
# DACA LEGAL SERVICES TOOLKIT

**Practice Advisory 3 of 7**

## An alternative to DACA: Applying for SIJ Status

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# A Note from the Executive Director

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved significant victories in numerous major class action cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of immigrants and other disadvantaged communities**.**

This practice advisory is part of a *DACA Legal Services Tool Kit* produced by the Center for Human Rights and Constitutional Law including seven practice advisories addressing deportation defense, educational and other government services, employment rights, employment and family-based visa eligibility, individual deferred action status applications, and a potential legislative fix for DACA recipients.

This practice advisory reviews how many young, undocumented residents who can no longer apply for DACA status may apply instead for a program that affords greater protections than DACA: Special Immigration Juvenile Status (SIJS). Keep in mind that the information provided may also be relevant to other immigrant groups including those with individual deferred action status, or without status.

Manuals prepared by the Center are routinely reviewed for improvements and updates to reflect current policies and practices. This manual was researched and written by Staff Attorney Michael Denvir. Please feel free to email me at pschey@centerforhumanrights.org to suggest corrections, updates or edits to this practice advisory.

Peter Schey
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## DACA Overview

On September 5, 2017, Secretary of Homeland Security Elaine Duke rescinded the Deferred Action for Childhood Arrivals program, commonly known as "DACA."

DACA was an initiative, announced by DHS Secretary Napolitano in 2012, to provide what the agency refers to as "deferred action" to persons who were in the United States without authorization but who:

> • came to the United States under the age of sixteen;
> • has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
> • is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
> • has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
> • is not above the age of thirty."

*See* Letter from DHS Secretary Janet Napolitano, August 15, 2012 (available at https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf).

In order to apply for deferred action under DACA, an individual was required to submit evidence that s/he satisfied each of these criteria. Satisfaction of the criteria did not *guarantee* that DHS would approve such a person for deferred action, but the agency afforded deferred action to the vast majority of applicants, about 800,000 in total.

In the wake of the Trump administration's DACA rescission, these 800,000 children and young adults are in jeopardy of deportation to countries they do not know. Hundreds of thousands more may have qualified, but did not have the chance to apply for DACA before the program was rescinded.

Deferred action was an implicit promise to somewhat regularize the immigration status of these hundreds of thousands of undocumented youth. With that promise rescinded, many are now fearful of USCIS' next moves.

This memo will discuss how many of these young undocumented residents who can no longer apply for DACA status may apply instead for a program that affords greater protections than DACA: Special Immigration Juvenile Status (SIJS).

## Special Immigrant Juvenile Status

SIJS permits undocumented children who have come under the jurisdiction of a juvenile court and meet other requirements to become lawful permanent residents ("LPRs"). The most important benefit of applying for SIJS is obtaining lawful permanent resident status (i.e. a green card). Special immigrant juvenile status is one of the only routes for an undocumented child to gain lawful permanent immigration status in the U.S.

The SIJS provisions of the Immigration and Nationality Act were enacted by Congress in 1990 (*see* 8 USC § 1101 [a] [27] [J], as added by Pub L 101-649, § 153, 104 US Stat 4978). Under the statute, immigrant juveniles, or any person acting on their behalf (*see* 8 CFR 204.11 [b]), may petition the United States Citizenship and Immigration Services ("USCIS") for SIJS. To be eligible for SIJS, an immigrant juvenile must have an order from a state juvenile court with requisite findings of certain criteria:

1. That the child has been declared dependent on a juvenile court or legally committed to or placed under the custody of a state agency or department or an individual or entity appointed by a state or juvenile court;

2. That reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and

3. That it is not in the child's best interest to be returned to his or her country of nationality or last habitual residence.

*See* 8 U.S.C. § 1101(a)(27)(J). Once the state court issues SIJS order with these findings, a juvenile may apply to USCIS for SIJ status using an I-360 petition, and if granted SIJS, he or she may be considered for adjustment to lawful permanent resident status.

At the time of the enactment of the statute in 1990, a state court's SIJS predicate order was required to find that (1) the juvenile was dependent on a juvenile court located in the United States and had been deemed eligible for long-term foster care, and (2) it would not be in the juvenile's best interest to be returned to the juvenile's or parent's home country (*see* Pub L 101-649, § 153, 104 US Stat 4978, 5005-5006; *Gao v Jenifer*, 185 F3d 548 [6th Cir 1999]; [***14] *Perez-Olano v Gonzalez*, 248 FRD at 265; *Matter of Hei Ting C.*, 109 AD3d at 102-103; *Matter of Mario S.*, 38 Misc 3d 444, 449, 954 NYS2d 843 [Fam Ct, Queens County 2012]). In 1997, Congress modified the SIJS definition to include an immigrant whom a juvenile court had "legally committed to, or placed under the custody of, an agency or department of a State," and added the requirement that the finding of eligibility for long-term foster care be "due to abuse, neglect, or abandonment" (Pub L 105-119, § 113, 111 US Stat 2440, 2460 [105th Cong, 1st Sess, Nov. 26, 1997]). According to the House Conference Report, the modifications in the statute were made "in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children" (HR Rep 105-405, 105th Cong, 1st Sess at 130, reprinted in 1997 US Code Cong & Admin News at 2941, 2954; *see* *Yeboah v United States Dept. of Justice*, 345 F3d at 222; *Matter of Hei Ting C.*, 109 AD3d at 103).

