PART II: SPECIAL IMMIGRANT JUVENILE STATUS FOR CHILDREN AND YOUTH UNDER JUVENILE COURT JURISDICTION

CHAPTER 3[1]

INTRODUCTION AND OVERVIEW TO SPECIAL IMMIGRANT JUVENILE STATUS

This chapter includes:

Special Immigrant Juvenile Status (SIJS) is a federal law that helps certain undocumented children and youth in the state juvenile system obtain lawful immigration status. This chapter provides basic information about SIJS. It also directs you to subsequent chapters that discuss different aspects of SIJS in more detail.

For many child welfare workers, this chapter will provide all the information you need. Chapters 4–9 are designed to answer more specific questions on the nuances of eligibility, risks and benefits of applying, general background on state juvenile court systems and how immigration interfaces with them, and the application process for both affirmative and defensive cases. In particular, Chapters 8–9 provide information on both the affirmative and defensive application processes and how to complete the forms.

The appendices to this manual contains many useful items for SIJS cases, such as a sample court order and other papers that you can present to a juvenile court judge, a handout in

[1] Portions of this chapter were reprinted with permission from Katherine Brady & David Thronson, *Immigration Issues Representing Children Who Are Not United States Citizens,* in *Child Welfare Law and Practice Manual: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases*, National Association of Counsel for Children (2d. 2004).

English and Spanish that you can use to discuss the risks and benefits of this program with the child, a copy of the law, regulations, and INS and CIS memoranda,[2] and sample completed copies of application forms. See **Appendices**. Note that it is easy to obtain the immigration forms you'll need for the application from the CIS website at www.uscis.gov, or by calling a toll-free number, or from an immigration practitioner. See instructions in § 8.2.

§ 3.1 Lawful Immigration Status: What Is It and Why Is It Important? The Stories of Julia and Martin

The Special Immigrant Juvenile Status law permits undocumented children who have come under the jurisdiction of a juvenile court and meet other requirements to become lawful permanent residents.

Examples: The Stories of Julia and Martin. When "Julia" was 14-years-old, she became a dependent of a juvenile court due to her parents' abuse. The court terminated her parents' rights and placed Julia in long-term foster care. She recovered from her abuse and adjusted well to life. She got good grades and was accepted to a state university.

However, just before Julia's 18th birthday the county social workers discovered that she had been born in Mexico and was brought into the United States illegally. Although Julia spoke English perfectly and seemed very "American," she was an undocumented immigrant. Because of this, it looked like everything Julia had worked for would be destroyed. As an undocumented person, at that time (before the passage of AB 540 in California) Julia was not eligible to pay in-state tuition and so could not afford college. Further, she could not work legally, and so faced a future of being exploited in the underground economy or working with fake papers and hoping she would not be discovered. Finally, if immigration officials ever located her, they could deport her back to Mexico, where she had no one.

Luckily, one of her social workers had heard of SIJS. Although right before Julia's 18th birthday was a late date to apply, county social workers and local immigration attorneys working together were able to successfully complete the SIJS application process before Julia was released from dependency. Julia became a lawful permanent resident through SIJS. The end of the story is that the real "Julia" went on to a successful college career, became an accountant, and has made a great life for herself!

"Martin" was placed in juvenile delinquency proceedings when he was arrested after a fight. When it came time for the juvenile court to release him on probation, the court found that it could not send him back to his parents because of their record of physical abuse and illegal actions. The court instead placed Martin in a foster care group home. Although guidance has not

[2] Often policy and procedure pertaining to immigration benefits are outlined in Interoffice Memoranda issued by CIS (and formerly by INS). Copies of relevant memoranda are located in the **Appendices** to this manual. They can sometimes also be found on the CIS website at www.uscis.gov. Select to "Laws" from the top menu and then click on "Policy Memoranda." You will be able to search by topic; of particular relevance is the category "juveniles."

been published on this, under the statute and the regulation Martin also meets all the requirements for a green card through SIJS.

§ 3.2 What Is Special Immigrant Juvenile Status and Who Is Eligible to Become a Permanent Resident through Special Immigrant Juvenile Status?

