

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

**CHAPTER 3<sup>1</sup>**

**INTRODUCTION AND OVERVIEW TO SPECIAL IMMIGRANT JUVENILE STATUS**

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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 or probation 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.

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<sup>1</sup> 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).

The appendices to this manual contain 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 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, USCIS memoranda,<sup>2</sup> 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 USCIS website at [www.uscis.gov](http://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, Martin, Eduardo and Ramon

*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, Martin, Eduardo and Ramon.** When “Julia” was 14-years-old, she became a dependent of a juvenile court due to her parents’ abuse. The court terminated her father’s parental rights and provided reunification services to Julia’s mother. Her mother eventually successfully completed services and reunified with Julia. Julia 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 and before completion of reunification, 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 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 and she was in reunification services with her mother, county social workers and local immigration attorneys working together were able to successfully complete the SIJS application process before Julia was released from dependency based on a claim of abuse by her father. 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!

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<sup>2</sup> Often policy and procedure pertaining to immigration benefits are outlined in Interoffice Memoranda issued by USCIS (and formerly by INS). Copies of relevant memoranda are located in the appendices to this manual. They can sometimes also be found on the USCIS website at [www.uscis.gov](http://www.uscis.gov). Select “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 “Special Immigrant Juveniles.”

“Martin” was placed in juvenile delinquency proceedings when he was arrested after a school fight. The juvenile court ordered him placed home on probation, with a probation officer having regular check-ins with Martin. However, the probation department realized that there was an issue with Martin’s immigration status. Martin’s public defender had heard of Special Immigrant Juvenile Status and, after learning that Martin’s father had abandoned his family many years ago and had never provided support for Martin, realized that Martin might be eligible for SIJS. Martin’s public defender successfully requested that the juvenile court make the findings necessary to allow Martin to apply for SIJS. Martin is now a lawful permanent resident, which has contributed greatly to his rehabilitation by allowing him to plan for future education and employment.

“Eduardo” came to the United States at the age of 16, traveling with a guide, or “coyote.” He was apprehended at the border, designated as an “unaccompanied alien child,” and placed in an ORR immigration detention facility in Harlingen, Texas. Eduardo was sent to the United States by his abusive father who wanted Eduardo to find work and send money home to the family. Eduardo had no plan for where he would live or how he would find work. He was later reunified with a maternal aunt who resides in San Jose, California. After meeting with a local immigration non-profit in San Jose, Eduardo was identified as being SIJS-eligible based on the extreme physical and emotional abuse he suffered from his father, and his mother’s failure to protect him. Eduardo was also in need of an adult guardian in the United States since he was 16 years old and residing in the United States without a parent. Eduardo’s attorney helped him file a petition to have his aunt appointed to be his guardian, and also to request that the court make the eligibility findings for SIJS. After a successful petition in probate (guardianship) court and a positive outcome from his SIJS application, Eduardo is safely residing in his maternal aunt’s care and well on his way to becoming a lawful permanent resident.

After being assaulted and harassed by gang members in his neighborhood for months, “Ramon” fled Guatemala at the age of 14 to reunite with his mother who resides in Los Angeles, California. Ramon’s father had physically abused both his mother and Ramon when he was a child. After his mother escaped to the United States, Ramon lived with his maternal grandparents. His father visited infrequently, usually while intoxicated, and never provided Ramon with emotional or financial support. Ramon has not seen his mother since he was five years old but successfully reunites with her after being apprehended by border patrol and placed in an immigration detention center for children. Ramon’s mother would like to request sole legal and physical custody of Ramon to protect him from any future abuse by his father. If a family court grants Ramon’s mother’s custody petition and also makes the eligibility findings for SIJS, Ramon will be SIJS-eligible.

### **§ 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.<sup>3</sup> The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), enacted on December 23, 2008, clarified and expanded the definition of a Special Immigrant Juvenile and supersedes the previous statutory definition. Pursuant to the pre-TVPRA statute, federal regulations were promulgated and can be found at 8 CFR § 204.11. These regulations implement the federal statute, but have not been updated following significant changes to the SIJS statute made by the TVPRA. In 2011, updated regulations were proposed and public comment was received; however, at the time of this writing, revised regulations have not been finalized. To the extent that the federal regulations conflict with the current statute, they are superseded by the statute. Nonetheless, pending issuance of the revised regulations, the current regulations remain in effect to the extent that they do not conflict with the statute.