In 2008, the requirements for SIJS were again amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (*see* Pub L 110-457, 122 US Stat 5044 [110th Cong, 2d Sess, Dec. 23, 2008]). The 2008 amendments expanded eligibility to include those immigrant children who had been placed in the custody of an individual or entity appointed by a state or juvenile court (*see* Pub L 110-457, 122 US Stat 5044, 5079; *Matter of Hei Ting C.*, 109 AD3d at 103-104). Congress also removed the requirement that the immigrant child had to be deemed *eligible for long-term foster care* due to abuse, neglect, or abandonment, and replaced it with a requirement that the juvenile court find 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" (Pub L 110-457, 122 US Stat 5044, 5079; *see Matter of Hei Ting C.*, 109 AD3d at 104; *Matter of Mario S.*, 38 Misc 3d at 449). \

In sum, the requirements for SIJS status are now codified at Immigration and Nationality Act § 101(a)(27)(J) and 8 U.S.C. § 1101(a)(27)(J):

> (J) an immigrant who is present in the United States--
> (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose 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;
> (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence;

As of December 2017, the time of this writing, regulations have still not been updated to reflect the 2008 TVPRA changes removing the requirement that the juvenile be "eligible for long term foster care." However, both the courts and USCIS recognize that the statute controls and the TVPRA changes are effective law. *See, e.g.,* USCIS Policy Manual, Volume 6, Part J, Chapter 1 at fn. 9 ("Certain portions of the regulations have been superseded. This part provides up-to-date guidance.").

The full history of SIJS amendments is outlined in the USCIS Policy Manual:

| Acts and Amendments | Key Changes |
|---|---|
| **The Immigration Act of 1990** | Established an SIJ classification for children declared dependent upon a juvenile court in the United States, eligible for long-term foster care, and for whom it would not be in their best interest to return to their country of origin |
| **Miscellaneous and Technical Immigration and Nationality Amendments of 1991** | Provided that children with SIJ classification were considered paroled for the purpose of adjustment of status to lawful permanent residence |

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| | Provided that foreign national children cannot apply for admission or be admitted to the United States in order to obtain SIJ classification |
| **The Immigration and Nationality Technical Corrections Act of 1994** | Expanded eligibility from those declared dependent on a juvenile court to children whom such a court has legally committed to, or placed under the custody of, a state agency or department |
| **The 1998 Appropriations Act** | Limited eligibility to children declared dependent on the court because of abuse, neglect, or abandonment<br><br>Provided that children are eligible only if the Attorney General (later changed to the Secretary of the Department of Homeland Security) expressly consents to the juvenile court order serving as a precondition to the grant of status<br><br>Prohibited juvenile courts from determining the custody status or placement of a child who is in the custody of the federal government, unless the Attorney General (later changed to the Secretary of the Department of Health and Human Services) specifically consents to the court's jurisdiction |
| **Violence Against Women Act of 2005** | Prohibited compelling an SIJ petitioner to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for SIJ classification |
| **The Trafficking Victims Protection and Reauthorization Act (TVPRA 2008)** | Removed the need for a juvenile court to deem a child eligible for long-term foster care and replaced it with a requirement that the juvenile court find that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law<br><br>Expanded eligibility to include children whom a juvenile court has placed under the custody of a person or entity appointed by a state or juvenile court |

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|---|---|
| | Provided age-out protections so that SIJ classification may not be denied to anyone, based solely on age, who was under 21 years of age on the date that he or she properly filed the SIJ petition, regardless of the petitioner's age at the time of adjudication<br><br>Simplified the consent requirement: The Secretary of Homeland Security now consents to the grant of SIJ classification instead of expressly consenting to the juvenile court order<br><br>Altered the "specific consent" function for those children in federal custody by vesting this authority with the Secretary of Health and Human Services, rather than the Secretary of the Department of Homeland Security<br><br>Added a timeframe for adjudication: USCIS shall adjudicate SIJ petitions within 180 days of filing |

USCIS Policy Manual, Volume 6, Part J, Chapter 1 (available at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter1.html#S-A).

## Additional requirement of "unmarried" juvenile

Marriage. Under DHS regulations, applicants for SIJS must remain unmarried until the entire process is completed and the USCIS grants permanent residency.

"Not married" includes a child whose marriage ended because of annulment, divorce, or death. (http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=28f308d1c67e0310VgnVCM100000082ca60aRCRD&vgnextchannel=28f308d1c67e0310VgnVCM100000082ca60aRCRD)

The requirement that the child be "unmarried" is not in the statute, but arises from USCIS' use of the definition of child found at INA § 101(b)(1) to interpret the use of the term "child" in TVPRA 2008 § 235(d)(6). Section 101(b)(1) states that a "child" is an unmarried person under 21 years of age. The SIJ definition found at INA § 101(a)(27)(J) does not use the term "child," but USCIS had previously incorporated the child definition of the INA § 101(b)(1) into the regulation governing SIJ petitions and this requirement has yet to be successfully challenged in court.