Special Immigrant Juvenile Status (SIJS) is a federal law that assists certain undocumented children in obtaining lawful permanent residency. The statutory basis for Special Immigrant Juvenile Status can be found in the Immigration and Nationality Act (INA) at § 203(b)(4), which allocates a percentage of immigrant visas to individuals considered "special immigrants," and § 101(a)(27)(J) which defines Special Immigrant Juveniles.[3] The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), enacted on December 23, 2008, clarified and expanded the definition of Special Immigrant Juvenile and supersedes the previous statutory definition.

Now persons who are declared dependent upon a juvenile court or committed to the custody agencies or departments of a state or to court-appointed individuals or entities, 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" and whose return to their country of nationality or last habitual residence is not in their best interest, may be able to obtain Special Immigrant Juvenile Status and, based on that, apply for lawful permanent residency (a green card). To do this, they must submit two applications and meet two sets of requirements:

1) They must apply for **Special Immigrant Juvenile Status**, and

2) Based on the Special Immigrant Juvenile petition, they also must **apply for lawful permanent residency** (a green card). In immigration terminology, applying for permanent residency is called applying for **adjustment of status** to that of a lawful permanent resident.

The two applications are filed at the same time in an affirmative application. In a defensive application one in which the child is in removal (deportation) proceedings, the SIJS petition is submitted first and adjustment of status application is submitted later.

A. Petition for Special Immigrant Juvenile Status (SIJS)

A federal statute (law) provides that an applicant must meet the following criteria to qualify for SIJS.[4]

[3] INA § 101(a)(27)(J), reprinted in **Appendix C**. This section was added by § 153 of the Immigration Act of 1990 (IA90) and amended most recently by the TVPRA in 2008.
[4] INA § 101(a)(27)(J), reprinted in **Appendix C**.

1. Dependency, Delinquency, or Other Juvenile Court Proceedings

The applicant must be a dependent of the juvenile court or the court must have legally committed the child to, or placed him or her under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court. This broad definition includes children in dependency, guardianship/probate as well as delinquency proceedings. It also includes children who enter into dependency or are committed to the custody of individuals and are later adopted.

> **Example:** Samy is a dependent of a juvenile court and placed in foster care due to neglect by his parents. Leila enters into the child welfare system due to her mother's incarceration. The juvenile court appoints her aunt as her guardian. Rose is in delinquency proceedings for auto theft, and the court has found that it can't return her to her parents' custody on probation due to their abuse. All three of these children may be eligible for SIJS if they can meet all of the other requirements.

For further discussion of dependency, delinquency, guardianship, and adoption and its intersection with SIJS see § 4.3. For general background of these systems, for those unfamiliar with them, consult Chapter 7.

2. The Juvenile Court Must Find That Reunification with One or Both Parents Is Not Viable

For the child to qualify for SIJS, a judge must issue a court finding that *the child's reunification with one or both parents is not viable* due to abuse, neglect or abandonment or a similar basis under state law.[5]

A finding for SIJS purposes that reunification is not viable does not require formal termination of parental rights or a determination that reunification will never be possible. While short separations from parents likely would not qualify for a finding that reunification is not viable, the possibility need not deter a finding that reunification presently is not viable as long as there is a significant separation.

The "one or both parents" language also signifies that the child need not be separated from both parents to be eligible for SIJS. In other words, the statute appears to provide SIJS eligibility on the basis of the non-viability of reunification with one parent due to abuse, neglect or abandonment, even while the child remains in the care of the other parent or while the court is actively trying to reunite the child with the other parent. Advocates should be aware, however, that the parent with whom the child remains or with whom he or she eventually reunifies will not be eligible for legal status through the child at any point in the future, even after he or she

[5] Manoj Govindaiah, Deborah Lee, Angela Morrison, & David Thronson, *Update on Legal Relief Options for Unaccompanied Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, Practice Advisory, AILA InfoNet Doc. 09021830, pp. 3–4 (posted 2/19/09). (Hereinafter "TVPRA Practice Advisory.")

becomes a U.S. citizen. There is very little legislative history on the meaning of this language and it remains to be seen how immigration authorities will interpret it, so advocates should proceed cautiously in this area until further guidance is provided.

Advocates should also note that the former SIJS statute required an applicant to have been "deemed eligible for long-term foster care" by the court, which in turn was interpreted to mean that family reunification was no longer a viable option. The TVPRA eliminated this requirement, which had been a source of confusion for both juvenile courts and U.S. Citizenship and Immigration Services (CIS). In essence, the TVPRA clarified the terminology in the statute and made clear that the child need not be in actual state foster care to be SIJS-eligible.[6] Some official SIJS state court forms, such as California's (the JV-224), still track the old statutory language and need to be updated. See **Appendix J**.