Under the current law, persons who are declared dependent upon a juvenile court *or* committed to the custody of 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 typically 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 the 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.<sup>4</sup>

##### ***1. 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

<sup>3</sup> INA § 101(a)(27)(J). This section was added by § 153 of the Immigration Act of 1990 (IA90) and amended most recently by the TVPRA in 2008.

<sup>4</sup> INA § 101(a)(27)(J).

state, *or* an individual or entity appointed by a state or juvenile court. A juvenile court is defined as any “court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.”<sup>5</sup> The name of the court is not determinant; rather the role of the court is what matters for purposes of SIJS eligibility. The broad definition of juvenile court and the jurisdiction it may have under federal law includes children in dependency (child welfare), guardianship, family court/custody as well as delinquency (alleged violations of the law by youth) proceedings. It also includes children who enter into dependency or are committed to the custody of individuals and are later adopted.

**Examples:**

- **Dependency:** Samy is a dependent of a juvenile court and placed in foster care due to neglect by his parents. Following his parents’ failure to comply with reunification services, Samy’s parents’ parental rights are terminated. Samy is eligible for SIJS.
- **Guardianship:** Miguel is living with a paternal uncle in New York State after fleeing gang violence and parental abuse and neglect in his home country of Honduras. A state court appointed Miguel’s uncle to be his guardian, and also found that reunification with Miguel’s parents was not possible due to physical abuse and neglect and that it is not in his best interest to return to Honduras. Miguel is eligible for SIJS.
- **Delinquency:** Erika was brought to the United States at the age of two. As a teenager, she gets arrested for shoplifting, is charged in delinquency court and committed to the care, custody, and control of the probation department. She is ordered home on probation and resides with her father. Her mother is a drug addict and abandoned the family when Erika was seven years old. An advocate can argue that Erika is eligible for SIJS based on her mother’s neglect and abandonment and the fact that it would not be in Erika’s best interest to be returned to her home country of Mexico, where she has no one to provide care for her and where she has no other support system.
- **Family/Custody:** Rosa is residing safely with her mother in Los Angeles after fleeing Guatemala. In Guatemala, her father had abused her when she was young, and then abandoned the family. Rosa’s mother seeks legal and physical custody of her in a family court in Los Angeles so that she can have full custodial rights and protect her daughter from any further harm. If the family court also finds that reunification with Rosa’s father is not viable due to abuse and abandonment and that it is not in Rosa’s best interest to return to Guatemala, she will then be eligible to apply for SIJS.

All four of these children may be eligible for SIJS if they can meet all of the other requirements.

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<sup>5</sup> 8 CFR § 204.11(a).

For further discussion of dependency, delinquency, guardianship, custody, and adoption and their intersection with SIJS, see **Chapter 4**. For general background of these systems, 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 an order 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.<sup>6</sup>

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 provides 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 becomes a U.S. citizen.<sup>7</sup> There is very little legislative history on the meaning of this language and there has been some resistance from state courts to grant these claims. However, the plain language of the statute, some state court decisions, as well as USCIS's official interpretation and implementation of the statute support the viability of these claims. See **Chapter 4** for further discussion of “one-parent” SIJS cases.

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**NOTE on Expansion of Scope of SIJS beyond Foster Care:** Advocates should 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 USCIS. 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.<sup>8</sup>

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<sup>6</sup> INA § 101(a)(27)(J); see also 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”].

<sup>7</sup> INA § 101(a)(27)(J)(iii)(II).

<sup>8</sup> USCIS Memorandum, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, HQOPS 70, 8.5, p. 2 (Mar. 24, 2009) [hereinafter “Neufeld Memorandum”].

**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 provided reunification services with Sara’s mother. For SIJS eligibility, the juvenile court only needs to find that family reunification with one parent—here, Sara’s father—is not viable and therefore, the court can enter SIJS findings even while reunification services are provided to Sara’s mother. Sara would be eligible for SIJS.

While this example demonstrates the expansion of who may be eligible for SIJS while in dependency (child welfare) proceedings, there are additional avenues for children to come under the jurisdiction of a juvenile court and be eligible for SIJS. They include delinquency, guardianship, family/custody, and adoption proceedings. See examples in the prior section. For further discussion, see **Chapter 4**.

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### 3. *Due to abuse, neglect, abandonment or similar basis under state law*

The court order must 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.<sup>9</sup>

Abuse, neglect and abandonment are defined under the relevant 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 subject to juvenile court jurisdiction 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.

