



## **Practice Advisory Immigration Relief for Noncitizens with Dependency Actions**

**The practice advisory reviews types of immigration relief available to noncitizens involved in dependency actions.**

### **Purpose of this Practice Advisory<sup>1</sup>**

The purpose of this practice advisory is to discuss how basic immigration law concepts and procedures intersect with the practice of legal representation of parents and children in child welfare proceedings. This advisory will also inform child welfare lawyers of the ways in which child welfare orders (as well as child welfare agency actions) may have devastating *direct* immigration consequences for noncitizens. Recent federal executive orders and federal immigration enforcement practices have prompted additional need to ensure all dependency clients are receiving effective and zealous legal representation.<sup>2</sup>

A noncitizen means anyone who is not a U.S. citizen or U.S. national.<sup>3</sup> Both children and parents of any age might be noncitizens. It should also be noted that the children of noncitizen parents may have only U.S. citizenship; may have dual nationality with the United States; or may have dual nationality with one or more foreign countries. Some noncitizen parents and children may also be stateless.<sup>4</sup>

### **Ongoing Duty of Diligence in Advising Clients Regarding Immigration Consequences**

Public defenders are often reminded about the devastating immigration consequences of criminal convictions. Child welfare attorneys should *also* take great care to ensure they provide ethical legal representation, which includes competent, diligent counsel and advice. Such representation helps clients make informed, intelligent, and voluntary decisions in their child welfare cases.<sup>5</sup> Child welfare attorneys should strongly consider seeking consultation with immigration law experts in order to correctly advise their clients about the direct and collateral immigration consequences of the child welfare intervention.<sup>6</sup> Child welfare attorneys should assist their clients in obtaining direct legal immigration advice and/or representation as soon as possible, particularly when they are unrepresented in potential or existing immigration proceedings or when they are in custody.<sup>7</sup>

### **Practice Tips:**

- WDA's Immigration Project offers technical case assistance to attorneys seeking immigration consultation regarding immigration consequences. Please contact WDA's Immigration Project, [here](#).

- Noncitizen clients may also contact the only free or low cost legal agency providing comprehensive direct legal immigration representation in Washington State, [Northwest Immigrant Rights Project](#) (“NWIRP”).

## **Family-Based Immigration Relief**

The most commonly-known way of obtaining lawful immigration status is based on a petition by family member (a spouse, parent, child over 21 or sibling), Cancellation of removal is another path to lawful status for noncitizens who have lived in the U.S. for at least 10 years, have a “qualifying relative” (U.S. citizen or lawful permanent resident spouse, parent or child under 21), and meet other criteria.<sup>8</sup> In addition to other criteria, noncitizens without green cards seeking this relief have to establish “that [their] removal would result in exceptional and extremely unusual hardship to the[ir] spouse, parent, or child, who is a citizen of the United States or [person] lawfully admitted for permanent residence.”<sup>9</sup> Even a lawful permanent resident (“green card holder”) can be placed in removal proceedings, and the most common form of relief is also called cancellation of removal, though the requirements for them are different than those for non-permanent residents.<sup>10</sup>

## **Immigration Relief for Battered Spouses and Children**

Noncitizens who are battered spouses, battered children, or battered parents may be eligible to stop their own deportation or file a self-petition to obtain a green card even without being in removal proceedings.<sup>11</sup> The noncitizen must have been battered by or subjected to extreme cruelty by a green card holder or U.S. Citizen who is their spouse, their child, or their parent, or the parent of their child (a helpful alternative if they are not legally married to the abusive partner). Some noncitizens parents and children may be eligible to apply for lawful status (U-visa) because they are cooperative victims of crime.<sup>12</sup> Certain qualifying family members are also eligible for a derivative U-visa based on their relationship to a cooperative crime victim.<sup>13</sup>

Noncitizen parents and children who are victims of human trafficking as defined by law may also be eligible for lawful status (T-visa).<sup>14</sup> These noncitizen parents and children must establish, among other things<sup>15</sup>, that they will suffer extreme hardship involving severe and unusual harm if removed from the United States and that they will cooperate with investigation or prosecution of the trafficking, or, if they are under 18 years of age, that they are unable to do so due to physical or psychological trauma. Certain qualifying family members are also eligible for a derivative T-visa based on their relationship to the cooperative human trafficking victim.<sup>16</sup> But note, even though U-visas and T-visas come with work permits, neither status conveys “green cards.”