> **Example:** Sondra is in permanent placement now that reunification efforts with both parents have ended. She is in long-term foster care but might be adopted. Reunification with both parents is not viable and, therefore, she is eligible for SIJS.
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> **Example:** Esteban's parents are being offered reunification services. He has been living in foster care for months. Since the judge has not yet found that reunification is not viable, he may not be eligible for SIJS.
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> **Example:** David's mother's parental rights were terminated due to abuse. While David's father has abandoned him, his rights were not terminated because he could not be timely served through publication. David is eligible for SIJS.
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> **Example:** Sara lived with both her father and mother. Sara was abused by her father and her mother failed to protect her from his abuse. Sara's situation was reported to local child welfare authorities. Sara's mother left Sara's father. Subsequently, the juvenile court reunified Sara with her mother. For SIJS eligibility, the juvenile court only needs to find that family reunification with one parent—here, Sara's father—is not viable. An advocate may argue that reunification with Sara's mother would not bar her from SIJS, although there is no guarantee that immigration authorities will agree with such an interpretation.[7]

For further discussion, see § 4.4.

[6] USCIS Memorandum, Donald Neufeld and Pearl Chang, "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions" HQOPS 70, 8.5, p. 2 (Mar. 24, 2009). (Hereinafter the "Neufeld Memorandum.")
[7] TVPRA Practice Advisory, pp. 3–4.

3. Due to Abuse, Neglect, Abandonment or Similar Basis under State Law

The court should make it clear that reunification with one or both parents is not viable *due to abuse, neglect or abandonment of the child or a similar basis under state law*, as opposed to just to get the child lawful immigration status or for some other reason.[8]

Abuse, neglect and abandonment are defined under state law and do not have to take place within the United States for the child to be eligible for SIJS. The relevant question for SIJS eligibility is whether a judge, under the applicable law of the state, has found abuse, neglect or abandonment or some other similar finding. While this language prohibits establishing SIJS eligibility via juvenile court jurisdiction for children not otherwise in need, it does not require that formal charges of abuse, neglect or abandonment be levied against parents. For example, a child for whom the court appoints a guardian can qualify without a separate proceeding against the parents alleging abuse, neglect or abandonment.

Under changes by the TVPRA, the SIJS statute now allows for SIJS eligibility based on findings under state law "similar" to abuse, neglect, or abandonment. For example, some states use different legal terms, other than abuse and neglect, to describe the basis for refusing to reunify a child with his or her parents. Other courts, such as delinquency, may not normally enter abuse and neglect findings, but other findings for which they have jurisdiction. The TVPRA broadened the eligibility requirements such that these state law findings based on slightly different vocabulary meet the SIJS statutory requirements. However, the applicant must still establish that such a basis is in fact similar to a finding of abuse, neglect, or abandonment. To avoid this extra step, if the child was declared a dependent under some other legal term it is best to ask the judge to also include in the SIJS order (discussed below) one of the designated statutory terms "abuse, neglect or abandonment." The judge should use the term whose plain meaning reflects what actually happened to the child.

The juvenile court judge's order should specifically identify whether abuse, neglect or abandonment or a similar basis in law was the foundation for the determination that reunification with one or both parents was not viable. For example, the judge's order could state, "The minor's reunification with the parent is not viable based on abuse" or "The above orders and findings were made due to abandonment and neglect of the minor." See sample judge's order in **Appendix J**. According to a CIS memorandum, the judge's order, or other documents submitted, also must provide a very basic statement of the facts that supported the order.[9] For further discussion, see § 4.5.

4. The Court or an Administrative Agency Must Determine That It Is Not in the Child's Best Interest to Be Returned to His or Her Home Country

Generally the juvenile court should include in its SIJS order (discussed below) that it is not in the child's best interest to be returned to his or her country of nationality or last habitual

[8] INA § 101(a)(27)(J)(i).
[9] Neufeld Memorandum, p. 2.

residence. The evidence for this finding may range from a foreign social service agency's home study determining that a grandparent's home is not appropriate to simply interviewing the child to learn that there are no known appropriate family members in the home country. If the juvenile court does not include this language in its SIJS order, the applicant must submit evidence that this finding has been made in another administrative or judicial proceeding. For further discussion, see § 4.6.

