Status.” *Del Cid*, 2025 WL 2985150, at *4 (citing *Osorio-Martinez*, 893 F.3d at 175). The Board’s ruling would all but eliminate that opportunity, rendering illusory the protections Congress intended to put in place for SIJS beneficiaries. Granting a motion to reopen to consider a new SIJS grant, however, would redress the constitutional infirmity of the Board’s decision by affording Petitioners the chance to apply for adjustment.

C. The Board’s Rationale Would Deny Reopening to Every SIJS Beneficiary Awaiting a Visa Number

Moreover, the Board’s rationale for denying reopening—that the minor Petitioners do not yet have a visa available to them (and would not have an available visa at some near future date)—describes the current situation of nearly every SIJS recipient. If applied to SIJS beneficiaries similarly situated to Petitioners, this reasoning would, effectively, shut down the SIJS program. As USCIS has acknowledged, “Congress likely did not envision that SIJ petitioners would have to wait years before a visa became available.” U.S. Citizenship & Immigr. Servs.,

Policy Alert: Special Immigrant Juvenile Classification and Deferred Action (June 6, 2025), <https://shorturl.at/Eanp8>. Further, “the lack of an immediately available visa does not negate Congress’s intent . . . that [SIJS] Petitioner[s] have an opportunity to pursue lawful permanent residence in the United States.” *Alfaro Herrera v. Baltazar*, 2026 WL 91470, at *8 (D. Colo. Jan. 13, 2026). But under the Board’s ruling, *all* SIJS beneficiaries who must wait four or more years in the visa queue should be subject to removal. For SIJS recipients, then, who have no path to lawful permanent residence other than SIJS-based adjustment, which cannot be pursued from abroad, removal would block them from ever securing lawful permanent resident status—a de facto revocation of the status they earned. *See Xol-Maas*, 2026 WL 457005, at *9. The Board cannot, “in a single sentence,” frustrate Congress’s entire purpose in establishing the SIJS scheme, particularly without considering the gravity of its decision. *See E.A.C.A. v. Rosen*, 985 F.3d 499, 508 (6th Cir. 2021) (“[W]e may not assume that the Board considered factors that it failed to mention in its opinion.” (citation omitted)). Petitioners “should not have to bear the ultimate cost for [the government’s] inefficiencies. If approval can wait, then surely removal can also wait.” *Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011).

II. AN APPROVED I-360 PETITION ESTABLISHES *PRIMA FACIE* ELIGIBILITY FOR ADJUSTMENT OF STATUS

A. *Prima Facie* Eligibility for Adjustment Requires Only Objective Evidence Showing a Reasonable Likelihood That the Applicant Is Entitled to Relief

The BIA incorrectly held that Petitioners failed to demonstrate prima facie eligibility for relief notwithstanding their approved I-360 petitions. That holding rests on a basic definitional mistake. To establish prima facie eligibility, an applicant need only “produce objective evidence showing *a reasonable likelihood* that he can establish [that he is entitled to relief].” *Shardar*, 503 F.3d at 313 (emphasis added). Put another way, evidence showing a realistic chance of success upon remand is all Petitioners are required to demonstrate. *See Guo v. Ashcroft*, 386 F.3d 556 (3d Cir. 2004). The inquiry is limited to “the merits of the application,” and the Board considers only the application, such as the Form I-485, supporting documentation, and USCIS fee receipts. *See Matter of Hashmi*, 24 I&N Dec. 785, 792 (BIA 2009). Only if admissibility is challenged need “the respondent . . . provide evidence establishing his admissibility or his eligibility for a corresponding waiver of inadmissibility.” *Id.* Prima facie eligibility is thus a question distinct from whether adjustment should ultimately be granted. In finding an applicant prima facie eligible, the Board decides “only that there is a reasonable likelihood that the statutory requirements for the relief sought” can be fulfilled on remand—not “that the respondents should be granted [relief] as a matter of law or discretion if the facts alleged are shown to be true.” *Matter of L-O-G-*, 21 I&N Dec. 413, 419, 422 (BIA 1996) (en banc).