## **Special Considerations for Noncitizen Children**

Noncitizen minor children<sup>17</sup> who are not lawfully present in the United States have several options available to them to seek lawful immigrant status as a result of the child welfare proceeding. Attorneys for noncitizen children must be diligent in identifying issues related to immigration status

and nationality but careful in how they conduct investigations and with whom they share information.<sup>18</sup> Merely being the child subject of a dependency petition or of a “pick up” order<sup>19</sup> in a Chapter RCW 13.34 proceeding will not prevent that noncitizen child from being deported or placed into ICE detention. The child’s attorney can take action in the child welfare case to help the noncitizen child become eligible for lawful immigration status and to prevent that noncitizen child from being deported.

Because noncitizen children do not receive lawyers at public expense in the immigration removal (“deportation”) proceedings, helping the noncitizen child find an immigration attorney and then helping that immigration attorney file for immigration relief prior to ICE detaining the child is the best practice.<sup>20</sup> In general, the type of immigration relief available to noncitizen children depends on how they came to be in the United States. Some noncitizen children may be lawfully present, but still may not possess a green card. Some minors and unaccompanied minors may have been admitted as refugees or have been granted asylum (not a green card), but they may be able to apply for green cards. It is imperative that child’s attorneys communicate about immigration status early in the representation because there are timelines associated with those applications.<sup>21</sup> Finally, some noncitizen children may be eligible to file a self-petition to stop their deportation as “battered children” under the special rules outlined by the Violence Against Women Act (“VAWA”).<sup>22</sup>

### **What is Special Immigrant Juvenile Status and why does everyone keep talking about it?**

Special Immigrant Juvenile (SIJ) status is the special type of protection that the federal government provides to foreign national children found in the United States who have been abused, abandoned, or neglected and who are unable to be reunited with at least one parent. Once the SIJ self-petition is approved and the status documents are received, the noncitizen child begins to be eligible to apply for a green card. How long one must wait to petition for a green card varies by country of nationality.<sup>23</sup> The SIJ petition does *provide a pathway to citizenship* assuming the child client remains eligible to adjust her/his status and/or to naturalize later on. Once granted, SIJ status allows a noncitizen child to remain lawfully in the U.S.; to go to school; and to work lawfully in the United States.

As the noncitizen child’s attorney, you can file a motion to request the findings and order necessary for SIJ to be filed at any time.<sup>24</sup> A dispositional order of dependency is preferred, but not always required.<sup>25</sup> Immigration advocates suggest that an order of disposition be entered at least as to one of the parents prior to filing a motion for the SIJ predicate order. Such a motion asks the state juvenile court to find and order that:

- (1) The Court has jurisdiction to make decisions about custody and care of this foreign national child; and
- (2) This child is unmarried; and
- (3) This child is under the age of 21 years; and
- (4) [ ] This child is dependent upon the state or court; or [ ] This child is legally placed with a state (or private) agency or placed with a private person (who is not the parent); and
- (5) The court must find it is not in this child’s best interests to return to their home country (or the country they last lived in); and

- (6) The court must find this child cannot be reunited with a parent because they were:  
[ ] abused, [ ] neglected, [ ] abandoned, or [ ] for some other similar reason under state law.

Child welfare attorneys are uniquely situated to be able to seek the SIJ predicate order in state juvenile court and provide that order to an immigration attorney<sup>26</sup> so that the immigration attorney can petition for the child to receive SIJ status. The state juvenile court *can* make findings and enter an order that allows the child to start the child's immigration case at any time.<sup>27</sup> Without the SIJ predicate order, the immigration case cannot begin. Immigration officials will monitor the status of the dependency case; whether reunification has occurred with both parents as opposed to just one parent; and/or whether the case is dismissed while the immigration petition is pending.<sup>28</sup> The noncitizen child's attorney, even when the child is not the petitioner, should insist upon entry of the orders of dependency and disposition as soon as practicable as to at least one parent. The noncitizen child must receive an immigration decision about whether the SIJ petition is granted or denied within 180 days of the filing of that petition. The sooner the petition is filed, the sooner the noncitizen child is protected from removal.

Noncitizen dependent children in the Extended Foster Care Program<sup>29</sup> are eligible to file for the SIJ status until age 21, so long as they meet the SIJ requirements and their court case remains open. Unmarried noncitizens, who are between the ages of 18 and 21 and who are not in the Extended Foster Care, may now seek predicate SIJ orders in state court through a new form of guardianship, called Vulnerable Youth Guardianship, so long as they are otherwise eligible.<sup>30</sup> If you are the attorney for an unmarried noncitizen under the age of 21, you might be able to start the new court action file a petition for vulnerable youth guardianship and to request the findings and order necessary for an SIJ petition to be filed for your client.<sup>31</sup>

**Please consider reviewing more practice advisories related to representing noncitizens in dependency actions, or contact the Incarcerated Parents Project for more information at [dadre@defensenet.org](mailto:dadre@defensenet.org).**

Dependency Immigration Basics (Part I)

Mitigating Negative Findings for Noncitizens in Dependency Actions (Part II)

Incarcerated or Detained Noncitizens in Dependency Actions (Part IV)

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<sup>1</sup> This advisory is authored by D'Adre Cunningham, the Washington Defender Association's Incarcerated Parents Project Attorney, in consultation with Sara Sluszka WDA's Immigration Project. More information and resources for both projects can be found at: [www.defensenet.org](http://www.defensenet.org).