5. The Juvenile Court Judge Should Sign an Order Making the Above Findings

In order for a child to qualify for SIJS, the juvenile court judge must sign a special order, usually prepared by the child's attorney or other advocate, stating that all the findings required for SIJS have been made. The child will submit this order to CIS as part of the child's petition for Special Immigrant Juvenile Status. Advocates should ensure that juvenile court orders submitted with an SIJS petition reflect the new statutory language, e.g., "reunification with one or both parents is not viable" instead of the juvenile is "eligible for long-term foster care."[10] Otherwise, the SIJS order will likely be rejected and a revised one will have to be obtained. A sample judge's order appears in **Appendix J**.

6. Consent to the Grant of SIJS and Specific Consent

There are two requirements of consent under the SIJS law: (1) consent to the grant of SIJS in any case; and (2) specific consent for a juvenile court determination on a child's custody or placement status if the child is in federal custody during removal (deportation) proceedings.

The first type of consent requires that the Secretary of Homeland Security, through the CIS District Director, must consent to the grant of Special Immigrant Juvenile Status.[11] This consent is an acknowledgement that SIJS was not "sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment."[12] CIS conflates consent with the act of approving an SIJS petition and, therefore, there is no separate consent application that needs to be made. An approval of an SIJ application itself is evidence of this consent.[13]

The second type of consent is rarer. It applies only to children in federal custody who seek a juvenile court determination of their custody status or placement. Children in federal custody who are deemed "unaccompanied" will be under the jurisdiction of the Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR), Division of Unaccompanied Children Services (DUCS) (herein after referred to as ORR). As such, children in federal custody seeking a juvenile court determination on their custody or placement status must first obtain "specific consent" from ORR. This is a notable change. Prior to the TVPRA, the specific consent had to be obtained from the Department of Homeland Security (DHS), which

[10] Neufeld Memorandum, p. 2.
[11] INA § 101(a)(27)(iii).
[12] See H.R. Rep. No. 105-405, at 130 (1997).
[13] Neufeld Memorandum, p. 3.

had policies and practices toward unaccompanied minors that were confusing, inconsistent, and detrimental for these youth.[14] For further discussion, see § 4.7.

7. Other Requirements: Applicant Must Be under Age 21 at Time of Filing with CIS, Juvenile Court Should Retain Jurisdiction (Until Further Guidance Is Provided), and Child Should Be Unmarried

a. The Age of 21

Any person under the age of 21 who meets the other requirements can apply for SIJS.[15] Historically, this meant that applicants needed to complete the entire immigration adjudication process prior to turning 21. However, under the TVPRA, as long as the applicant is a "child" (defined as an unmarried person less than 21 years of age) on the date the SIJS petition is properly filed with CIS, CIS cannot deny SIJS regardless of the applicant's age at the time of petition's adjudication.[16] In other words, so long as the applicant is a child at the time of proper filing, the applicant's age will be locked in time for purposes of the SIJS petition. This new rule applies *only* to petitions pending on or filed on or after December 23, 2008.

Note on Applicants Who Are 18 or Older. State laws generally require that a child be under age 18 at the time he or she first is declared a juvenile court dependent. State laws vary as to how long a child can remain a juvenile court dependent once he or she has been 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 potentially can extend dependency to age 21. Similarly, different states have different laws on how old a young person must be to enter or stay under juvenile court jurisdiction in a delinquency case.

Under the regulations, any person under 21 who meets the SIJS requirements can apply for SIJS.[17] Thus as far as CIS is concerned, a 19-year-old could become a juvenile court dependent for the first time at age 19 and could file an SIJS petition and have it approved—so long as he or she meets the other SIJS requirements. In reality, however, this would be very difficult to achieve. Most jurisdictions will not declare a youth dependent once they are 18 or older. In fact, advocates report significant difficulties in obtaining juvenile court jurisdiction even for older children who are close to their 18th birthdays.

b. Continuing Juvenile Court Jurisdiction until the Entire Immigration Process Is Complete

The SIJS regulations provide that the person applying for Special Immigrant Juvenile Status must remain under juvenile court jurisdiction throughout the entire immigration process—that is, until CIS approves the petition for SIJS *and* the application for adjustment to lawful

[14] TVPRA Practice Advisory, p. 4.
[15] 8 CFR § 204.11(c)(1). See reprint of regulation in **Appendix C**.
[16] Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d)(6).
[17] 8 CFR § 204.11(c)(1), reprinted reprint of regulation in **Appendix C**.

permanent residency. [18] This provision predates changes enacted by the TVPRA, and at this time it is unclear whether this requirement will continue to exist.