This Court’s decision in *Guo*, 386 F.3d 556, illustrates the necessary showing required to demonstrate prima facie eligibility, which is intended to be a “relatively low bar,” *Lin v. Att’y Gen.*, 847 F. App’x 136, 137 (3d Cir. 2021). The Board had denied Guo’s motion to reopen on the ground that she failed to establish a “well-founded fear” of persecution. *Guo*, 386 F.3d at 563. Her argument was supported by a prior Board decision granting reopening to a similarly situated applicant, a new asylum application, her marriage certificate, her child’s birth certificate, a letter from her obstetrician, and a demographer’s affidavit. *Id.* at 560. This Court held that the Board had applied “an excessively rigorous standard” by engaging in fact-finding at the prima facie stage. *Id.* at 564. And rather than remand for the Board to reapply the correct standard, this Court concluded as a matter of law that Guo’s evidence sufficed because it showed “a realistic chance of success on remand.” *Id.*

B. Delayed-but-Certain Visa Availability Is Not Speculative: The Only Question Is *When*, Not *If* Petitioners Will Be Able to Adjust Status

The Board subjected Petitioners to an improper, and more demanding, standard for establishing prima facie eligibility. It cursorily dismissed Petitioners’ “approved visa petitions for special immigrant juvenile classification,” concluding that they are not prima facie eligible for relief because their “eligibility for adjustment of status based on an approved special immigrant juvenile petition is speculative considering the 4-year delay in visa availability.” *Matter of Z-R-C-N-*,

29 I&N Dec. 523, 526–27 (BIA 2026). That reasoning confuses *when* Petitioners will obtain permanent resident status with *if* they are eligible for it. Petitioners have obtained SIJS, and no fact bearing on Petitioners’ eligibility is in dispute: USCIS has already adjudicated and approved their petitions, and EB-4 visa numbers will become available; the only open question is the date. *Id.* at 527.

The Board’s own precedent recognizes the distinction between *prima facie* eligibility and an award of final relief. In *Avetisyan*, the Board contrasted “a purely speculative event or action (such as a possible change in a law or regulation)” with “an event or action that is certain to occur”—offering as its example of the latter the “remote availability of a fourth-preference family-based visa.” 25 I&N Dec. at 696.³ Thus, delayed-but-certain visa availability is not *speculative*; rather, the Board in *Avetisyan* deemed remote availability relevant to whether administrative closure is appropriate, but treated the eventuality of the visa as *certain*. *Id.* Immigration and Customs Enforcement guidance has also condoned using procedures to put a case on pause when “due solely to the statutory cap, a . . . visa is not currently available.” U.S. Immigr. & Customs Enf’t, ICE Directive 11005.2: Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U Visa) Petitioners §

³ Although the Board has made more recent pronouncements that are in tension with *Avetisyan*, it has not overruled this aspect of *Avetisyan*. To the extent that the Board departed from *Avetisyan*, it “did not explain its departure and, therefore, its disregard of its own precedents was arbitrary.” *Johnson v. Ashcroft*, 286 F.3d 696, 705 (3d Cir. 2002).

3.5 (2019). In fact, it described a determination in which the sole remaining barrier is a visa number as “the functional equivalent of a full adjudication on the merits of the petition.” *Id.*; *see also Benitez v. Wilkinson*, 987 F.3d 46, 55 (1st Cir. 2021) (noting that ICE recognizes “waitlist status entitles some aliens to relief from removal proceedings in appropriate circumstances”).

In any event, *Guo* makes clear that certainty is not required: objective evidence of a realistic chance of success suffices. 386 F.3d at 564. Petitioners’ prospect of adjustment, which is only delayed by the queue for visa numbers, is even stronger than the asylum claim this Court found sufficient in *Guo*, in which the applicant’s evidence in favor of asylum had not yet been weighed. *See id.*; *Matter of Z-R-C-N-*, 29 I&N Dec. at 527. An unknown final date that relief will occur does not render the relief unlikely to occur—no barrier but the passage of time stands in the way.

This Court’s precedent confirms that *prima facie* eligibility does not depend on immediate visa availability. In *Hashmi v. Attorney General of the United States*, the government contended that an applicant whose visa petition remained pending was only a potential candidate for adjustment, but this Court *rejected* the government’s position, holding that the petitioner “is not *potentially* eligible to apply for a status adjustment. It appears that he is eligible. He has already filed his I-130 petition, and is in the process of having the petition adjudicated.” 531 F.3d 256, 260

(3d Cir. 2008) (emphasis added) (distinguishing *Khan v. Att’y Gen.*, 448 F.3d 226 (3d Cir. 2006) because that petitioner had not filed, and was not yet eligible to file, a visa petition). Petitioners stand on stronger footing still: their petitions are not merely pending but approved. This Court also warned that “[a] ruling in favor of the government . . . would leave [the government] with no incentive to fix its procedures to avoid such a situation in the future and would allow the deportation of similarly-situated individuals” *Id.* at 261–62. So too here. Deporting Petitioners because of a government-created backlog—a delay for which they bear no responsibility—would defeat Congress’s intent in creating SIJS. SIJS was enacted “to protect abused, neglected, or abandoned children.” *Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216, 221 (3d Cir. 2003). Removing Petitioners without allowing them to “apply for adjustment of status when a visa is available renders the status functionally meaningless” and completely deprives them “of the benefit of that process.” *Medina Lopez*, 2026 WL 1370583, at *10.