## What is a "juvenile court" under SIJS?

USCIS requires SIJS findings from a state "juvenile court." Immigration regulations define the term juvenile court as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a). The USCIS Manual also provides the following:

> The title and the type of court that may meet the definition of a juvenile court will vary from state to state. Examples of state courts that may meet this definition include: juvenile, family, dependency, orphans, guardianship, probate, and delinquency courts.

USCIS Policy Manual, Volume 6, Part J, Chapter 3, subsection (1)(a) (available at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter3.html#footnote-4).

Thus, practitioners should check statutes and case law in their state to be sure that the forum selected for initial SIJS finding is a state court with "jurisdiction under State law to make judicial determinations about the custody and care of juveniles."

As home to many undocumented juveniles, in 2014, California codified the jurisdiction and process of obtaining SIJS findings at California Civil Code §155. Under §155(a), any division of the Superior Court has jurisdiction to make SIJS findings (so any division of the California Superior Court is a "juvenile court" for the purposes of SIJS):

> (1) A superior court has jurisdiction under California law to make judicial determinations regarding the custody and care of children within the meaning of the federal Immigration and Nationality Act (8 U.S.C. § 1101 et seq. and 8 C.F.R. § 204.11), which includes, but is not limited to, the juvenile, probate, and family court divisions of the superior court. These courts have jurisdiction to make the factual findings necessary to enable a child to petition the United States Citizenship and Immigration Services for classification as a special immigrant juvenile pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code.
>
> (2) The factual findings set forth in paragraph (1) of subdivision (b) may be made at any point in a proceeding regardless of the division of the superior court or type of proceeding if the prerequisites of that subdivision are met.

Cal Code Civ Proc § 155(a).

## Requisite SIJS Findings:

The USCIS Policy Manual provides:

> To be eligible for SIJ classification, a juvenile court in the United States must have issued order (or orders) with the following findings:

•Dependency or Custody – Declares the petitioner dependent on the court, or legally commits or places the petitioner under the custody of either a state agency or department, or a person or entity appointed by a state or juvenile court;[4]

•Parental Reunification – Declares, under the state child welfare law, that the petitioner cannot reunify with one or both of the petitioner's parents prior to aging out of the juvenile court's jurisdiction due to abuse, neglect, abandonment, or a similar basis under state law; and

•Best Interests – Finds that it would not be in the petitioner's best interest to be returned (to a placement) in the petitioner's, or his or her parent's, country of nationality or last habitual residence.

USCIS Policy Manual, Volume 6, Part J, Chapter 2, at (D) (available at https://www.uscis.gov/policymanual/Print/PolicyManual-Volume6-PartJ-Chapter2.html)

California has promulgated procedures for SIJS findings under Cal Code Civ Proc §155(b) mirroring statutory SIJS requirements:

(1) If an order is requested from the superior court making the necessary findings regarding special immigrant juvenile status pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code, and there is evidence to support those findings, which may consist solely of, but is not limited to, a declaration by the child who is the subject of the petition, the court shall issue the order, which shall include all of the following findings:

(A) The child was either of the following:
(i) Declared a dependent of the court.
(ii) Legally committed to, or placed under the custody of, a state agency or department, or an individual or entity appointed by the court. The court shall indicate the date on which the dependency, commitment, or custody was ordered.

(B) That reunification of the child with one or both of the child's parents was determined not to be viable because of abuse, neglect, abandonment, or a similar basis pursuant to California law. The court shall indicate the date on which reunification was determined not to be viable.

(C) That it is not in the best interest of the child to be returned to the child's, or his or her parent's, previous country of nationality or country of last habitual residence.

These three eligibility findings for SIJS must be included in any state court predicate order. In addition, it is advisable to include a short statement of the factual basis for each finding, as well as citations to any state law provisions that the court relied upon in making the findings (such as statutory definitions of abuse, neglect, abandonment, etc.). Although Congress tasked state courts

with making these factual findings of eligibility because of their expertise in child welfare matters, USCIS has increased scrutiny of SIJS state court predicate orders in recent years. Because of USCIS's increased scrutiny, advocates are advised to include this additional information in the state court predicate order. As such, motions for SIJS findings to state courts should include a proposed order with the appropriate language.

The USCIS Policy Manual now provides:

> USCIS relies on the expertise of the juvenile court in making child welfare decisions and does not reweigh the evidence to determine if the child was subjected to abuse, neglect, abandonment, or a similar basis under state law. In order to exercise the statutorily mandated DHS consent function, USCIS requires that the juvenile court order or other supporting evidence contain or provide a reasonable factual basis for each of the findings necessary for classification as a SIJ. The evidence needed does not have to be overly detailed, but must confirm that the juvenile court made an informed decision in order to be considered "reasonable." USCIS generally consents to the grant of SIJ classification when the order includes or is supplemented by a reasonable factual basis for all of the required findings.