When this requirement is read in tandem with the TVPRA's new age-out protection (described above), however, it appears this continuing jurisdiction requirement is eliminated altogether for children whose juvenile court cases close due to age. If CIS cannot deny SIJS to any person on account of "age," as long as he or she was under the age of 21 when the SIJS petition was filed, CIS cannot then refuse to approve an SIJS petition or revoke an approved SIJS petition simply because the child's juvenile court case has been closed if this closure is because of "age." This issue comes into play, for example, under state law where dependency, delinquency, or other juvenile court jurisdiction ends when a child turns 18 years old. For these reasons, advocates believe that this regulation needs to be changed to reflect the age-out protections of the TVPRA.

While it seems clear that the statute now intends to protect a child from aging out of SIJS eligibility, until CIS provides further guidance advocates should proceed with caution in this area. Some juvenile court judges will want to, or must under state law, terminate juvenile court jurisdiction when the child reaches a certain age. It, therefore, remains best practice to proceed as expeditiously as possible in pursuing Special Immigrant Juvenile Status to complete processing while the child continues to be under court jurisdiction. If the court is considering termination of jurisdiction, advocates should fight to keep the child under juvenile court jurisdiction until the immigration process is complete. At the same time, immigration attorneys using a new expeditious adjudication requirement can persuade the CIS to speed up ("expedite") the process if the child is about to age out of the juvenile court system.

If continuing to retain jurisdiction in a case is not possible, advocates are best advised to obtain specific language in the juvenile court order terminating jurisdiction of the case that states the case is being closed due to age.

Continuing existence of this regulation creates a difficult situation and needlessly costs state systems time and energy by requiring children to stay in longer in the juvenile court system than they otherwise would. We hope that better rules will appear in the future as a result of the TVPRA's age-out protection. Advocates should keep abreast of developments.

> **Example:** Julia entered the foster care system when she was 14-years-old. Because social workers had not heard about SIJS earlier and did not know about her immigration situation, Julia did not apply for SIJS until she was 19. The juvenile court retained jurisdiction over Julia until she was 20 and the CIS granted her SIJS application.
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> **Example:** Mario entered the delinquency system when he was 15-years-old and resided in a foster care group home for years. Mario did not apply for SIJS until he was 18-years-old. The juvenile court terminated jurisdiction on Mario's 19th birthday due to his age and the fact he had completed probation. Mario should remain eligible for SIJS

[18] 8 CFR § 204.11(c)(5), reprinted at **Appendix C**.

because he was under 21 on the date he applied for SIJS and a denial based on a lack of continuing juvenile court jurisdiction would be "based on age"—something the TVPRA prohibits.

c. The Applicant Cannot Be Married

Under CIS regulations, applicants for SIJS must remain unmarried until the entire immigration process is completed and CIS grants permanent residency. An applicant's being divorced or having his or her own children does not bar SIJS eligibility.

B. Application for Permanent Resident Status

Besides meeting the above requirements for SIJS, the children must fulfill other requirements that apply to all persons who become lawful permanent residents of the United States (get green cards).

Applicants generally might have a difficult time gaining permanent residency or may even be barred from doing so if they have a record of involvement with drugs, prostitution, or other crimes, have engaged in alien smuggling, were previously deported, or have certain other "bad marks" against them. These children need advice from expert immigration counsel before applying. They may well win their case—but they need to get good advice to make sure of that before they apply. Immigration lawyers should note that children seeking SIJS-based adjustment of status are automatically exempted from many grounds of inadmissibility. Also, special waivers of inadmissibility are available to Special Immigrant Juveniles that do not require a qualifying relative. See discussion at § 5.3.

More detailed information on all eligibility requirements for SIJS and adjustment of status is provided in Chapters 4 and 5.

