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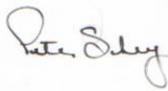
## Practice Advisory Forward

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The Center has achieved major victories in numerous major cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of disadvantaged persons.

*This practice advisory provides an overview of the statutory framework of obtaining Special Immigrant Juvenile Status and describe various state laws on SIJS.*

Manuals prepared by the Center are constantly being examined for improvements and updated to reflect current practices. Please feel free to email [pschey@centerforhumanrights.org](mailto:pschey@centerforhumanrights.org) if you would like to suggest updates or edits to portions of this practice advisory.



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## **I. Background: Statutory Framework to Obtain SIJS and Legal Permanent Residency**

### **A. Federal Law Creates “Special Immigrant Juvenile Status”**

Pursuant to its authority to regulate immigration, in 1990 Congress created Special Immigrant Juvenile Status (“SIJS”) in order to protect vulnerable immigrant children and allow them to remain lawfully in the United States. In 2008, the Trafficking Victims Protection Reauthorization Act (TVPRA) dramatically expanded the scope of SIJS by removing the requirement that the immigrant minor had to be eligible for foster care, and modifying the reunification requirement. Under the TVPRA, “reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, or abandonment, or a similar basis found under state law”<sup>1</sup> was sufficient to be eligible for SIJS, a minor must meet the following conditions:

(i) ...been declared dependent on a juvenile court ... *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..., and whose reunification with one or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) ... 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; and

(iii) ... the Secretary of Homeland Security consents to the grant of special immigrant juvenile status....

8 U.S.C. 1101(a)(27)(J)). See 8 C.F.R. § 204.11(c).<sup>2</sup>

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<sup>1</sup> Pub. L. No. 110-457, § 235, 122 Stat. 5080 (2008).

<sup>2</sup> A person eligible for SIJS if he or she:“(1) Is under twenty-one years of age; (2) Is unmarried; (3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court;....(6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents....”

The term “juvenile” as it relates to the SIJS statute includes immigrants up to the age of 21. 8 C.F.R. 204.11(c)(1). Moreover, the SIJS statute applies to an immigrant over age 21 if they were under 21 on the date on which they applied for SIJ status. 8 U.S.C. § 1232 (d)(6).<sup>3</sup>

## **B. State Courts Make “SIJS Findings” Based on State Child Welfare Laws**

To obtain SIJS status under federal law first requires that a minor obtain a predicate ruling of “SIJS findings” from a state “juvenile court.” As discussed below, what qualifies as a juvenile court has been the subject of dispute between the USCIS, the federal agency empowered to approve SIJS, and the states themselves.

“SIJS Findings” include that: (1) one or both parents have abused, abandoned, or neglected the minor; (2) it is not in the best interests of the minor<sup>4</sup> to be returned to the home country.

State law determines what a juvenile court is for purposes of the federal SIJS statute. States provide several venues in which a judge may make findings that a minor satisfies the elements of

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<sup>3</sup> “USCIS will not deny, revoke, or terminate a class member’s application for Special Immigrant Juvenile (SIJ) classification or SIJ-based adjustment of status if, at the time of filing an application for SIJ classification (Form I-360), (1) the class member is or was under 21 years of age, unmarried, and otherwise eligible, and (2) the class member either is the subject of a valid dependency order or was the subject of a valid dependency order that was terminated based on age prior to filing.” From *Perez-Olana* 2015 Stipulation.

[https://www.uscis.gov/sites/default/files/USCIS/Laws/Legal%20Settlement%20Notices/PerezOlano\\_Order\\_Approving\\_Stipulation.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Legal%20Settlement%20Notices/PerezOlano_Order_Approving_Stipulation.pdf)

<sup>4</sup> Contrast the advantages of the client's present situation with the mistreatment that she experienced previously or would face in the future to demonstrate that the current situation would best serve the child's interests. Look at state law to determine what factors may be taken into account, including family/friend support systems, emotional/mental well being, medical considerations, and educational resources. Country conditions in the parents’ home country should be examined.

SIJS. For example, minors whose rights are being adjudicated in the context of family court, dependency court, or juvenile court may request predicate SIJS findings.<sup>5</sup>

Receiving a predicate order of SIJS Findings from a state court is the first step in adjusting a minor's immigration status. After a state court makes SIJS findings, the minor must petition the USCIS to grant SIJS.<sup>6</sup> If USCIS approves this petition, the minor next applies for lawful permanent resident (LPR) status or adjustment of status by filing Form I-485<sup>7</sup> with the Immigration Court. The second step of this three-step process – the decision by USCIS to grant or deny a Petition for SIJS based on the state court SIJS findings – has been the subject of controversy and litigation.

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<sup>5</sup> See American Bar Association, A Guide for State Court Judges and Lawyers on Special Immigrant Juvenile Status, March 2017, available at [https://www.americanbar.org/groups/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-36/mar-apr-2017/a-guide-for-state-court-judges-and-lawyers-on-special-immigrant-/](https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/mar-apr-2017/a-guide-for-state-court-judges-and-lawyers-on-special-immigrant-/) (judges may make SIJS findings in a variety of settings, including “a delinquency case where a youth is committed to the care and custody of the probation department, even if he continues living at home; as part of a case seeking a restraining order, particularly where custody to the nonoffending parent is included in the order; and in any matter where custody or guardianship is awarded to a relative or other third party caregiver.”)