<sup>2</sup> See resources under the heading, *Immigration Enforcement Issues & Presidential Executive Orders of January 25, 2017*, at <http://www.defensenet.org>.

<sup>3</sup> The term, noncitizen, is used by immigration advocates to describe anyone who is not a U.S. citizen. In international treaties, a noncitizen is labelled a "foreign national," which is defined as a person who is not a citizen or national of the country in which they are living. The term "national" means "a person owing permanent allegiance to a state." 8 U.S.C. 1101(a)(21). Foreign nationals may or may not have lawful immigration status. See also definitions contained at:

[https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA\\_Manual\\_4th\\_Edition\\_August2016.pdf](https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf).

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The term “national of the United States” means “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” See 8 USC 1101(a)(22). Examples of U.S. nationals who are not U.S. citizens are persons born either in American Samoa or on Swains Island to parents who are not U.S. citizens.

<sup>4</sup> “A stateless person is someone who, under national laws, does not enjoy citizenship – the legal bond between a government and an individual – in any country. While some people are de jure or legally stateless persons (meaning they are not recognized as citizens under the laws of any state), many people are de facto or effectively stateless persons (meaning they are not recognized as citizens by any state even if they have a claim to citizenship under the laws of one of more states.)” U.S. Department of State webpage, <https://www.state.gov/j/prm/policyissues/issues/c50242.htm>. Stateless persons can still be detained and ordered deported, but usually will not be subject to physical deportation from the U.S.

<sup>5</sup> Rules of Professional Conduct 1.1 (Competence); Rules of Professional Conduct 1.2 (a) (Scope of Representation, *inter alia*); Rules of Professional Conduct 1.3 (Diligence); Rules of Professional Conduct 1.4 (b)(Communication).

<sup>6</sup> Indeed, criminal defense counsel’s failure to correctly advise, or seek consultation to correctly advise, her client about the impact of a criminal conviction on that client’s immigration status falls below the standard of “reasonableness under the prevailing professional norms” enunciated in Strickland v. Washington. Padilla v. Kentucky, 559 U.S. 356, 368-69 (2010); see also State v. Sandoval, 171 Wn.2d 163, 171-72 (2011). [WDA’s Immigration Project](#) offers technical case assistance to attorneys seeking immigration consultation regarding collateral immigration consequences.

<sup>7</sup> Under federal law, any legal aid or nonprofit legal association receiving Legal Services Corporations funding are prohibited from using the funds to represent people who are undocumented, or are incarcerated in federal, state, and local prisons (including jails). 45 CFR 1637.1. There are limited exceptions. In 2017, some local jurisdictions created funding sources to pay for immigration representation for detained residents of their cities or counties.

<sup>8</sup> 8 USC section 1229b(b), [Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents](#).

<sup>9</sup> 8 USC section 1229b(b), see endnote 10.

<sup>10</sup> 8 USC section 1229b(a), [Cancellation of Removal for Certain Permanent Residents](#).

<sup>11</sup> 8 USC 1229b(b)(2) (“[Special Rule Cancellation of Removal](#)”); 8 USC 1154(a)(1)(A)(iii) (“[VAWA Self-Petition](#)”). Also at: <https://www.uscis.gov/humanitarian/battered-spouse-children-parents#spouse>.

<sup>12</sup> The U Nonimmigrant Status (U-Visa) is for victims of certain crimes who have suffered mental or physical abuse and who cooperate with law enforcement or government officials in the investigation or prosecution of criminal activity created by the Victims of Trafficking and Violence Protection Act. Qualifying crimes, include abusive sexual contact, DV, Female Genital Mutilation (FGM), Rape, Prostitution, and Trafficking. They are listed here at: <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status#Qualifying%20Criminal%20Activities>

<sup>13</sup> Noncitizen parents under the age of 21 may apply on behalf of their own children, parents, and unmarried siblings under the age of 18. Noncitizen parents 21 years old and older may apply on behalf of their spouses and children. Family members can apply for work authorization to accompany the nonimmigrant visa. Noncitizen children may apply on behalf of their own children, parents, and unmarried siblings under the age of 18. Family members can apply for work authorization to accompany the nonimmigrant visa. There is an annual cap of 10,000 U-visas for cooperative crime victims, but there is no cap for qualifying family members. U-visa recipients (either the crime victim or family member) can apply for a green card after three years and work authorization.