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<sup>9</sup> INA § 101(a)(27)(J)(i).

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 and provide some facts to support the finding. It is not sufficient for the order to simply track the language of the SIJS statute. For example, the judge's order could state, "The minor's reunification with the mother is not viable based on physical abuse he suffered in the form of weekly beatings which left bruises on the minor's body" or "The above orders and findings were made due to abandonment and neglect of the minor by the father, in that the father failed to provide support for the child and has not contacted the child in seven years." See sample judge's order in **Appendix J**. According to USCIS guidance, the judge's order, or other documents submitted, must provide a basic statement of the facts that supported the order, sufficient to establish that there was a factual basis for the court's findings.<sup>10</sup> For further discussion, see § 4.5.

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**PRACTICE TIP:** Advocates who demonstrate that juvenile court proceedings are protected by state privacy/confidentiality laws should avoid giving USCIS any documents from the state court proceedings.

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**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 residence. Both the downsides of the child returning to her home country and the upsides of remaining in the United States are relevant. 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 or that no one is available to protect the child from harm in the home country. Other factors may include: family and friend support systems in the United States, the child's emotional and physical well-being, and access to medical and educational resources that the child may require. 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 USCIS as part of the child's petition for Special Immigrant Juvenile Status. A sample judge's order appears in **Appendix J**.

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<sup>10</sup> Neufeld Memorandum, p. 2.

## **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 USCIS District Director, must consent to the grant of Special Immigrant Juvenile Status.<sup>11</sup> 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."<sup>12</sup> USCIS 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 SIJS application itself is evidence of this consent.<sup>13</sup>

The second type of consent is more rare. 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 placed in the custody of the Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR), Division of Children's Services (DCS) (hereinafter referred to as ORR). As such, children in federal custody seeking a juvenile court determination that changes 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 had policies and practices toward unaccompanied minors that were confusing, inconsistent, and detrimental for these youth.<sup>14</sup> For further discussion, see § 4.7.

## **7. Other requirements: Applicant must be under age 21 at time of filing with USCIS, 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.<sup>15</sup> 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 USCIS, USCIS cannot deny SIJS regardless of the applicant's age at the time of the petition's adjudication.<sup>16</sup> 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.

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<sup>11</sup> INA § 101(a)(27)(J)(iii).

<sup>12</sup> See H.R. Rep. No. 105-405, at 130 (1997).

<sup>13</sup> Neufeld Memorandum, p. 3.

<sup>14</sup> TVPRA Practice Advisory, p. 4.

<sup>15</sup> 8 CFR § 204.11(c)(1).

<sup>16</sup> Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d)(6).

**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 is first under the jurisdiction of the juvenile court. State laws vary as to how long a child can remain under juvenile court jurisdiction once he or she has entered the system. Some states, for example, 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. In the guardianship and family law context, most state courts can only take jurisdiction of a minor who is under the age of 18, although there are some notable exceptions (for example, in New York, a guardian may be appointed past the age of 18).

Under the regulations, any person under 21 who meets the SIJS requirements can apply for SIJS.<sup>17</sup> Thus as far as USCIS 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, appoint them a guardian, or make a custody determination once they are 18 or older. This misalignment between federal and state law creates a class of youth, ages 18 to 21, who are otherwise eligible for SIJS under federal law, but are effectively barred from applying for this status because no state court can take jurisdiction of them and make the SIJS findings. 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 USCIS approves the petition for SIJS *and* the application for adjustment to lawful permanent residency.<sup>18</sup> 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 age-out protection (described above) and the terms of the *Perez-Olano* Settlement Agreement (described in **Chapter 4**), however, it appears that this continuing jurisdiction requirement is eliminated altogether for children whose juvenile court cases close due to age. If USCIS 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, USCIS 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, guardianship, family or other juvenile court jurisdiction ends when a child turns 18 years old. For

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<sup>17</sup> 8 CFR § 204.11(c)(1).

<sup>18</sup> 8 CFR § 204.11(c)(5).

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 USCIS 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. Juvenile court jurisdiction may also end by operation of law when a child turns 18. 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 the expeditious adjudication requirement can persuade USCIS to speed up (“expedite”) the process if the child is about to age out of the juvenile court system.<sup>19</sup>

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 that 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 the juvenile court system longer 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 child welfare 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 USCIS granted her SIJS application.