<sup>6</sup> <https://www.uscis.gov/green-card/sij> (To petition for SIJS, file Form I-360, evidence of age, predicate SIJS findings by state court). The Massachusetts Supreme Court offers a robust explanation of the process: “An application for SIJ status consists of a variety of forms, and a certified copy of the juvenile court order must be included. See SIJ: Forms You May Need, <http://www.uscis.gov/green-card/special-immigrant-juveniles/sij-forms-you-may-need> [<http://perma.cc/H8TV-UTWH>]. In order to provide USCIS with sufficient information concerning the applicant's eligibility for SIJ status, State courts should provide sufficient detail about how they came to their conclusions in their order of special findings. *H.S.P.*, 223 N.J. at 213-214. An applicant should include the supporting evidence used in the State court proceeding to aid USCIS in its decision-making process. See SIJ: Forms You May Need, *supra*. Doing so may result in a quicker decision. See *id*. Once a child has filed the necessary paperwork, an interview between the applicant and a USCIS official will be conducted. See SIJ: After You File, <http://www.uscis.gov/green-card/special-immigrant-juveniles/sij-after-you-file> [<http://perma.cc/4H77-YF3K>]. A decision will be issued within 180 days from the official filing date. See *id*. See also 8 C.F.R. § 204.11.” *Recinos v. Escobar*, 46 N.E.3d 60, 65 (2016).

<sup>7</sup> <https://www.uscis.gov/i-485>

## **II. States That Allow SIJS Findings for 18-to-21-year-old Immigrant Youth**

Several states have passed legislation that allows a minor petitioning for the appointment of a guardian in Probate Court to simultaneously petition the court to make SIJS Findings up to the age of 21. These statutes were generally created for the express purpose of bringing state guardianship laws into alignment with the federal statute that allows SIJ status to immigrants up to 21 years old.

Other state courts, like Massachusetts and New Jersey, have held that the broad authority of their courts to appoint guardians for the care and protection of minors extends to making SIJS predicate findings up to the age of 21.

As discussed below, SIJS findings are grounded in each state's child welfare laws relating to the health, welfare and education of the minor. In order to make "SIJS Findings," the judge must find that it is in the minor's best interests to have the guardian appointed; that the minor has been abused, abandoned, or neglected by one or both parents based on state law standards; and that reunification with one or both parents in their home country would be detrimental to the minor's health and welfare.

### **A. State Legislation Specifically Makes SIJS Findings Available to 18-21-year-olds**

#### **1. California**

State law governs which courts may make SIJS findings. Effective January 1, 2016, the California Legislature empowered Probate Courts to make SIJS Findings in the context of guardianship proceedings for juveniles up to 21 years of age. Probate Code §1051.1. The Legislative intent of this statute was specifically to provide an avenue for SIJS protection in the guardianship context for minors between 18 and 21, in alignment with federal law:

**SECTION 1.** (a) The Legislature finds and declares all of the following:

(1) California law grants the superior courts jurisdiction to make judicial determinations regarding the custody and care of children within the meaning of the federal Immigration and Nationality Act, including the juvenile, probate, and family court divisions of the superior court. These courts are empowered to make the findings necessary for a child to petition the United States Citizenship and Immigration Services for classification as a special immigrant juvenile under federal law.

(2) Special immigrant juvenile status, under the federal Immigration and Nationality Act, offers interim relief from deportation to undocumented immigrant children *under 21 years of age*, if a state juvenile court has made specific findings.

(3) The findings necessary for a child to petition for classification as a special immigrant juvenile include, among others, a finding that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law, and a finding that it is not in the child's best interest to be returned to his or her country of origin.

*(4) Despite recent changes to law that eliminate ambiguity regarding the jurisdiction of superior courts to make the findings necessary to petition for special immigrant juvenile status, misalignment between state and federal law continues to exist.*

*(5) Federal law allows a person under 21 years of age, who otherwise meets the requirements for special immigrant juvenile status, to file for relief as a special immigrant juvenile. In California, however, individuals who are between 18 and 21 years of age have largely been unable to obtain the findings from the superior court necessary to seek special immigrant juvenile status and the relief that it was intended to afford them, solely because probate courts cannot take jurisdiction of individuals 18 years of age or older by establishing a guardianship of the person. This is true despite the fact that many unaccompanied immigrant youth between 18 and 21 years of age face circumstances identical to those faced by their younger counterparts.*

(6) Given the recent influx of unaccompanied immigrant children arriving to the United States, many of whom have been released to family members and other adults in California and have experienced parental abuse, neglect, or abandonment, *it is*

*necessary to provide an avenue for these unaccompanied children to petition the probate courts to have a guardian of the person appointed beyond reaching 18 years of age. This is particularly necessary in light of the vulnerability of this class of unaccompanied youth, and their need for a custodial relationship with a responsible adult as they adjust to a new cultural context, language, and education system, and recover from the trauma of abuse, neglect, or abandonment. These custodial arrangements promote permanency and the long-term well-being of immigrant children present in the United States who have experienced abuse, neglect, or abandonment.*

(7) Guardianships of the person may be necessary and convenient for these individuals between 18 and 21 years of age, although a youth for whom a guardian has been appointed retains the rights that an adult may have under California law.