USCIS Policy Manual, Volume 6, Part J, Chapter 2, at (D)(5) (available at https://www.uscis.gov/policymanual/Print/PolicyManual-Volume6-PartJ-Chapter2.html)

In California, a uniform Judicial Council Form is available and should be used for all SIJS findings made in state courts. The Form FL-357 (family court)/GC-224 (probate court)/JV-357 (delinquency or dependency court) is available for free on the California Judicial Branch's website (http://www.courts.ca.gov). The form is appropriate for use in family court custody proceedings (such as a parentage, petition for custody, divorce, or domestic violence restraining order), probate guardianship proceedings, juvenile dependency proceedings, and juvenile delinquency proceedings. The form includes the three findings required to demonstrate eligibility for SIJS and
space to include information about the facts supporting each finding. Advocates are encouraged to use these areas to set forth a brief summary of the facts supporting each finding.

## Reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment

In addition to being declared a dependent, 8 USC § 1101(a)(27)(J)(i) mandates the court must find "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…" Attorneys should ensure that juvenile court orders submitted as evidence with an SIJ petition include this language as quoted above in 8 USC § 1101(a)(27)(J)(i).

***Where the Abuse Occurred:*** There is no requirement in the statute, regulation, or the INS memoranda that the abuse, neglect, or abandonment occur in the U.S. In fact, many immigrant children lost parents or escaped abusive parents in the country of origin and came alone to the U.S. Many U.S. juvenile courts are open to accepting these unaccompanied or abandoned

children in the same way they are open to accepting U.S. citizen children who are living on the street (in contrast to children directly removed from families). The only legal issue is whether the juvenile court has made its determinations based on abuse, neglect or abandonment of the child as defined under state law.

## What evidence must the juvenile court include in its order to establish that it made the order due to abuse, neglect or abandonment?

USCIS states that the factual basis for abuse, neglect, or abandonment:

> …does not have to be overly detailed, but must confirm that the juvenile court made an informed decision in order to be considered "reasonable." USCIS generally consents to the grant of SIJ classification when the order includes or is supplemented by a reasonable factual basis for all of the required findings.

USCIS Policy Manual, Volume 6, Part J, Chapter 3 at (D)(5) (available at https://www.uscis.gov/policymanual/Print/PolicyManual-Volume6-PartJ.html

The USCIS Policy Manual also provides:

> Template orders that simply recite the immigration statute or regulatory language are generally not sufficient. Orders that have the necessary findings or rulings and include, or are supplemented by, the factual basis for the court's findings (for example, the judicial findings of fact) are usually sufficient to establish eligibility. If a petitioner cannot obtain a court order that includes facts that establish a factual basis for all of the required findings, USCIS may request evidence of the factual basis for the court's findings.
>
> USCIS does not require specific documents to establish the factual basis or the entire record considered by the court. However, the burden is on the petitioner to provide the factual basis for the court's findings. Examples of documents that a petitioner may submit to USCIS that may support the factual basis for the court order include:
>
> - Any supporting documents submitted to the juvenile court, if available;
> - The petition for dependency or complaint for custody or other documents which initiated the juvenile court proceedings;
> - Affidavits summarizing the evidence presented to the court and records from the judicial proceedings; and
> - Affidavits or records that are consistent with the findings made by the court.

*Id.* at (A)(1) (available at https://www.uscis.gov/policymanual/Print/PolicyManual-Volume6-PartJ.html

To balance USCIS's desire for information about the factual basis with the client's interest in protecting their sensitive information (some of which may be confidential under state law), many

advocates have had success in providing two to four sentences worth of information to support each of the three required findings. Based on current USCIS guidance, including the state law code sections supporting the findings is also recommended.

Many advocates feel a legal and/or ethical obligation to disclose only the legal basis for the dependency and not to give further factual information. For example, a court order could state "the minor was made a dependent of this court and deemed eligible for long term foster care under Calif. W&I Code § 300(a) (physical abuse) and § 300(d) (sexual abuse)." This is evidence that the juvenile court deemed the juvenile eligible for long-term foster care due to abuse, neglect or abandonment.

Other advocates provide more factual information depending upon privacy rules in their courts, in response to USCIS threats to deny the SIJS application. If the USCIS requests information that you believe is illegal or unethical to provide, we recommend that the advocate speak with other groups in his/her area (including the Bar Association) and ask to meet with local USCIS about the issue, rather than simply give over confidential information for review by USCIS officers who, after all, have no training to evaluate the information.