**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 that he had completed probation. Mario should remain eligible for SIJS 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. Note: if the court had terminated jurisdiction due to completion of probation and not because of age, Mario would be in jeopardy of having his SIJS application denied even if he filed it before the age of 21.

**Example:** Thelma arrived to the United States at the age of 17 and a half. She had been abandoned by both parents as a young child and was raised by a grandmother who was no longer able to care for her. She reunified with a loving maternal aunt who petitioned the

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<sup>19</sup> Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d)(2).

court to be appointed her guardian. By the time Thelma’s hearing date in guardianship court came and her aunt was appointed her guardian, she was weeks away from her 18<sup>th</sup> birthday, when the court’s jurisdiction ends by operation of law. Thelma should remain eligible for SIJS because she was under 21 on the date she applied for SIJS and a denial based on a lack of continuing juvenile court jurisdiction would be “based on age,” which is prohibited by the TVPRA.

**c. The applicant cannot be married**

Under USCIS regulations, applicants for SIJS must remain unmarried until the entire immigration process is completed and USCIS 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 **Chapters 4 and 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 encountered law enforcement even if they have never been formally arrested and/or placed in delinquency proceedings
- Children who have engaged in drug use or drug dealing
- Children who may be in a gang database or flagged as a gang member or associate

- Children who have been previously deported or removed
- Children who have been involved in alien smuggling

### § 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 and federal financial aid to go to college. Also, after five years (and in some cases sooner) 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 USCIS. Applicants who have submitted the SIJS petition and the adjustment of status application **are protected against deportation** and may be 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 **Chapter 6** for a further discussion of these benefits.

### § 3.4 What Are the Risks of Applying?

The greatest risk to the child is that, if an affirmative application is turned down, Immigration and Customs Enforcement (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 USCIS to the fact that he or she is present in the United States unlawfully. Since these petitions are not confidential, if the SIJS petition and/or the adjustment of status application are

denied, USCIS 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 USCIS 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 (a visa for victims of crime) or through an abusive U.S. citizen or permanent resident parent under Violence Against Women Act ("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 USCIS's discretion should file for these forms of relief. If the children are not in removal proceedings, they should generally submit the SIJS petition and the adjustment of status application together affirmatively.<sup>20</sup> 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 their case 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.<sup>21</sup> 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 that changes the child's custody or

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<sup>20</sup> Note that in an affirmative SIJS case, both the I-360 and I-485 are generally filed concurrently with USCIS, unless there is a reason to file the I-360 alone in advance of the I-485 (for example, if the child has a prior executed removal order and the approved I-360 is needed to prevent reinstatement of the removal order, or if it may be helpful for an applicant to have additional time to demonstrate rehabilitation if there are any negative factors in the case, such as a delinquency history).

<sup>21</sup> 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.

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** and **S** through **W**.

**Affirmative Case.** The child must file two applications, one for Special Immigrant Juvenile Status and one to adjust status to lawful permanent residency. Unlike many other bases of eligibility for adjustment of status, the applicant for lawful permanent residency based on SIJS does not have to travel outside of the United States, but can apply locally.<sup>22</sup> Currently, both the SIJS and 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 USCIS-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 USCIS interviews.

After the applications are filed with USCIS, the child can obtain employment authorization. USCIS will schedule an appointment for the child to be photographed and fingerprinted (“biometrics”), and the FBI will complete a check of any criminal or delinquency record or prior deportation for children ages 14 and older. USCIS must adjudicate SIJS petitions within 180 days of filing, so the child should be scheduled for an adjustment of status interview within six months of the filing date. USCIS may adjudicate the SIJS petition with or without an interview of the child. When USCIS does decide to interview the child, he or she often can have a social worker, and certainly an attorney, attend if desired. USCIS might approve the case at the interview, or might request further information. If USCIS denies the case, it may or may 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 USCIS called the Administrative Appeals Office (AAO), 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.

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<sup>22</sup> Immigration practitioners should see INA § 245(h), which provides that SIJS applicants are deemed paroled in and therefore eligible for adjustment even if they entered without inspection. They do not have to qualify under § 245(i) or another special program, or pay a penalty fee; they are entitled to adjustment by virtue of their 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.