*(b) It is the intent of the Legislature to give the probate court jurisdiction to appoint a guardian for a person between 18 and 21 years of age in connection with a special immigrant juvenile status petition. It is further the intent of the Legislature to provide an avenue for a person between 18 and 21 years of age to have a guardian of the person appointed beyond 18 years of age in conjunction with a request for the findings necessary to enable the person to petition the United States Citizenship and Immigration Services for classification as a special immigrant juvenile.*

California Assembly Bill 900 (2016).

The bill, AB 900, amended the California Probate Code to add the following section:

1510.1. (a) (1) With the consent of the proposed ward, the court may appoint a guardian of the person for an unmarried individual who is 18 years of age or older, but who has not yet attained 21 years of age in connection with a petition to make the necessary findings regarding special immigrant juvenile status pursuant to subdivision (b) of Section 155 of the Code of Civil Procedure.

....

(b) (1) At the request of, or with the consent of, the ward, the court may extend an existing guardianship of the person for a ward past 18 years of age, for purposes of allowing the ward to complete the application process with 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.

.... (c) This section does not authorize the guardian to abrogate any of the rights that a person who has attained 18 years of age may have as an adult under state law, including, but not limited to, decisions regarding the ward's medical treatment, education, or residence, without the ward's express consent.

(d) For purposes of this division, the terms "child," "minor," and "ward" include an unmarried individual who is younger than 21 years of age and who, pursuant to this section, consents to the appointment of a guardian or extension of a guardianship after he or she attains 18 years of age.

CA Probate Code § 1510.1(a).

## **2. New York**

New York's state legislature adopted a similar statute allowing a "family court" to make SIJS findings in the context of a guardianship proceeding, and allowing guardianships for immigrant youth between 18 and 21 years of age. N.Y. Fam. Ct. Act § 661(a). That statute states:

When initiated in the family court, such court has like jurisdiction and authority to determine as county and surrogates courts in proceedings regarding the guardianship of the person of a minor or infant and permanent guardianship of a child. Such jurisdiction shall apply as follows:

(a) Guardianship of the person of a minor or infant. ....For purposes of appointment of a guardian of the person pursuant to this part, the terms infant or minor shall include a person who is less than twenty-one years old who consents to the appointment or continuation of a guardian after the age of eighteen.

N.Y. Fam. Ct. Act § 661(a).

The New York Family Court has jurisdiction over abuse and neglect proceedings, among other legal matters related to the care and custody of minors. N.Y. Fam. Ct. Act § 115. Its jurisdiction includes making custodial and caretaking determinations of minors up to age 21, including guardianship proceedings. *See, e.g.*, N.Y. Fam. Ct. Act § 661.

### 3. Maryland

In 2014, Maryland extended its state “equity court” jurisdiction to include custody or guardianship of youth under age 21 (rather than the previous limit of 18), relating to a motion for an SIJS predicate order.<sup>8</sup>

Md. Code, Fam. Law § 1-201(a), (b)(10) (“Jurisdiction of Equity Court”) provides:

- (a) For the purposes of subsection (b)(10) of this section, “child” means an unmarried individual under the age of 21 years.
- (b) An equity court has jurisdiction over:
  - (10) custody or guardianship of an immigrant child pursuant to a motion for Special Immigrant Juvenile factual findings requesting a determination that the child was abused, neglected, or abandoned before the age of 18 years for purposes of § 101(a)(27)(J) of the federal Immigration and Nationality Act.

Maryland courts have held that the SIJS predicate findings must be based on Maryland law regarding abuse, neglect and abandonment, without regard to where the child lived at the time the events occurred. *In re Dany G.*, 223 Md. App. 707, 117 A.3d 650 (2015).

### 4. Colorado

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<sup>8</sup> Justin Potesta, “Special Immigrant Juvenile Status: Refining State and Federal Practice,” January 1, 2016, Digital Commons, Loyola Marymount University and Loyola Law School, available at <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2985&context=llr> (“Maryland House Bill 315 explicitly granted some Maryland courts jurisdiction to rule on SIJS related claims. The stated purpose of the bill was to alter ‘the jurisdiction of an equity court to include a certain petition to award custody or guardianship of an immigrant child.’ Because unaccompanied children are eligible to apply for SIJS relief until their twenty-first birthday, Maryland juvenile courts could no longer address required SIJS findings for applicants over eighteen because those courts may only hear cases involving children under eighteen. To remedy this situation, the bill provided ‘equity courts with jurisdiction over SIJS applicants who would otherwise have aged out of the juvenile court system’ but who may still be eligible to apply for SIJS relief.”)

In March 2019, Colorado’s legislature signed into law HB19-1042<sup>9</sup> to provide access to the state’s juvenile court to immigrant youth between the ages of 18 and 21 and allow for SIJS eligibility for victims of parental abuse or neglect up to age 21.