Petitioners *will* be eligible to adjust status once their visa priority date becomes current, so the question is *not* their eligibility for adjustment of status. The Board resists this conclusion citing *Matter of Cahuec Tzalam*, 29 I&N Dec. 300 (BIA 2025), incorrectly relating Petitioners’ motion to reopen to administrative closure, a

docket-management tool that pauses removal proceedings.⁴ *See Avetisyan*, 25 I&N Dec. at 692 (administrative closure “temporarily remove[s]” a case from the immigration docket). Minor Petitioners here seek reopening in order to continue to seek adjudication or termination of their removal cases and to exercise their statutory and due process rights as SIJS beneficiaries to pursue adjustment of status. *Cf. Potdar v. Mukasey*, 550 F.3d 594, 597 (7th Cir. 2008) (denial of continuance “effectively prevented [petitioner] from exercising his statutory right to apply for adjustment of status”). It is well-settled that SIJS beneficiaries in removal proceedings who are awaiting visas can seek termination or continuance. *See Matter of Coronado Acevedo*, 28 I&N Dec. 648, 651–52 (A.G. 2022) (interim Attorney General decision holding that immigration judges and the BIA can grant termination where “necessary for the respondent to be eligible to seek immigration relief”); *see also* 8 C.F.R. § 1003.18(d)(1)(ii)(B) (immigration judges can, exercising discretion, terminate the case when respondent is “prima facie eligible for naturalization, relief from removal, or lawful status”); 8 C.F.R. § 1003.29 (immigration judges “may grant

⁴ Although this issue is not directly before the Court, it should not rely on this case as it was an unreasoned departure from previous Board precedent and should therefore be vacated. *Cahuec Tzalam* improperly claims that multiple previous cases held administrative closure could not be granted to await a visa. *See* 29 I&N Dec. at 305. But each of those turned on another key factor: separate availability of relief in the underlying removal proceedings, *see Matter of B-N-K-*, 29 I&N Dec. 96, 101 (BIA 2025), ineligibility due to criminal activity, *see Matter of Gomez-Beltran*, 26 I&N Dec. 765, 772 (BIA 2016), or requested relief the judge had no jurisdiction to grant, *see Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982).

a motion for continuance for good cause shown”); USCIS Policy Manual pt. J, ch. 4 n.2, <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4> (last accessed Aug. 5, 2026) (“If an SIJ is in removal proceedings, the immigration court must terminate the proceedings before USCIS can adjudicate the adjustment application.”).

Circuit courts have been clear that “[t]he absence of an immediately available visa is not a reason to deny a continuance ‘but merely a statement of the obvious.’” *Ahmed v. Gonzales*, 465 F.3d 806, 810 (7th Cir. 2006) (quoting *Subhan v. Ashcroft*, 383 F.3d 591, 593 (7th Cir. 2004)). Recipients of SIJS have already met a “rigorous” set of statutory requirements, are entitled to apply for adjustment of status once a visa becomes available, and hold a place in a line that by statute must advance. *Osorio-Martinez*, 893 F.3d at 163, 168. They are “a hair’s breadth from being able to adjust their status.” *Id.* at 174; *see also Portillo v. Holder*, 350 F. App’x 506, 510 n.3 (2d Cir. 2009) (“Visas will certainly become available *The only question is when, not if.*” (emphasis added)); *see also* 2023 DHS Memo, *supra*. For this reason, “deferred action ha[d] been broadly awarded to SIJS beneficiaries for four-year terms so that the recipients [might] be physically present in the United States when their priority dates issue[d].” *Ramos-Lopez*, 2026 WL 1745700, at *3. At best, then, the Board’s opinion denying a simple request for reopening represents an

unreasoned departure from past practice and must be vacated for further explanation. *See Johnson*, 286 F.3d at 700.