Regarding documents filed with the court, USCIS recognizes that while such documents would be the most reliable evidence of the elements to be proved, in many States documents submitted to or issued by the juvenile court in dependency or delinquency proceedings may be subject to privacy restrictions. *Advocates who demonstrate that juvenile court proceedings are protected by state privacy laws should be able to avoid giving USCIS documents filed with court.*

It appears that sworn statements by court or state department or agency are a safety device provided in case the juvenile court judge is unable or willing to provide sufficient information. According to the DHS:

> *If* a dependency order does not include information establishing these crucial elements and State laws prevent court documents from being submitted to DHS, a statement summarizing the evidence presented to the juvenile court during the dependency proceeding and the court's findings should be sufficient to establish the elements. In order for a statement to serve as acceptable evidence of these elements, the statement should be in the form of an affidavit or other signed, sworn statement, and be prepared by the court or the State agency or department in whose custody the juvenile has been placed. All other evidence the petitioner submits to establish the consent elements must also be considered in determining whether or not to consent to the dependency order.[1]

Thus, when all else fails a social worker, department attorney, or other responsible party from court or state agency or department can submit a sworn statement. Immigration proceedings regularly accept un-notarized sworn statements with the following signature statement: "I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief." Again, the person providing the sworn statement must consider legal and ethical confidentiality concerns when deciding what information to include.

[1] July 9, 1999 "Memorandum #2" issued by Thomas E. Cook, Acting Assistant Commissioner. p. 3 (available at http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-MemoSIJS-07.09.99.pdf)

### A court or an administrative agency must rule that it is not in the child's best interest to be returned to his or her home country.

The juvenile court must include in its SIJS order that it is not in the child's best interest to be returned to the home country. Here again, the court must look to state law regarding what is in the child's best interest (though they can and should consider conditions and available caretakers in the country of origin). In California, the "health, safety, and welfare. the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children." Cal Fam. Code § 3020(a). Any and all evidence, including the child's own views about where s/he feels safest should be included in the petition for SIJS findings.

Individual findings will depend on the circumstances of each case, but factors a court might consider are how long the child has in the United States, whether the child lived for long in the country of origin, whether there is family and structure in the country of origin to properly care for the child, whether the child is doing well in the United States, whether the child has special needs that are better cared for in the United States, whether the child has a suitable guardian in the United States, etc. In other words, a court might consider any facts that relate to the child's 1) physical and emotional safety; 2) best placement for furthering long-term nurturing and growth; 3) physical, mental, and emotional health; or 4) a sense of permanency, among any other factors relevant to the child's best interests.

## What Goes into a Motion for SIJS Findings?

The Motion for Special Findings makes the case for why your client is eligible for Special Immigrant Juvenile Status. It should argue why the court should make the factual findings that your client is 1) under 21 years of age, 2) unmarried, 3) under the jurisdiction of the juvenile court, 4) unable to reunify with one or both of her parents due to abandonment, abuse, or neglect, and 5) unable to return to her home country because it is not in her or his best interest to do so. The Memorandum of Law should persuasively set forth the legal claim and support the Guardianship/Custody petition. The client's affidavit or declaration might be the most important component of the Motion for Special Findings. This is the child's story and should be written to ensure facts underlying all of the necessary SIJS elements are included. The child may be asked by the judge at a subsequent hearing to testify to what is in the affidavit.

## Continuing Jurisdiction

Juvenile court lawyers must ensure that judges retain jurisdiction over the applicant until USCIS grants the SIJS application after the interview. The interview may take place from six to thirty-six months, or even longer, after the SIJS application is filed.

The USCIS Policy Manual provides:

In general, the petitioner must remain under the jurisdiction of the juvenile court at the time of the filing and adjudication of the SIJ petition, subject to some exceptions discussed below. If the petitioner is no longer under the jurisdiction of the juvenile court for a reason related to their underlying eligibility for SIJ classification, the petitioner is not eligible for SIJ classification. This may include cases in which the petitioner is no longer under the jurisdiction of the court because:

- The court vacated or terminated its findings that made the petitioner eligible because of subsequent evidence or information that invalidated the findings; or

- The court reunified the petitioner with the parent with whom the court previously deemed reunification was not viable because of abuse, neglect, abandonment, or a similar basis under state law.

However, this requirement does not apply if the juvenile court jurisdiction ended solely because:

- The petitioner was adopted, or placed in a permanent guardianship; or

- The petitioner was the subject of a valid order that was terminated based on age before or after filing the SIJ petition (provided the petitioner was under 21 years of age at the time of filing the SIJ petition).

A petitioner with a juvenile court order who moves to the jurisdiction of a different juvenile court may need to either submit evidence that the petitioner is still under the jurisdiction of the court that issued the order or submit a new court order.

A juvenile court order does not necessarily terminate because of a petitioner's move to another court's jurisdiction. In general, a court maintains jurisdiction when it orders the child placed in a different state or makes a custody determination and the legal custodian relocates to a new jurisdiction. If, however, a child relocates to a new jurisdiction and is not living in a court ordered placement or with the court ordered custodian, then the petitioner must submit:

- Evidence that the court is still exercising jurisdiction over the petitioner; or
- A new juvenile court order from the court that has jurisdiction.

If the original order is terminated due to the relocation of the child but another order is issued in a new jurisdiction, USCIS considers the dependency or custody to have continued through the time of adjudication of the SIJ petition, even if there is a lapse between court orders.