## 5. Connecticut

The Connecticut Legislature passed a 18-21-year-old SIJS law on July 1, 2018. Public Act No. 18-92 (“An Act Concerning Guardianship Appointments for Individuals Seeking Special Immigrant Juvenile Status”) provides:

(b) At any time during the pendency of a petition to ... appoint a guardian or coguardian ... a party may file a petition requesting the Probate Court to make findings under this

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<sup>9</sup> HB 19-1042 amends Colorado Revised Statutes, 15-14-102. Definitions: “(8) “Minor” means an unemancipated individual who has not attained eighteen years of age; EXCEPT THAT IN PROCEEDINGS PURSUANT TO SECTION 15-14-204(2.5) ONLY, “MINOR” MEANS AN UNMARRIED INDIVIDUAL WHO HAS NOT ATTAINED TWENTY-ONE YEARS OF AGE.” (additions in all caps).

It further added the following: “15-14-204 Judicial appointment of guardian – conditions for appointment – definition: (2.5) “(a) For purposes of this subsection (2.5) only, “minor means an unmarried individual who has not attained twenty-one years of age.

(b) the court may enter an order for allocation of parental responsibilities for a child, as defined in subsection (1.5)(a) of this section, and a determination of whether the child shall be reunified with a parent or parents, when the requirements of subsection (1) of this section are met, the order is in the child's best interests, and:

(i) the child has not attained twenty-one years of age;

(ii) the child is residing with and dependent upon a caregiver; and

(iii) a request is made for findings from the court to establish the child's eligibility for classification as a special immigrant juvenile pursuant to 8 u.s.c. sec. 1101 (a)(27)(1).

(c) if a request is made for findings from the court to establish the child's eligibility for classification as a special immigrant juvenile under federal law and the court determines that there is sufficient evidence to support the findings, the court shall enter an order, including factual findings and conclusions of law, determining that:

(i) the child has been placed under the custody of an individual appointed by the court pursuant to an order for allocation of parental responsibilities;

(ii) reunification of the child with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law; and

(iii) it is not in the best interests of the child to be returned to the child's or parents' previous country of nationality or country of last habitual residence.

section to be used in connection with a petition to the United States Citizenship and Immigration Services for designation of the minor child as having special immigrant juvenile status under 8 USC 1101(a)(27)(J).

....

(d) ... "minor child" means...(2) an unmarried person under the age of twenty-one who (A) is dependent on a competent caregiver, (B) has consented to the appointment or continuation of a guardian after attaining the age of eighteen, and (C) files or on whose behalf is filed a petition for findings pursuant to this section."

## **6. Washington**

On May 10, 2017, Washington Governor Inslee signed into law a measure that allows courts to appoint guardians for vulnerable immigrant youth up to age 21, intended as a necessary step to qualify for SIJS protection. As summarized by the Washington District Court in *Galvez*, an action challenging USCIS's failure to approve SIJS for minors with such guardianships:

In 2017, the Washington legislature established the Vulnerable Youth Guardianship ("VYG") program specifically for juveniles aged eighteen to twenty-one years old. [RCW 13.90.900](#). The VYG program allows the juvenile to consent to the appointment of a guardian even if he or she was not previously in the child welfare system. The legislature found that "[o]pening court doors for the provision of a vulnerable youth guardianship serves the state's interests in eliminating human trafficking, preventing further victimization of youth, decreasing reliance on public resources, reducing youth homelessness, and offering protection for youth who may otherwise be targets of traffickers." *Id.* In creating the VYG program, the legislature intended to fix a disconnect between state and federal law. [RCW 13.90.901\(1\)\(d\)](#). Under federal immigration law, SIJ status is available to youth until the age of twenty-one. [8 U.S.C. §1101\(b\)\(1\)](#). ...As of 2017, Washington extended juvenile court jurisdiction to cover "judicial determinations regarding the custody and care of youth" between the ages of eighteen and twenty-one and to make findings necessary for a juvenile in that age group to seek SIJ status. [RCW 13.90.901\(1\)\(a\)](#).

*Galvez*, supra, at pp. 7-8

## **7. Virginia**

In 2017, the Virginia Court of Appeals sharply restricted state judges' ability to issue SIJS orders, leaving Virginia immigrant children without protection. *Canales v.* 67 Va. App. 759, 800 S.E.2d 208, 2017 Va. App. LEXIS 153, 2017 WL 2644214 (2017).

The Virginia Court of Appeals held that

the circuit court did not err when it found that it lacked jurisdiction to make separate SIJ findings of fact. The Code of Virginia does not provide such authority and 8 U.S.C. § 1101(a)(27)(J) does not in any way alter the jurisdiction of Virginia courts. Rather, it simply allows immigrant juveniles to use certain state court judgments and supporting factual findings—such as those made under the best interests analysis of Code § 20-124.3—to support a petition for SIJ status with the Department of Homeland Security.

To address this jurisdictional issue, legislation effective July 1, 2019 (if signed as expected by the Virginia Governor) overturns the *Canales* case by establishing jurisdiction to state courts over guardianship and other issues related to making SIJS findings. Code of Virginia § 16.1-241<sup>10</sup>

#### 8. Illinois

On July 30, 2019, Illinois expanded the availability of SIJS to immigrant minors in that state by broadening which state courts have authority to make SIJS findings. It does not expand SIJS to over 18-year-old immigrants, but it does allow civil courts, not only “juvenile courts” to make SIJS findings based on a motion for such findings.