<sup>14</sup> <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>

<sup>15</sup> <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status#T%20Nonimmigrant%20Eligibility>

<sup>16</sup> Noncitizen parents under the age of 21 may apply on behalf of their spouses, children, parents, and unmarried siblings under the age of 18; noncitizen parents 21 and older may apply on behalf of their spouse and children. Noncitizen children may apply on behalf of their spouse, children, parents and unmarried siblings under age 18.

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<sup>17</sup> Children with U.S. citizenship are treated as U.S. citizens, even if they are nationals of another country. Determining nationality can be complicated and depends on the laws of the country of birth and the laws of the parents' countries of nationality. <https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/citizenship-and-dual-nationality/dual-nationality.html> <sup>18</sup> Any state actor with the information that a

parent or child is a foreign national and not lawfully present in the United States is neither prohibited from informing ICE about that person's status, nor obligated to keep that information private or confidential from ICE.

<sup>19</sup> Orders issued prior the 72-hour shelter care hearing authorizing the removal of children under RCW 13.34.132.

<sup>20</sup> With new funding sources, children detained by ICE from the City of Seattle and King County may soon have access to direct legal representation in their immigration proceedings. Northwest Immigrant Rights Project has also expanded their representation of children in immigration proceedings by adding additional children's attorneys. They can be reached at: <https://www.nwirp.org/our-work/direct-legal-services/children-youth/>.

<sup>21</sup> <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves>

<sup>22</sup> 8 USC 1229a (c)(7)(C)(iv). Also at: <https://www.uscis.gov/humanitarian/battered-spouse-children-parents#spouse>

<sup>23</sup> As of this writing, children from Mexico, Honduras, El Salvador, and Guatemala have about a 2 year wait to be able to request a green card. <sup>24</sup> Briefing regarding SIJ is readily available upon request, by contacting Lindsay Lennox, attorney at [Children & Youth Project](#) at Northwest Immigrant Rights Project. Please seek assistance by contacting NWIRP directly, [here](#).

<sup>25</sup> In a limited number of cases, particularly where the findings of abuse, neglect, and abandonment apply to both parents and cases where the child cannot go home to the parents, one should consider making the motion for a SIJ predicate order during shelter care. Also, in cases where the findings are not in dispute, it is better to set the motion earlier in the case. Achieving international service by process can be lengthy and the child could be filing for immigration relief during that time frame.

<sup>26</sup> The only free legal immigration advocate organization in Washington State is [Northwest Immigrant Rights Project](#) ("NWIRP"). *Pro bono* attorneys representing detained children in immigration proceedings have also been organized by Kids In Need of Defense (KIND).

<sup>27</sup> Attorneys should consider setting a separate motion for the entry of the SIJ predicate order prior to the dispositional order being entered at least as to one parent; however, it is critical that attorneys ensure that both the dispositional order is eventually entered and that notice and service of process as to any living parents are properly achieved.

<sup>28</sup> In those instances where the child's attorney is petitioning for dependency with and on behalf of the noncitizen child, it is important that the dependency action be diligently prosecuted by the petitioner and that the Order of Dependency be entered as soon as practicable. The dependency action should also remain open with reunification not viable as to at least one parent of the child in order to support the SIJ petition in Immigration Court until a legal resolution to dependency can be entered (and the case dismissed).

<sup>29</sup> Extended Foster Care services may be provided to dependents aged 18-20 even those who are parents. RCW 13.34.267.

<sup>30</sup> The Washington State Legislature passed [Substitute House Bill 1988](#), codified at Chapter RCW 13.90, to create this new form of guardianship for unmarried noncitizens over the age of 18 but under the age of 2 so that eligible people can apply for SIJ protections in immigration court.

<sup>31</sup> Substitute House Bill 1988 "authorizes a court to appoint a guardian for a vulnerable youth from eighteen to twenty-one years old, who is not participating in extended foster care services authorized under RCW 74.13.031, and who is eligible for classification under 8 U.S.C. Sec. 21 1101(a)(27)(J) with the consent of the proposed ward." S.H.B. 1988, 65<sup>th</sup> Leg., Reg. Sess. (Wa 2017). Also Briefing regarding Vulnerable Youth Guardianship is also readily available upon request by by contacting Lindsay Lennox, attorney at [Children & Youth Project](#) at Northwest Immigrant Rights Project. Please seek assistance by contacting NWIRP directly, [here](#).