USCIS Policy Manual, Volume 6, Part J, Chapter 1 at (D)(4) (available at https://www.uscis.gov/policymanual/Print/PolicyManual-Volume6-PartJ.html).

Some juvenile court judges will want to, or must under state law, terminate dependency proceedings when the child reaches a certain age. Children's advocates should fight to keep the child under juvenile court jurisdiction. However, as outlined above, USCIS policy states that a

SIJS application will not be denied solely because "The petitioner was the subject of a valid order that was terminated based on age before or after filing the SIJ petition (provided the petitioner was under 21 years of age at the time of filing the SIJ petition)." *Id*. Note also that immigration attorneys may be able to persuade the USCIS to expedite the interview if the child is about to age out of the juvenile court system. When the child goes to the USCIS interview, s/he should have a copy of the minutes from his/her most recent court hearing to establish that s/he remains under juvenile court jurisdiction.

State laws generally require that a youth be under 18 years old at the time he/she is first is declared a juvenile court dependent. State laws vary as to how long a child can remain a juvenile court dependent once declared a dependent. Some states end dependency at age 18, others extend it to age 19 (especially if the child must complete high school), and others can potentially extend the age to 21. Similarly, different states have different laws for how old a young person must be to enter or stay under juvenile court jurisdiction in a delinquency case.

## Age-out protection

Under DHS regulations, any person under 21 who meets the SIJS requirements can apply for SIJS.
Section 235(d)(6) of the TVPRA 2008 provides age-out protection to SIJ petitioners. As of December 23, 2008, if an SIJ petitioner was a "child" on the date on which an SIJ petition was properly filed, USCIS cannot deny SIJ status to the petitioner, regardless of the petitioner's age at the time of adjudication. If a petitioner was under 21 years of age on the date of the proper filing of Form I-360, USCIS cannot deny SIJ classification solely because the petitioner is older than 21 years of age at the time of adjudication.

## How to Apply for SIJS

The child must file two applications, one for SIJS and one to adjust status to lawful permanent residency. The applicant does not have to travel outside of the U.S., but can apply locally.[2] Currently, both the SIJS and the adjustment of status applications are sent to the following addresses in Chicago:

**USCIS Chicago Lockbox**

For U.S. Postal Service (USPS):

[2] Immigration practitioners should see INA § 245(h), which provides that SIJS applicants are deemed paroled in and therefore eligible for adjustment even if they entered without inspection. They do not have to qualify under § 245(i) or another special program, or pay a penalty fee: they are entitled to adjustment by virtue of their SIJS petition. Otherwise, immigration attorneys should note that an SIJS adjustment procedure is like that of a 245(a) adjustment for an immediate relative.

USCIS
PO Box 805887
Chicago, IL 60680-4120

For FedEx, UPS, and DHL deliveries:

USCIS
Attn: FBAS
131 South Dearborn - 3rd Floor
Chicago, IL 60603-5517

Check USCIS policy at https://www.uscis.gov/i-485-addresses to be sure you have the correct address. Besides the forms, the applicant must submit the results of a set medical exam conducted by an DHS-approved doctor (which includes a test for HIV and tests for the presence of some illegal drugs), various filing fees unless they are waived, and some proof of age (ex. - birth certificate).

Generally, applicants are required to have a photo-identification at the interview. As soon as the application is filed with the USCIS, the applicant can obtain employment authorization. USCIS will schedule an appointment for the applicant to get fingerprinted for an FBI check of any criminal or delinquency record or prior deportation. The wait for the interview itself can be long – depending on the USCIS office, it may be from six months to three years, or even longer. When the applicant finally gets to the interview, he or she often can have a social worker, and certainly an attorney, attend if desired. The USCIS might approve the case right at the interview, or might request further information. If the USCIS denies the case, it might or might not refer the child to a judge for deportation ("removal") proceedings. The applicant can apply again in front of the judge, and can appeal denials at any stage.

## USCIS Forms

Currently, in almost all cases the petition for special immigrant juvenile status and supporting documentation (Form I-360 packet) and the adjustment of status application and supporting documentation (Form I-485 packet) should be submitted to USCIS together as one packet. (There are some exceptions to this for persons already in removal proceedings.)

**CAUTION:** You are completing several forms that ask for much of the same information. Make sure that the information on all the forms is consistent, e.g., list of addressees, birth date, and etc.

**NOTE:** You do not need to submit a fingerprint card to the local DHS office with your I- 485 packet. DHS will give you instructions on submitting that at a later date. For information about the medical exam and fingerprinting.

Be sure to answer all questions on the form, using a black pen or typewriter. If an item is not applicable, write "N/A". If an answer is none, write "none." If extra space is needed to answer any item, attach a sheet of paper with the applicant's name and DHS alien registration number (if any) and indicate the item number that you are answering.

## Form I-360

Form I-360 and instructions are available at: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=95be2c1a6855d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD.