The following types of cases, discussed in Chapter 5, deserve special attention and expert advice:

- Children who soon will turn 18, or are over 18
- Children who soon will be released from juvenile court jurisdiction
- Children who currently are in removal (deportation) proceedings
- Children who are or have been in juvenile delinquency proceedings or have a juvenile or adult criminal record
- Children who have engaged in drug use or drug dealing
- Children who have been previously deported or removed

§ 3.3 What Are the Benefits of Applying for Special Immigrant Juvenile Status?

The most important benefit of applying for SIJS is obtaining lawful permanent resident status—a green card. Special Immigrant Juvenile Status might be the only route for an undocumented child to gain lawful permanent immigration status in the United States. (But see

Part III of this manual for other important and, in some instances, more viable ways that some children can obtain lawful immigration status.)

A lawful permanent resident has the right to **live and work permanently** in the United States and to **travel in and out of the country**. While public benefits (e.g., welfare, MediCare) for permanent residents have been drastically curtailed since 1996, permanent residents are eligible for some benefits initially and more as time goes on. In particular, youth may be eligible for Title IV-E funds, federal foster care, and federal financial aid to go to college. Also, after five years permanent residents can apply for **U. S. citizenship**.

Lawful permanent resident status is **permanent**—a Special Immigrant Juvenile who obtains permanent residency will keep it after he or she is no longer under juvenile court jurisdiction. The person remains a permanent resident for her entire life. The only reason it would end would be if the person became deportable for some reason, such as violation of certain laws and conviction *as an adult* of certain criminal offenses.

The above benefits come with the green card, but two important benefits come as soon as the person submits the SIJS packet to CIS. Applicants who have submitted the SIJS petition and the adjustment of status application **are protected against deportation** and are granted **employment authorization** until their cases are decided.

Counties benefit when a child gains SIJS because they may be able to access federal foster care matching funds, which they cannot do for undocumented children.

See §§ 6.4–6.5 for a further discussion of these benefits.

§ 3.4 What Are the Risks of Applying?

The greatest risk to the child is that, if the affirmative application is turned down, ICE might attempt to remove (deport) the child from the United States.

When a child files an affirmative petition for SIJS, the child is alerting immigration officials in CIS to the fact that he or she is in the United States. Since these petitions are not confidential, if the SIJS petition and/or the adjustment of status application are denied, CIS might transfer the file to ICE, which could use that information to place the child into removal proceedings for deportation.

It is crucial to make sure that the child is likely to gain SIJS and adjustment of status before submitting an SIJS packet to CIS so that you don't unintentionally cause the child to be deported. Note that children who are not eligible for SIJS still may be eligible to get lawful status in some other way, such as through U nonimmigrant status or through an abusive U.S. citizen or permanent resident parent under "VAWA" provisions, even if the child does not come or remain under juvenile court jurisdiction. See Chapters 10 and 11.

In the cases where a child is already in removal (deportation) proceedings and applying for SIJS and adjustment of status defensively, this risk does not exist because immigration authorities are already aware of the child's presence in the United States. In these cases, however, there may be significant barriers to obtaining SIJS and adjustment of status—including getting the children into juvenile court and time pressures created by immigration court deadlines.

§ 3.5 Who Should Apply?

Children who meet all of the statutory and regulatory requirements for SIJS and adjustment of status and who merit a favorable exercise of CIS's discretion should file for these forms of relief. If the children are not in removal proceedings, they should submit the SIJS petition and the adjustment of status application together affirmatively. Generally children should not affirmatively apply if the advocate is not confident that the applications will be granted. In case of doubt, the advocate should be sure to consult with competent immigration counsel. For example, children with juvenile delinquent or adult criminal records or records of extensive immigration violations should consider strategy with an expert before filing.

There is one exception to this cautious advice: Children who are already in removal (deportation) proceedings have nothing to lose by submitting an SIJS petition and a corresponding application for adjustment of status since ICE is already trying to deport them.[19] They should apply for SIJS if there is any chance of qualifying since approval of the SIJS petition and adjustment of status application would stop their deportation. Note that if these children are already in federal custody (ORR custody), juvenile courts will have to get permission ("specific consent") from ORR if they make any determination regarding the child's custody or placement status. No consent is needed if such a determination is not regarding custody or placement status and merely to enter SIJS predicate order findings. See § 4.7.

§ 3.6 What Is the Application Procedure?