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<sup>10</sup> “[E]ach juvenile and domestic relations district court shall have...exclusive original jurisdiction...concurrent jurisdiction with the juvenile court or courts of the adjoining city or county, over all cases, matters and proceedings involving: A. The custody, visitation, support, control or disposition of a child: 1. Who is alleged to be abused, neglected, in need of services, in need of supervision, a status offender, or delinquent except where the jurisdiction of the juvenile court has been terminated or divested; 2. Who is abandoned by his parent or other custodian or who by reason of the absence or physical or mental incapacity of his parents is without parental care and guardianship....”

House Bill 1553 will take effect January 2020, and provides:

“(a) The court has jurisdiction to make the findings necessary to enable a minor who has been adjudicated a ward of the court to petition the [USCIS] for classification as a special immigrant juvenile under 8 U.S.C. 1101(a)(27)(J). A minor for whom the court finds under subsection (b) shall remain under the jurisdiction of the court until his or her [SIJ] petition is filed with the [USCIS]....

(b) If a motion requests findings regarding SIJS...and the evidence, which may consist solely of, but is not limited to, a declaration of the minor, supports the findings, the court shall issue an order that includes the following findings:

(1)(A) the minor is declared a dependent of the court; or (b) the minor is legally committed to, or placed under the custody of, a State agency or department, or an individual or entity appointed by the court; and (2) that reunification of the minor with one or both of the minor’s parents is not viable due to abuse, neglect, abandonment, or other similar basis; and (3) that it is not in the best interest of the minor to be returned to the minor’s or parent’s previous country of nationality or last habitual residence.

(c) In this Section: (1) the term abandonment means, but is not limited to, the failure of a parent or legal guardian to maintain a reasonable degree of interest, concern, or responsibility for the welfare of his or her minor child or ward.”

The bill also adds jurisdiction to make SIJS findings to “a court of this State that is competent to allocate parenting responsibilities,” (750 ILCS 5/603.11(b) effective Jan. 2020); “a court of this State that is competent to adjudicate parentage,” (750 ILCS 46/613.5(b) effective Jan. 2020); “a court of this State that is competent to adjudicate adoption petitions” (750 ILCS

50/1701(b) effective Jan. 2020); “a court of this State that is competent to issue an order of protection” (750 ILCS 60/214.5(b) effective Jan. 2020); and “a court of this State that is competent to adjudicate a petition for guardianship” (755 ILCS 5/11-5.5(b) effective Jan. 2020).

## **B. States Apply “Broad Authority of Probate Courts” to Permit SIJS Findings for 18-21-year-olds**

### **1. Massachusetts**

Massachusetts’ state legislature has not adopted legislation expanding the power of its state courts to make SIJS findings for immigrant youth up to the age of 21, but the Massachusetts Supreme Court has interpreted “the broad equity power” of the Juvenile Court and the Probate and Family Court to permit them to make SIJS findings for immigrant children up to 21 years old. *Recinos v. Escobar*, 46 N.E.3d 60, 65 (2016). The Massachusetts Supreme Court held:

In Massachusetts, the Juvenile Court and the Probate and Family Court both have jurisdiction to make judicial determinations about the care and custody of juveniles despite only one court being designated as a juvenile court. See G. L. c. 119, § 1; G. L. c. 208, §§ 19, 28, 28A, 31, 31A. Therefore, in Massachusetts, an immigrant child may petition for special findings in either the Juvenile Court or the Probate and Family Court...[T]he special findings a juvenile court makes should be limited to child welfare determinations.

....We conclude that the Probate and Family Court has jurisdiction, under its broad equity power, over youth between the ages of eighteen and twenty-one for the specific purpose of making the special findings necessary to apply for SIJ status pursuant to the INA.

*Id.*

### **2. Minnesota**

Minnesota courts authority make SIJS findings for immigrant youth under 21 is also pursuant to the “broad jurisdiction of the probate court.” *In re Guardianship of Guaman*, 879

N.W.2d 668; 2016 Minn. App. LEXIS 36; 2016 WL 2842937 (holding that the broad jurisdiction of the probate court required it to make SIJS findings where the evidence supported it in the context of a guardianship proceeding, where the appellant guardian argued that doing so was necessary to effectuate the protective nature of the guardianship.) Under Minnesota law, the probate court may appoint a guardian for an individual if it finds, by clear and convincing evidence, that the individual is an incapacitated person and that the individual's needs cannot be met by less restrictive means. [Minn. Stat. § 524.5-310\(a\)](#) (2014). In addition, the probate court may make any other order that is in the best interests of the ward or may grant other appropriate relief. [Minn. Stat. § 524.5-317\(b\)](#) (2014). Given the broad scope of the probate court's authority to act in the best interests of the ward, a probate court is authorized to make Special Immigrant Juvenile (SIJ) findings in a guardianship proceeding.

In *Guaman*, clear and convincing evidence supported finding that the proposed ward, despite being over 18, was incapable of taking care of himself.

In 2014, shortly after turning 18 years old, Jose fled to the United States in order "to escape memories of his father's murder, his abusive mother, and his father's murderers who continued to threaten [him]." Appellant claimed that (1) as a result of Jose's history of abuse and trauma, he has "limited cognitive capabilities" and is an "incapacitated person"; (2) it is in Jose's best interests to remain in the United States because if he were to return to [\*670] Ecuador, he would be subjected to his mother's abuse and to the violence of those who murdered his father; and (3) Jose needs a guardian because he lacks the ability to make important decisions, to be [\*\*3] independent and self-supporting, to meet his basic needs, and to protect himself from harm.