Further, refusal to reopen for children who have not merely applied for but obtained SIJS cannot be squared with this Court’s precedent, and the Board offered no reasoned explanation for departing from it. *See id.* As this Court has observed, “the BIA has made clear its conclusion that even mere applicants for SIJ status—let alone children who have already received SIJ status—should not be removed from the country,” having “repeatedly held” that, absent evidence of ineligibility, an immigration judge “‘should, as a general practice, continue proceedings to await adjudication of a pending state dependency petition.’” *Osorio-Martinez*, 893 F.3d at 173 (quoting *In re Gonzalez-Morales*, 2015 WL 4873234, at *1 (BIA July 2, 2015)).⁵ Finally, Congress was clear in “the text of the INA” that it was granting “a status” to SIJS designees that grants “a host of legal rights and protections,” not simply an empty promise. *Id.* at 161 n.7. The Board’s premise that an approved petition counts for nothing is at odds with the statute, this Court’s precedent, and the

⁵ DHS’s “pursuit of Petitioner[s]’ removal via ICE, despite USCIS granting Petitioner[s] SIJ status, is directly contradictory and thus arbitrary and capricious.” *Alfaro Herrera*, 2026 WL 91470, at *13. Such internal contradictions are independently grounds to vacate and remand this case. *See Gen. Chemical Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (holding “internally inconsistent” agency actions are contrary to law).

agency's own longstanding treatment of these children, and thus is wrong as a matter of law.

Whether there is an objective chance of success on remand incorporates the possibility of the immigration judge on remand granting a continuance, terminating removal proceedings, or administratively closing the case. Any of these procedural mechanisms could cover the time delay between remand and Petitioners' priority date becoming current. Because "it is the IJ who customarily grants a continuance" or other postponement of proceedings, the relief Petitioners requested "from the Board" was "reopening the proceedings and remanding to the IJ for consideration of further relief," which allows incorporation of possible procedural paths available on remand to the IJ. *See Benitez*, 987 F.3d at 53.

The Board therefore should accept USCIS's approval of an I-360 petition as sufficient evidence of prima facie eligibility for adjustment of status; it should not second-guess that approval by recasting a delay in visa availability as doubt about eligibility itself. Because Petitioners' approved petitions supply objective evidence of far more than a reasonable likelihood that they are entitled to permanent resident status, the Board's contrary holding must be vacated.

C. The Board's Contrary Rule Is Inconsistent With Past Practice and Circuit Court Precedent

Both the Board—and all Circuit Courts to have considered the issue—have long held that analogous cases should be remanded for consideration of whether a

continuance is appropriate, despite a visa backlog. Specifically, U visas face a similar backlog to EB-4 visas, and the BIA's established practice was to remand these analogous cases to the immigration court, *see Benitez*, 987 F.3d at 54, "for consideration of whether proceedings should be continued pending a decision by USCIS on . . . [a U visa] petition," *In re Ramirez-Rios*, 2016 WL 1084499, at *1 (BIA Feb. 29, 2016); *see also, e.g., In re Carillo*, 2018 WL 1897754, at *1 (BIA Feb. 12, 2018).⁶ And multiple Courts of Appeals have held that "the backlog and slow processing time for U visas do not suffice, under the [BIA's] own rules, to justify the denial of a continuance." *Guerra Rocha v. Barr*, 951 F.3d 848, 854 (7th Cir. 2020); *see also Malilia*, 632 F.3d at 606 (denying "an otherwise reasonable continuance request" because of a delay of "months or even years" was "akin to

⁶ Although the Board may point to its recent opinions that conflict with past practice, an agency "acts arbitrarily if it departs from its established precedents without announcing a principled reason for its decision." *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 608 (3d Cir. 2011). "The BIA abuses its discretion in denying a motion for a continuance when, as here, it relies solely on secondary factors," such as efficiency. *Cabrera v. Garland*, 21 F.4th 878, 883 (4th Cir. 2022). But a number of recent opinions, such as *Matter of Pinzon Roza*, 29 I&N Dec. 507, 508–09 (BIA 2026) and *Matter of Cahuec Tzalam*, 29 I&N Dec. at 304, announce no basis for departure from past precedent, improperly give secondary factors dispositive weight *sub silentio*, and this Court should therefore disregard them.

Further, although the previous opinions establishing the Board's past practice were unpublished, "we see no earthly reason why the mere fact of nonpublication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases." *Benitez*, 987 F.3d at 54 (quoting *Thompson v. Barr*, 959 F.3d 476, 487 (1st Cir. 2020)).