The process for applying for SIJS and adjustment of status depends upon whether the child is applying affirmatively or defensively (while in removal proceedings as a defense to deportation). Some steps are similar and others differ. The application procedure is discussed in greater detail in Chapters 8 (affirmative) and 9 (defensive). Sample application packets appear in **Appendices M** through **X**.

Affirmative Case. The child must file two applications, one for Special Immigrant Juvenile Status and one to adjust status to lawful permanent residency. The applicant does not have to travel outside of the United States, but can apply locally.[20] Currently, both the SIJS and

[19] If the child's immigration attorney contests removability and puts DHS to its burden to establish the child's alienage, however, then the attorney would not want to submit an SIJS petition on the child's behalf until that issue is resolved since the SIJS petition does require the child to admit alienage.

[20] 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

the adjustment of status applications are filed at the same time at a central location, the Chicago Lockbox. Besides the forms, the applicant must submit the SIJS order, photographs, the results of a medical exam conducted by a CIS-approved doctor, various filing fees unless they are waived, and some proof of age such as a birth certificate. Applicants generally need to have a photo identification to complete their biometrics and for their CIS interviews.

After the applications are filed with CIS, the child can obtain employment authorization. CIS will schedule an appointment for the child to be photographed and fingerprinted, and the FBI will complete a check of any criminal or delinquency record or prior deportation for children 14 and older. CIS must adjudicate SIJS petitions within 180 days of filing, so the child should be scheduled for adjustment of status interview within six months of the filing date. When CIS interviews the child, he or she often can have a social worker, and certainly an attorney, attend if desired. CIS might approve the case at the interview, or might request further information. If CIS denies the case, it might or might not refer the child to a judge for removal (deportation) proceedings. The child can appeal the SIJS petition's denial to a higher unit at CIS, but it cannot appeal the denial of the adjustment of status application. Instead, the adjustment of status application can only be renewed before the immigration court.

The child will submit two applications *at the same time* if applying for SIJS affirmatively:

One for Special Immigrant Juvenile Status, and
one for adjustment of status to permanent resident.

Defensive Case. The child still must file two applications, one for Special Immigrant Juvenile Status and one to adjust status to lawful permanent residency. Unlike in affirmative cases, however, she does not file them together. Instead, the child first files her SIJS petition with CIS at the Chicago Lockbox—since CIS alone has the power to grant or deny a child's SIJS petition. Besides the forms, the child must submit the SIJS order and some proof of age such as a birth certificate. CIS may adjudicate the SIJS petition with or without an interview of the child. Again, this adjudication must happen within 180 days of the SIJS petition's filing. If CIS denies the child's SIJS petition, the child can appeal to a higher unit at CIS. If CIS approves the child's SIJS petition, she proceeds to the next step.

Once CIS has approved the child's SIJS petition, then the child's immigration attorney will file the child's adjustment of status application with the immigration judge—since the immigration judge alone has the power to grant or deny a child's adjustment of status if the child is in removal proceedings.[21] Besides the forms, the child must submit the results of a medical

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to qualify under § 245(i) or another special program, or pay a penalty fee; they are entitled to adjustment by virtue of their approved SIJS petition. Otherwise, immigration attorneys should note that an SIJS-based adjustment procedure is like that of a § 245(a) adjustment for an immediate relative.

[21] The only exception is if the child is charged as an "arriving alien" in her removal proceedings. In that case, CIS has jurisdiction to adjudicate the child's adjustment of status application. 8 CFR §§ 245.2(a)(1), 1245.2(a)(1).

exam conducted by a CIS-approved doctor and filing fees. The child's immigration attorney must also submit a biometrics packet to CIS so that the child can have her background checks completed. After these steps are completed, the immigration judge will schedule a merits hearing for the child. At that hearing, the immigration judge will take testimony and will likely issue a decision on the child's case. If the immigration judge approves the case, the child becomes a lawful permanent resident. If the case is denied, the child can file appeals with the Board of Immigration Appeals and then the federal courts, depending upon the circumstances.

Note that if the immigration judge is willing to terminate the child's removal proceedings upon the filing or approval of the child's SIJS petition, then the child can proceed affirmatively with her case and seek her adjustment of status before CIS rather than in immigration court.

The child will submit two applications *at different times and to different entities* if applying for SIJS defensively:

One for Special Immigrant Juvenile Status to CIS, and then one for adjustment of status to permanent residency to the Immigration Judge—but only if the SIJS petition is approved.

