

## Young Center Proposal for a Best Interests of the Child Visa<sup>1</sup>

Issue to be addressed: The best interests standard is the fundamental principle guiding decisions in dependency and custody proceedings pursuant to state domestic child welfare laws in the United States. It is also the guiding principle under international law as set forth in the Convention on the Rights of the Child. Although the U.S. “best interests” model as applied to children in domestic cases was the benchmark around which the international Convention on the Rights of the Child was crafted, U.S. immigration law does not provide a statutory best interest standard.<sup>2</sup> At present, the TVPRA § 235(c)(6) provides for the appointment of Child Advocates for trafficking victims and other vulnerable unaccompanied immigrant children and provides that the role of the Child Advocate is to advocate for the best interests of the child. The Child Advocate makes best interests recommendations to decision makers using standards set forth in state child welfare laws and international law. However, at present, many immigration judges still do not consider the child’s safety and well-being when making decisions regarding removal. We regularly see cases where children who lack a basis to apply for immigration status, face long-term separation from their parents if deported or face return to countries where they have no one to care for them. Some decision-makers believe that without a statutory best interests standard, their hands are tied and they must order the child deported in such cases. A statutory best interests standard would require judges to consider the child’s best interest—safety and well-being—and would bring U.S. immigration law in line with state child welfare law.

The following draft language sets forth the framework for a best interests visa. The visa would be considered after all other forms of relief are denied (with the exception of voluntary departure). The essential element is a finding that it would not be in the best interests of the child to be repatriated. The language below also includes a definition for best interests.

The following amendments are recommended:

Section 101(a)(27) of the Immigration and Nationality Act:

**(N) an immigrant who is present in the United States—**

**(i) who is a child (as defined in section section 101(b)**

**(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the best interests of the child (as defined in section 235(c)(7) of the TVPRA) to be returned to the alien’s previous country of nationality or country of last habitual residence.**

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<sup>1</sup> Drafted January 18, 2011, with revisions drafted in June 2013.

<sup>2</sup> There is one form of protection—Special Immigrant Juvenile Status—in which a best interest determination is required for children who have been abused, abandoned and neglected. In these cases, the federal government has discretion to grant permission for the state court to make a determination about whether it is in the child’s best interest not to be returned to his/her country of origin. Immigration & Nationality Law, Sec. 204.11(c)(6). This section was drafted in consultation with Sarah Diaz, of DePaul Law School.

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TVPRA § 235(c).<sup>3</sup>

**(7) Best Interests of the Child.—The best interests of the child shall be a primary consideration in all proceedings where an alien child (as defined in section 462(g) of the Homeland Security Act) is the respondent or applicant. In determining the best interests of the child, a decision-maker must consider all relevant factors, including, but not limited to:**

**(1) the safety of the child;**

**(2) the child's need for permanence, which includes the child's need for stability and continuity of relationships with parent figures and with siblings and other relatives;**

**(3) the wishes of the child's parent(s) or legal guardian; and**

**(3) the child's opinion in accordance with the child's age and maturity.**

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<sup>3</sup> The revisions to the best interests standard language were drafted in consultation with Lisa Frydman, Center for Gender and Refugee Studies, Megan McKenna, Kids in Need of Defense (KIND), the Women's Refugee Commission, and Aryah Somers, attorney.