‘blaming a petitioner for an administrative agency’s delay’” (quoting *Ahmed v. Holder*, 569 F.3d 1009, 1013 (9th Cir. 2009)); *Quecheluno v. Garland*, 9 F.4th 585, 589 (8th Cir. 2021) (remanding case to BIA on motion to reopen and remand despite a backlog of “5 years or more”).⁷

Even in a discretionary posture, the Board and the Courts of Appeals recognize that a backlog beyond the applicant’s control does not diminish the likelihood that relief will ultimately be granted. *See, e.g., Guerra Rocha*, 951 F.3d at 854; *Malilia*, 632 F.3d at 606. *A fortiori*, such a backlog cannot defeat the antecedent, less demanding question of whether an applicant is *prima facie* eligible to adjust. *See Shardar*, 503 F.3d at 313 (reopening requires only a “reasonable likelihood” of relief); *Lin*, 847 F. App’x at 137 (*prima facie* eligibility is a “relatively low bar”).

Further, the Board has no principled reason for treating SIJS beneficiaries differently from U-visa beneficiaries, for whom it has recognized that a visa backlog does not preclude a finding of *prima facie* eligibility. Even without an administrative

⁷ In *Matter of Ibarra-Vega*, 29 I&N Dec. 476, 480–81 (BIA 2026), the Board recently sought to distinguish *Malilia* on the ground that visa unavailability caused by Congress’s annual cap “is not the same as ‘delays in the USCIS approval process.’” However, whether the wait results from statutory visa caps or from agency processing times, the delay is equally outside the noncitizen’s control—the very rationale of *Malilia* and *Guerra Rocha*—and it supplies no principled basis for penalizing children who have done everything the statute asks of them. *Ibarra-Vega*, moreover, addressed the re-calendar of administratively closed proceedings, which is a docket-management question, not *prima facie* eligibility to adjust.

stay, U-visa petitioners are entitled to a “rebuttable presumption . . . warrant[ing] a favorable exercise of discretion for a continuance” of removal proceedings because the government has conceded that they filed “a prima facie approvable” U-visa application. *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 815 (BIA 2012); *cf. Guerra Rocha*, 951 F.3d at 853 (criticizing the Board for failing to “even mention the likelihood that [the petitioner’s] application would be granted”). In fact, Congress’s purpose in creating SIJS suggests special solicitude for children who *necessarily* face harm upon removal to the home where they faced abuse, neglect, or abandonment. Further, “Congress clearly contemplated that SIJ designees would remain in the United States while awaiting adjudication of their adjustment of status applications.” *Xol-Maas*, 2026 WL 457005, at *8. Therefore, adopting a more searching version of prima facie eligibility for SIJS compared to the U-visa is an inconsistent, unprincipled departure from past practice and must be vacated. *See Valdiviezo-Galdamez*, 663 F.3d at 608.

III. THE BOARD’S REFUSAL TO REOPEN *SUA SPONTE* RESTS ON LEGAL ERROR AND REQUIRES REMAND

A. A Refusal to Reopen *Sua Sponte* That Rests on an Error of Law Is Subject to Review and Remand

The Board’s alternative disposition denying *sua sponte* reopening cannot be sustained as an exercise of discretion. It dismissed Petitioners’ request for *sua sponte* reopening in a single conclusory sentence. *Matter of Z-R-C-N-*, 29 I&N Dec.

at 527. That ruling rests on a legal misapprehension of what an approved SIJS petition establishes, of the binding judicial and agency findings it embodies, and of the Board's own precedent. Where a refusal to reopen *sua sponte* "reflects an error of law," this Court "ha[s] the power and responsibility to point out the problem," and remand is required. *Pllumi v. Att'y Gen.*, 642 F.3d 155, 160 (3d Cir. 2011) (citing *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009)). The Board designated this decision as precedent, *Matter of Z-R-C-N-*, 29 I&N Dec. at 523 & n.1, so its rationale now binds immigration judges and the Board itself in future SIJS cases. An error of that reach is precisely the kind of exceptional circumstance this Court should correct now, before it is reflexively applied and petitions for review accumulate.

B. Because the Circumstances Required to Obtain SIJS Are Necessarily Exceptional, SIJS Beneficiaries Are Not Categorically Outside the Board's *Sua Sponte* Authority

The Board's *sua sponte* reopening authority is reserved for "exceptional situations," *Matter of G-D-*, 22 I&N Dec. 1132, 1134–35 (BIA 1999), but Congress has already explained why SIJS beneficiaries merit exercise of that authority, given who qualifies for beneficiary status.