"An alien may not be classified as a special immigrant juvenile unless the alien is the beneficiary of an approved petition to classify an alien as a special immigrant…. The petition must be filed on Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The alien, or any person acting on the alien's behalf, may file the petition for special immigrant juvenile status. The person filing the petition is not required to be a citizen or lawful permanent resident of the U.S.." 8 CFR § Sec. 204.11(b).

The I-360 petition must be filed with evidence of the child's eligibility for special immigrant juvenile status. This includes a court order, signed by the juvenile court judge, which specifically sets out all of the requirements for special immigrant juvenile status. In other words, the judge should sign one order, which you will prepare, identifying the child and stating that s/he is under the jurisdiction of a juvenile court, eligible for long term foster care, and it is in his or her best interest not to be returned to the country of origin, due to abuse, neglect or abandonment.

A Form G-28 "Notice Of Appearance" of attorney should also be attached to the I-360 if an attorney is representing the child in the immigration process. There is no fee for this form. If neither an attorney nor a BIA-accredited representative (paralegal who has been certified by the government to handle immigration matters) is representing the child – for example, if a social worker is handling the application -- do not file the form G-28.

## Form I-485

Form I-485 and instructions are available at:

http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3faf2c1a6855d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD

An application for adjustment of status must contain the following completed forms and documents. Note that multiple copies are required in some cases; follow the instructions on the form.

* Form I-485/Application for Permanent Residence (adjustment of status application);

* Form G-325A/Biographical Information (in quadruplicate), if the applicant is 14 years or older;

* 3 "green card" size photographs that meet specified requirements;

* I-485 Filing fees or request for waiver of fees;

* Fingerprinting fee (only children 14 years old or older need to be fingerprinted);

* Birth certificate or other proof of age (translation into English is required)

* Form I-693 medical exam completed by INS-approved doctor (while the I-485 instruction sheet directs applicants to wait until after filing the I-485 form before getting a medical exam, apparently some INS offices want the medical exam at the time of the I-485 filing);
* Form I-765/Request for Work Authorization, if desired (for current fee see http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=73ddd59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=7d316c0b4c3bf110VgnVCM1000004718190aRCRD)

* A passport, Form I-94, or I-186 card showing lawful entry into the U.S., if any exist (in many cases, children will have entered the U.S. without papers, won't have these documents, and don't need to show them);

* "Adit" sheet -- Some DHS offices have an administrative sheet they ask applicants to complete. Talk with local practitioners to see if your office has such a form.

Initial documents needed in support of petition

8 CFR § 204.11 (d) lists the initial documents that need to be submitted in support of the petition:

(1) Documentary evidence of the alien's age, in the form of a birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age; and

(2) One or more documents which include:

(i) A juvenile court order, issued by a court of competent jurisdiction located in the U.S., showing that the court has found the beneficiary to be dependent upon that court;

(ii) A juvenile court order, issued by a court of competent jurisdiction located in the U.S., showing that the court has found the beneficiary eligible for long-term foster care; and

(iii) Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent

or parents.

**Proving Age:** USCIS regulations require every applicant for special immigrant juvenile status to submit some documentary proof of age. The evidence can take the form of a "birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age..." § Sec. 204.11(d)(1). Immigration practitioners should note that the requirement is for some proof of *age*, a much looser standard than the usual proof of birth. There is no requirement that the person submit a birth certificate. Children have been granted SIJS who did not even know what country they were born in, and did not personally know their year of birth. The statute recognizes that these children come from abusive, chaotic, or interrupted homes, and does not impose the strict requirements of proof of birth that appear in regular family immigration.

**Obtaining Documentation to Prove Age.** The following practice tips may help you to obtain documents. Because the search for documents can be time consuming (for example, it might take several weeks to hear back from a foreign registry), it is critical to start as soon as the application for SIJS becomes a possibility. For example, if a social worker or probation officer identifies that the child is undocumented and is waiting to transfer the matter to another part of the agency for handling, that person could do the child a tremendous service by immediately beginning the search for documents.

Foreign birth certificates, if you can obtain them, are the ideal proof of age.

(1) The easiest way to obtain a foreign birth certificate is to contact helpful family or friends in the home country who will travel to the local or national registry to obtain a certified copy. Unfortunately, abused children often lack these connections.

(2) Send away for the birth certificate yourself. You will need a letter written in the language of the country and addressed to the registrar in the town where the child was born (or, more importantly, where she believes her birth was registered) or to national registry. You will need an international money order. The letter should state the name, birth date and birthplace of the child and if possible the names of both parents. There are relatively inexpensive "express mail" services to Mexico and Central America in most large cities.

The Foreign Affairs Manual (FAM) of the Department of State is an important resource. The FAM provides information on how to how to obtain foreign birth certificates from various countries. If birth certificates from a particular country appear in a different form, such as family registration certificates, or if they are generally unavailable and therefore not required, the FAM will state this. To find the FAM, go to a local law library or contact a local immigration agency or attorney. If you are in northern California, you may contact the Immigrant Legal Resource Center, Attorney of the Day at (415) 255-9499, ext. 6263. The Attorney of the Day will send you copies of the pages from the FAM that relate to the country you're dealing with.