Id.

Although the probate court had acknowledged that it had authority to make SIJ findings, it declined to do so as "unnecessary" to the guardianship before it. On appeal, the proposed guardian argued that "SIJ findings are 'necessary . . . for the effective functioning of [Jose's] guardianship.'"

The Court of Appeal agreed and remanded for further consideration. “Here, because the record supports the appointment of a guardian and contains evidence as to each potential SIJ finding, we conclude that the probate court abused its discretion by declining to consider appellant's request for SIJ findings.”

### **3. New Jersey**

New Jersey’s Court of Appeal has interpreted its “age of majority” statute as permitting SIJS findings to be made for immigrant minors between 18-21. *O.Y.P.C. v. J.C.P.*, 442 N.J. Super. 635, 638 (App. Div. 2015). In *O.Y.P.C.*, the trial court denied the plaintiff’s SIJS-related petition for custody of her eighteen-year old brother on the ground he had reached the age of majority. The Court of Appeal reversed, observing “it would defeat the purpose of the hybrid federal-state scheme Congress created if state family courts decline to hear these cases solely because a juvenile is over the age of eighteen, so long as the juvenile is still under the age of twenty-one.” *Id.* at 640.

Although N.J.S.A. 9:17B-3 provides that, in general, one is deemed an adult at the age of eighteen, this statute also “excepts from its definition of adulthood-at-age-eighteen `the right of a court to take any action it deems appropriate and in the interest of a person under 21 years of age.” *Id.* at 643 (quoting N.J.S.A. 9:17B-3). Even if a court denies a petitioner custody of a non-citizen child pursuant to a SIJS petition, as mandated by the Court in *H.S.P.*, the trial court must still make the required findings in 8 U.S.C.A. § 1101(a)(27)(J) and 8 C.F.R. § 204.11(c). *Id.* at 641.

### **C. Jurisdiction Only if Petition for Guardianship Was Filed Before 18**

Even in states that have not adopted legislation extending SIJS to immigrant youth under 21, nor recognized the broad discretion of probate courts as including such authority, there may

be some limited protection for immigrant youth over age 18. See, e.g., *In re L.P.L.O.*, 2015 WL 3545456 (Texas). In *L.P.L.O.*, a minor from El Salvador whose mother had died and whose father was abusive, petitioned the juvenile court for a guardianship when he was 17 years old. The juvenile court refused to take jurisdiction. Petitioner turned 18 years old before filing an appeal, and the Court of appeal held that the juvenile court's exclusive jurisdiction attached as soon as any case involving a person under 18 years old is initiated and continued until the case concluded. Once jurisdiction is established, the child becomes a ward of the court and the wardship may continue.

### **III. Litigation to Preserve SIJ Status for 18-21-Year-Old Immigrant Youth**

Advocates in California, New York, and Washington challenged the USCIS policy denying SIJS to petitioners between 18 and 21, with initial success. *J.L. v. Cissna*, 341 F.Supp.3d 1048 (ND CA 2018); *R.F.M. v. Nielsen*, 365 F.Supp.3d 350 (SDNY 2019); *Galvez v. Cuccinelli*, CV-19-0321-RSL, 2019 U.S. Dist. LEXIX 119179 (D.Ct. WA 2019).

The facts of these cases are substantially similar, as summarized in the *R.F.M.* complaint.

The plaintiffs...are young immigrants who have been determined by the New York State Family Court ("New York Family Court" or "Family Court") to have been abused, abandoned, or neglected by one or both of their parents. Each plaintiff has sought Special Immigrant Juvenile ("SIJ") status -- a form of immigration relief that provides a path to lawful permanent residence in the United States [See 8 U.S.C. §§ 1101 (a)(27)(J); 1255(a), (h)] -- and received a denial. The plaintiffs allege that in early 2018 the Department of Homeland Security ("DHS"), the United States Citizenship and Immigration Services ("USCIS")... adopted a new policy without notice, and that prior to this policy change, the plaintiffs' SIJ applications would have been granted. The plaintiffs seek to enjoin the agency's reliance on that policy, arguing that the policy violates the *Administrative Procedure Act* ("APA") and is based on an erroneous understanding of federal and New York State law. The defendants counter that there is no new policy but merely a centralization of the SIJ adjudication process coupled with a

clarification of the SIJ statute and that, in any event, their interpretation of the SIJ statute accords with federal and state law.

The New York District Court recounted a concise history of the SIJS statute, including the 2008 legislative amendment (TVPRA) that struck the requirement that a minor be placed in “long-term foster care” in order to qualify for SIJS:

The TVPRA struck the requirement that the juvenile must be eligible for long-term foster care, broadening the statute to apply instead to juveniles for whom "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.

The TVPRA also expanded SIJ status to be available to juveniles who have 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 . . . ." 8 U.S.C. § 1101(a)(27)(J)(i) (emphasis added). The TVPRA amended the "consent" requirement giving the Secretary of DHS, rather than the Attorney General, authority to consent to the grant of SIJ classification, and removing the requirement that the consent be express. § 235(d)(1)(B), 122 Stat. at 5079 (2008).