SIJS approval requires an adjudicated finding in line with Congress's definition. The governing statute requires a finding that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a

similar basis found under State law,” together with a determination that returning the child to her country of origin would not be in her best interest. 8 U.S.C. § 1101(a)(27)(J). Further, here USCIS has independently confirmed those findings by approving the I-360 petitions.

C. The Predicate Findings Belong to State Juvenile Courts and USCIS, Not the Board

The premise that the Board could look past the SIJS findings also misapprehends *who* is charged with making those findings. The SIJS statutory scheme allocates authority very specifically: state “juvenile courts,” such as family courts, make the predicate findings concerning dependency or custody, abuse, neglect, or abandonment, and best interests, while USCIS adjudicates the petition itself. *See* 8 U.S.C. § 1101(a)(27)(J); *Osorio-Martinez*, 893 F.3d at 163. Neither determination is the Board’s to revisit.

The Board’s interpretation of the law intrudes on the authority of state courts and is thus legally dubious. *See T. M. v. Univ. of Maryland Med. Sys. Corp.*, 146 S. Ct. 1739, 1751 (2026) (blocking review of state court judgments to preserve “cooperation and comity”). Custody and welfare questions are “traditionally rendered by state courts applying state law,” and nothing in the INA suggests that Congress “intended to displace the common understanding” of those terms. *Perez v. Cuccinelli*, 949 F.3d 865, 875 (4th Cir. 2020) (en banc) (citing *Thompson v. Thompson*, 484 U.S. 174, 186 (1988)). In line with that tradition, “state juvenile

courts generally have jurisdiction over immigrant juveniles within their territory,” and the SIJS statute “explicitly recognizes—in fact, requires—attention to the judgments of state juvenile courts concerning the dependency, custody, and best interests of juvenile immigrants.” *Gao v. Jenifer*, 185 F.3d 548, 554 (6th Cir. 1999). When the Board ignores a state court’s specific findings of abuse, neglect, or abandonment, as it has here, it flouts our system of federalism and exceeds the authority Congress delegated to it.

D. The Board Failed to Weigh the Findings and Record It Was Required to Consider

The Board’s rationale here reflects a legal error because of its misapprehension of its authority. It failed to “review . . . the record as a whole,” and “balance the positive and adverse matters to determine whether discretion should be favorably exercised.” *Matter of Marin*, 16 I&N Dec. 581, 585 (BIA 1978). The Board’s role was to weigh the state court’s findings, the approved I-360 petitions, and the individual circumstances of these children, not to relitigate them. Instead, it impermissibly disregarded and disposed of those findings. *See Matter of Z-R-C-N-*, 29 I&N Dec. at 527.

This Court has repeatedly held that such an approach is impermissible. *See Pllumi*, 642 F.3d at 163 (case remanded given “the BIA mistakenly thought it did not have the authority to consider [the petitioner’s] health concerns”); *see also Mahmood*, 570 F.3d at 469 (holding that “where the Agency may have declined to

exercise its *sua sponte* authority because it misperceived the legal background and thought, incorrectly, that a reopening would necessarily fail, remand to the Agency for reconsideration in view of the correct law is appropriate”). In *Hashmi*, it reversed where the adjudicator “treated [the] case as if it were interchangeable with any other case within the same . . . category,” explaining that “[t]o reach a decision . . . with no regard for the circumstances of the case itself, is impermissibly arbitrary.” 531 F.3d at 261. The Board’s lack of engagement with the record’s material facts does not reflect a discretionary judgment entitled to deference. Rather, it signals a decision grounded in legal error—namely, the view that SIJS findings and the certain, albeit delayed, availability of a visa are irrelevant as a matter of law.

Further, the Board’s rationale, if applied to persons similarly situated to Petitioners, would foreclose *sua sponte* reopening to *every SIJS beneficiary* because its premise operates as a categorical bar based on priority date currentness. See Section I, *supra*. That is not a speculative possibility, given that the Board has designated the present decision as precedent.

CONCLUSION

This Court should not allow the Board to frustrate Congress’s explicit humanitarian purpose and should grant the petition for review.

August 20, 2026

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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that at least one attorney whose name appears on this brief is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,466 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

3. This brief complies with this Court's Rule 31.1(c) because the document has been scanned with version 14 of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2026, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

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CERTIFICATE OF IDENTICAL TEXT

Pursuant to Third Circuit L.A.R. 31.1(c), I hereby certify that the text of the electronic brief filed on August 20, 2026, is identical to the text of the hard copies of the brief that are being submitted to this Court.

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