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§ 3.7 Expeditious Adjudication

SIJS petitions are now required to be adjudicated expeditiously, within 180 days after the date on which the application is filed.[22] Advocates have been informed that this expeditious requirement only applies to the SIJS petition (I-360) and not the entire application packet, which includes the adjustment of status application (I-485). In order to comply with this requirement, CIS has the discretion to waive interviews with applicants under the age of 14 or when it is determined that an interview is not otherwise necessary. CIS has also been instructed that interviews should be scheduled as soon as possible.[23] Advocates should contact their local CIS offices if SIJS petitions are not adjudicated on time, and should then go up the chain of command at CIS until the issue is resolved. Action in federal court may be possible if CIS does not adjudicate a child's SIJS petition within the 180-day time frame.

§ 3.8 Talking with the Child Applicant and Child's Attorney about SIJS

Before a petition for Special Immigrant Juvenile Status is filed for a child, the child should understand what the application is about, and what are the risks and benefits of filing. Any attorney for the child must be consulted, and the child's social worker, probation officer, CASA volunteer, foster parent, or other interested advocate may be involved. A one-page form

[22] TVPRA, P.L. 110-457 at § 235(d)(2).
[23] Neufeld Memorandum, p. 4.

in Spanish and English that you can use to help explain the program to the child appears in **Appendix F**. A more in depth discussion about working with immigrant children is at Chapter 2.

§ 3.9 Natural Parents, or Prior Adoptive Parents, and Maybe Siblings, Cannot Benefit through Grant of SIJS to Child

A child who immigrates as a Special Immigrant Juvenile essentially ceases to be the "child" of his or her natural or prior adoptive parents for immigration purposes.[24] This means that the child will not be able to use her new lawful immigration status to help her original parents to get lawful status, even if parental rights were not terminated. For example, a Special Immigrant Juvenile who becomes a permanent resident and then a U.S. citizen will not be able to immigrate his or her natural mother. Usually a U.S. citizen of at least 21 years of age would have that right.

Congress enacted this rule to make sure that parents who abused, neglected or abandoned their children would not benefit from the fact that the children qualified for SIJS. These parents generally don't lose any immigration benefit that they otherwise would have had, because without SIJS their undocumented child usually could not have helped his or her parents to immigrate. Even though under the TVPRA a child may qualify for SIJS if only one parent is abusive, neglectful or has abandoned him or her, the other, non-offending parent still faces this same bar. He or she cannot gain any immigration benefit through the child. In some cases where children want to help a non-offending parent to also obtain lawful immigration status, U nonimmigrant status may be a better option. See Chapter 10.

A U.S. citizen who is at least 21-years-old can petition for permanent resident status for a sibling. Unfortunately, it may be that the child who gained lawful permanent residency through SIJS is barred from using her new status to assist a brother or sister to immigrate. Immigration law defines siblings as persons with a common parent. Since the SIJS recipient is no longer considered the "child" of the natural or prior adoptive parent, CIS may assert that the child no longer has a sibling relationship with brothers and sisters for immigration purposes. Even if the child can apply for siblings, the main drawback is that sibling's petition would be considered "fourth preference." These petitions generally have a long waiting period (of from 12 to 20 years after the petition is filed) before the sibling receives any legal rights. See Chapter 13 on family-based immigration.

§ 3.10 Children in Immigration Custody

If an unaccompanied immigrant child is already in immigration custody before coming to juvenile court, a juvenile court judge cannot make custody or care decisions about the child without the Office of Refugee Resettlement's (ORR) permission. Specifically, the SIJS statute states that

[24] INA § 101(a)(27)(J), reprinted in **Appendix C**.

> "no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction."[25]

Importantly, specific consent is not required for a juvenile court to take jurisdiction over a child's case or to enter SIJS findings. Custody or placement decisions are not always ones that arise in the process of obtaining the SIJS order. Specific consent is only required where a juvenile court will deal with a child's custody or placement status.

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.[26] Instructions are found at § 7.6. A sample request and response are provided at **Appendix Q**. As of October 2009, ORR has approved all requests for specific consent. The only requests ORR has returned were those for whom specific consent was not required.

[25] INA § 101(a)(27)(J)(iii)(I), reprinted in **Appendix C**.
[26] Neufeld Memorandum, p. 4.