Despite these changes to the statute, U.S.C.I.S. never modified its regulations to be consistent with the new statute. “Accordingly, even though Congress struck the foster care requirements from the SIJ statute in 2008, the current agency regulations [\*14] continue to rely on foster care determinations and requirements.” *Id.* (citing Pub. L. 110-457 § 235(d)(1)(B), 122 Stat. 5044 (2008) (amending 8 U.S.C. § 1101(a)(27)(J)).

[I]n early 2018, the USCIS began denying almost all SIJ applications from petitioners who obtained Special Findings Orders from the New York Family Court after turning eighteen. The plaintiffs contend that the bases for these SIJ denials constitute an arbitrary and capricious policy that is contrary to both state and federal law. They further contend that the policy was enacted without adherence to required procedures under the APA. The plaintiffs seek to enjoin the agency from adjudicating SIJ petitions in accordance with that policy.

The district court examined New York statutes and rejected the USCIS's position, in alignment with the the Northern District of California in *J.L. v. Cissna*, interpreting California's analogous statutes.

The Family Court has jurisdiction over all proceedings involving abuse, neglect, support, guardianship, and custody, *N.Y. Fam. Ct. Act § 115(a)(i)-(ii), (iv)*; accord *N.Y. Const. Art. VI § 13*, and is the court in New York that makes the predicate findings for SIJ status.<sup>5</sup>

Although the Family Court typically only has jurisdiction over juveniles up to the age of eighteen, see *N.Y. Fam. Ct. Act § 119(c)*, the Family Court has jurisdiction to appoint a guardian over a juvenile between the ages of eighteen and twenty-one with the juvenile's consent, and in such cases, that juvenile is considered an "infant or minor." *N.Y. Fam. Ct. Act. § 661(a)*; *Matter of Trudy-Ann W. v. Joan W.*, 73 A.D.3d 793, 901 N.Y.S.2d 296, 298 (*App. Div. 2010*).

The Court certified the following class:

all immigrants who obtained Special Findings Orders from the New York Family Court between their eighteenth and twenty-first birthdays, applied for SIJ status, and either:

(1) [were] issued (i) Notices of Intent to Deny, (ii) Notices of Intent to Revoke, (iii) Decisions of Denial, or (iv) Decisions revoking previously-granted SIJ status since January 1, 2016 on the ground that the Family Court is not a "juvenile court" under 8 C.F.R. § 204.11(a) and/or that the Family Court is not empowered to issue Special Findings Orders under 8 U.S.C. § 1101(a)(27)(J); or (2) have a Special Findings Order finding the eligibility criteria of 8 U.S.C. § 1101(a) (27) (J) are satisfied and have a pending petition for SIJ status before the USCIS based on the Special Findings Order.

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<sup>5</sup> At oral argument, both parties agreed that the court in New York that issues Special Findings Orders for SIJ status is the Family Court. See Transcript of the February 25, 2019, argument on the motions ("Tr.") at 8-12, 55. The parties also agreed that the New York Surrogate's Court would also be empowered to issue Special Findings Orders, but that as a matter of practice, Special Findings Orders are issued by the Family Court. The government stated that its new interpretation of the SIJ statute would also apply to the Surrogate's Court. *Id.* at 55. Issues surrounding the Surrogate's Court have not been briefed, and in any event, the class is defined only to include juveniles who obtained Special Findings Orders from the Family Court. *Id.* at 11.

*Id.* at \*23-24.

On June 13, 2019, USCIS issued a [class notice](#) that a minor in New York who received SIJS findings but was denied SIJS by USCIS should re-apply:

If you are a Class Member who received a denial of your SIJ application or revocation of your SIJ status, you MUST file a Form I-290B by May 31, 2021 to benefit from this lawsuit unless you have already filed a Form I-290B in response to the denial or revocation and that Form I-290B is still pending. If you are a Class Member, the filing fee for Form I-290B will be waived. In your Notice of Appeal or Motion, you must state that the ground for your motion is the Court’s decision in R.F.M.

Similarly, the California plaintiffs in *J.L. v. Cissna* won a preliminary injunction, arguing that this “new rule” refusing to acknowledge California Probate Courts as “juvenile courts” under the federal INA violated the Administrative Procedure Act in that it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The district court held that USCIS was not authorized to challenge a state court’s jurisdiction to make findings under state law or the court’s application of state law. 8 U.S.C. § 1101(a)(27)(J)(i), (ii); 6 USCIS PMJ.2 § (D)(4) (“There is nothing in USCIS guidance that should be construed as instructing juvenile courts on how to apply their own state law”).<sup>11</sup> The District Court granted a preliminary injunction, and granted class certification. The preliminary injunction order enjoined USCIS and DHS from denying SIJS on the grounds that the Probate Court did not have jurisdiction to reunify 18-to-21-year-old immigrants with their parents, and barred defendants from initiating removal proceedings against or removing any SIJS petitioner who was appointed a guardian and

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<sup>11</sup> USCIS has continuously recognized this mandate and promulgated agency practices to ensure that adjudicators defer to state court findings. See Special Immigrant Status, 58 Fed. Reg. 42843-01, 42848 (Aug. 12, 1993); Michael Aytes, Interoffice Mem., USCIS, AFM Update: Ch. 22: Employment-Based Petitions (AD03-01), at 82 (Sept. 12, 2006) (“The task of the adjudicator is not to determine whether the [SIJS Finding] was properly issued”), Cast. Decl., Ex. B5; 6 USCIS PM, J.2 § (D)(4).

but denied SIJS because of this reason. USCIS' Motion to Dismiss the Amended Complaint was denied in March 2019.