**The child will typically submit two applications *at the same time* if applying for SIJS affirmatively: One for Special Immigrant Juvenile Status (Form I-360), and one for adjustment of status to permanent resident (Form I-485).**

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**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 USCIS at the Chicago Lockbox—since USCIS 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. USCIS may adjudicate the SIJS petition with or without an interview of the child. Again, this adjudication must happen within 180 days of the filing of the SIJS petition. If USCIS denies the child’s SIJS petition, the child can appeal to a higher unit at USCIS (the AAO). If USCIS approves the child’s SIJS petition, she proceeds to the next step.

Once USCIS 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.<sup>23</sup> Besides the forms, the child must submit the results of a medical exam conducted by a USCIS-approved doctor and filing fees (or a request for fee waiver). The child’s immigration attorney must also submit a biometrics packet to USCIS 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 by USCIS, then the child can proceed affirmatively with her case and seek her adjustment of status before USCIS rather than in immigration court. This may be preferable because it allows the child’s adjustment of status application to be adjudicated in a non-adversarial setting. Advocates should request that the attorney representing ICE either join or agree not to oppose their motion to terminate. See **Chapter 9** for further information.

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**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 USCIS, and then one for**

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<sup>23</sup> The only exception is if the child is charged as an “arriving alien” in her removal proceedings. In that case, USCIS has jurisdiction to adjudicate the child’s adjustment of status application. 8 CFR §§ 245.2(a)(1), 1245.2(a)(1).

**adjustment of status to permanent residency to the immigration judge—but only if the SIJS petition is approved.**

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### **§ 3.7 Expedious Adjudication**

SIJS petitions are required to be adjudicated expeditiously, within 180 days after the date on which the application is filed.<sup>24</sup> 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, USCIS 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. USCIS has also been instructed that interviews should be scheduled as soon as possible.<sup>25</sup> Advocates should contact their local USCIS offices if SIJS petitions are not adjudicated on time, and should then go up the chain of command at USCIS until the issue is resolved. Action in federal court may be possible if USCIS 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 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 in Spanish and English that you can use to help explain the immigration benefit to the child appears in **Appendix F**. A more in depth discussion about working with immigrant children is in **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.<sup>26</sup> 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.

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<sup>24</sup> TVPRA, P.L. 110-457 at § 235(d)(2).

<sup>25</sup> Neufeld Memorandum, p. 4.

<sup>26</sup> INA § 101(a)(27)(J)(iii)(II).

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 or T nonimmigrant status, for example, may be better options.

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, USCIS 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 the sibling's petition would be considered "fourth preference." These petitions generally have a long waiting period (of anywhere from 12 to upwards of 20 years after the petition is filed) before the sibling receives any legal rights. See **Chapter 13** on family-based immigration.

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**NOTE on DAPA Eligibility for Parents of Children who Received Status through Special Immigrant Juvenile Status:** At the time of writing, there is an open question whether a parent of a child who gained lawful permanent residence or U.S. citizenship through SIJS may be able to obtain deferred action under the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA, part of the President's Executive Action on Immigration announced on November 20, 2014).<sup>27</sup> DAPA provides temporary reprieve from deportation and employment authorization for up to three years based on being the parent of a U.S. citizen or lawful permanent resident son or daughter and meeting other requirements. See **Chapter 16** for further information. Advocates could argue that the SIJS statute only provides that no parent be afforded any right, privilege, or status "under this Act," referring to the federal immigration statute, and that since DAPA is executive immigration policy and not a statutory amendment, obtaining relief through DAPA is not barred by federal immigration law.

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<sup>27</sup> The DAPA program, originally set to begin no later than May 2015, is, at the time of this writing, enjoined by a temporary injunction issued on February 16, 2015 by a federal district court in the Southern District of Texas in the *Texas v. United States* case. See *State of Texas, et al. v. United States*, No. 1:14-cv-254 (S.D. Tex. Feb. 16, 2015) (order granting temporary injunction). The federal government has already indicated that it will appeal the decision, but until a further ruling from the district court, appellate court, or the U.S. Supreme Court, the DAPA program will temporarily be blocked.

### **§ 3.10 Children in Immigration Custody**

If an unaccompanied immigrant child is in immigration custody when she comes to juvenile court, a juvenile court judge cannot make custody or care decisions that change the child's custody status or placement without ORR's permission. Specifically, the SIJS statute states that:

“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.”<sup>28</sup>

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 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, e.g., group home that is under local and not federal 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. Instructions are found at § 7.6.

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<sup>28</sup> INA § 101(a)(27)(J)(iii)(I).