(3) Contact the local consulate from the child's country and ask for their assistance. Foreign identity documents: Any foreign identity document, including a military document and perhaps a school identity card, should be accepted as proof of age. Other substitute documents: If you

cannot obtain a birth certificate, the regulation provides that the applicant can submit any "other document which in the discretion of the [DHS district director] establishes the person's age." The regulation creates a generous standard because it is well known that some of these children will not have necessary information or will have a hard time obtaining documents.

One good guide for what definitely must be acceptable substitute documents is the DHS regulation defining substitute documents for birth certificates in family visa petitions. See 8 CFR § 204.1(f) and (g)(2). This is a fairly strict standard for substitute documents that is imposed in regular family immigration cases. Substitute documents may include (1) a baptismal certificate with the seal of the church, showing date and place of birth and date of baptism; (2) affidavits from people who are personally aware of the birth; (3) early school records showing date of admission to the school, the child's date and place of birth, and the name and place of birth of the parent or parents. You must also describe the efforts you made to locate the birth certificate. The best proof is a statement from the registrar explaining that the child's birth certificate cannot be found there.[3] But that guide is not a requirement for SIJS. The DHS District Director can accept *any* document in his or her discretion to prove age in an SIJS case. If you have nothing else, offer a state court order on the child's age. Regular civil courts can make all kinds of findings, including age. For example, under California Welf. & Inst. Code § 362, a juvenile court can make any and all reasonable orders for the care of a minor.

When submitting foreign documents, be sure to demonstrate that you diligently searched for original documents and were unable to find them. This is required. Be prepared to show correspondence with a registrar in the home country, and/or a declaration by the worker of the steps taken to locate documents or information.

## Adjustment Interview

When the interview finally arrives, the child will meet at the USCIS office with the USCIS officer. An attorney can be present, and it is almost never a problem for the social worker or "next friend" to be present as well. If the officer attempts to bar a non-attorney from accompanying the interview with the child, ask to see a supervisor.

During the interview, the USCIS officer will ask routine questions about the adjustment application. He may go through each question on the I-360 and I-485 forms. Practice all of these questions with the child in a role-play beforehand. Some of the questions may be quite strange ("Are you a Communist? A drug dealer?") and the child should be prepared. The USCIS officer already will have received the report from the FBI describing any criminal or juvenile delinquency record the person may have. The officer also will have the medical exam, which will tell if the person is HIV positive or has venereal disease or tuberculosis, or had illegal drugs in her system.

Hopefully the interview will be short, courteous, and just cover basic information on the form. In

[3] These are the "secondary evidence" acceptable under federal regulation to prove birth in the U.S. in family visa cases when "primary evidence" (birth certificate, etc.) is not available. See 8 CFR § 204.1(f), (g)(2).

some cases, however, over-zealous USCIS officers have tried to ask about the details of abuse or abandonment, or other family issues such as when the father last visited. While we hope that this does not occur, you should be prepared just in case, in order to avoid possibly re-traumatizing the child at the USCIS interview. Our position is that such questioning is not appropriate, and isn't legally relevant. First, the USCIS does not need the details, but only needs to know that the juvenile court made certain findings. Second, even if it did need details, it should not get them from interviewing the child. If you do decide to provide the USCIS with more details about the child's difficult situation, tell the USCIS officer that you will provide these in writing or with your own statements, so that the officer does not question the child.

Bad interviews are relatively rare, and most USCIS officers understand the need not to interrogate the child. To prevent bad USCIS interviews, your office may wish to establish a relationship with the local USCIS office and discuss what the interview will be like. Most importantly, make sure that a lawyer or other advocate attends the interview with the child. If the interviewer insists on asking the child about sensitive subjects, insist on speaking with a supervisor and if needed, end the interview (especially if you are not in a very bad time crunch). It can be rescheduled. If needed, you can request a meeting with a higher-level USCIS officer to work out a system for these interviews. If you do this, it is a good idea to get children's and/or immigrants' rights organizations, the bar association, local officials, member of congress, etc. on your side to meet with USCIS.

## Conclusion

The above is only a short overview of the SIJS process. Be sure to check with experienced practitioners in your state to find the relevant state law. Also, as the DACA rescission has taught us, USCIS policy can change rapidly. Check sites like USCIS (https://www.uscis.gov) and it's Policy Manual (https://www.uscis.gov/policymanual/Print/PolicyManual-Volume6-PartJ.html) for updates on existing policy. In addition, there are many fine public interest groups publishing info on SIJS and other policies relevant to immigrant juveniles. A good start, especially for California attorneys, is Public Counsel's SIJS manual. It may need some double-checking, as it was published in 2010, but it goes through the application process in greater step-by-step detail. Safe Passage has published another excellent manual this year (2017), which will be especially helpful to New York attorneys. Of course, Googling "SIJ," "SIJS," or "Special Immigrant Juvenile is also a good idea.