A permanent injunction has not yet issued, and it is not known how long the preliminary injunction will stand. Advocates with clients 18-to-21 who are eligible for SIJS findings through the Probate courts should move as quickly as possible to Petition for guardianship and SIJS findings, and submit applications to USCIS.

Finally, on July 17, 2019, the Washington district court in *Galvez* issued a preliminary injunction on the same grounds, enjoining USCIS:

From denying Special Immigrant Juvenile Status pursuant to 8 U.S.C. §1101(a)(27)(J) on the ground that a Washington state court does not have jurisdiction or authority to "reunify" an immigrant with his or her parents; and from initiating removal proceedings against or removing any Special Immigrant Juvenile Status petitioner whose Special Immigrant Juvenile Status petition has been denied on the ground that the Washington state court did not have jurisdiction or authority to "reunify" an immigrant with his or her parents.

*Galvez*, pp. 24-25.

#### **IV. Practice Considerations**

##### **A. What if the minor is in Removal Proceedings?**

A child in removal proceedings who has an I-360 pending (or will submit an I-360) has several options:

1. At a minimum, a minor who has not yet received SIJS findings but has begun the process in a "juvenile court" may request that future IJ hearings be calendared for after such time as the state court is scheduled to issue its order on SIJS.
2. Where SIJS findings have already been made, a minor may ask the IJ for a continuance of the removal proceedings to allow USCIS to adjudicate the I-360. Once the I-360 is approved, the IJ would then proceed with adjudicating the I485.

3. A minor may ask the IJ to administratively close the removal proceedings until the I-360 is adjudicated. This prevents the child from having to repeatedly return to court while USCIS is still considering the child's petition. Once approved, removal proceedings would move forward and the IJ would adjudicate the I-485.
4. Finally, a minor could request that the IJ terminate the removal proceedings while the minor completes the entire immigration process (including filing and adjudication of I-360 and I-485) before USCIS. Case termination is also beneficial to the child as the child would no longer be in active removal proceedings.

#### **B. May a minor in federal custody apply for SIJ status?**

The same basic process exists for minors in federal custody who seek SIJS as those in state custody: (1) obtain a state court order making “SIJS findings”; (2) apply to USCIS for its “consent”; and (3) seek adjustment of status. For a minor in federal (not state) custody, there is a separate process for “specific consent,” in which the Department of Health and Human Services (HHS) must give its consent before the state court is allowed to change the child's custody status or placement. Specific consent is *not* required for a juvenile court to *take jurisdiction* over a child’s case or to enter SIJS findings. Specific consent is only required where a juvenile court will determine or *alter a child’s custody* or placement status. This would arise, for example, if the child was petitioning to be moved from a federal ORR facility to a local facility, such as a group home that is under local jurisdiction. Requests for consent for a juvenile court to order a change in custody or placement determination over a child in ORR custody must be made in writing to ORR.

#### **C. What are the "age out" issues advocates must address when handling SIJ applications?**

Under the TVPRA's "age-out" provision (referred to as "transition protection"), a child who is under 21 years old at the time of filing her SIJS petition (Form I-360) may not later be denied on the basis of age. So although different states have different rules governing the age of eligibility to apply for SIJS, even in states that do not have SIJS for 18-21-year-olds, so long as the minor was under 18 when the initial SIJS application was sought, the courts keep their jurisdiction. If a minor client wishes to move from a state with more generous SIJS eligibility to a state with more strict eligibility, practitioners must advise their client that they may lose this path to legal residency and consider delaying such a move until after the SIJS order has been obtained in state court. Whether HHS will grant SIJS if the minor subsequently moves to a state without 18-21-year-old SIJS eligibility has not been tested by the courts.

**D. What exactly does it mean for a minor to have been "abused, abandoned, or neglected."**

Practitioners seeking SIJS predicate orders should rely on relevant state laws to argue that the facts of a minor's case constitutes abuse, neglect, or abandonment – even where those acts did not occur in that state or even in the United States, but be sure to discuss with your clients that they are not necessarily accusing their parent of malicious acts, only that under your state's standards, such behaviors would be grounds for finding "abuse, abandonment, or neglect." For example, having insufficient food and nutrition, or deprivation of education or school at young ages may meet state child welfare laws definitions of abuse, abandonment or neglect.

The 2008 TVPRA provides an additional category, "similar basis under state law" that may provide additional grounds preventing child's reunification with parents. For example, one whose parent permitted him to undertake the dangerous journey to the U.S., or instructed a minor

to earn money in the U.S. to help support the family, might also fit into this “similar” standard if not constitute “abuse, abandonment or neglect,” under state statutes. Also, a child who is disabled so that the parent is unable to care for him might fit into this “similar” standard;

Practitioners should argue for as many categories as are supported by the facts, to give the state court ample opportunities to make the SIJS findings.