

DEPENDENCY FILINGS IN STATE JUVENILE COURTS ON BEHALF OF UNACCOMPANIED ALIEN CHILDREN SEEKING SPECIAL IMMIGRANT JUVENILE STATUS

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This memorandum discusses recent issues that have arisen regarding dependency filings in state juvenile courts on behalf of Unaccompanied Alien Children (UAC) that seek court findings to support applications for Special Immigrant Juvenile Status (SIJS). The information contained in this memo is based on legal research by the authors, consultations and information exchange with federal immigration court judges and immigration attorneys with non-profit immigrant rights organizations, information from state court judges and administrators, published guidance by the United States Citizenship and Immigration Services (USCIS), and comments to the United States Senate by the United States Department of Health and Human Services (HHS). The USCIS guidance and HHS comments are attached to this memo.

As an introductory note, state juvenile judges should be aware that they cannot decide whether or not a juvenile will be allowed to remain in the United States. The findings by the juvenile court judge in a dependency proceeding that are discussed later in this memorandum do not constitute a grant of SIJS. It is USCIS, and not the juvenile court, that determines if the juvenile is eligible for SIJS. Further, the juvenile court findings do not guarantee that USCIS will grant the juvenile SIJS, as there are other considerations that enter into that decision.

The Problem

The number of Unaccompanied Alien Children (UAC) from Central America entering the United States has been dramatically increasing. Estimates show that 52,000 UAC have crossed the southwest border between October and June 15, 2014. This is a 99% increase over the previous fiscal year. These children are first detained by the U.S. Department of Homeland Security and then delivered to the U.S. Department of Health and Human Services/Office of Refugee Resettlement (ORR) for placement. ORR initially places the children in an ORR facility run by ORR contractors who provide shelter and services. Children who are not deported will remain in ORR custody until they can be released to sponsors, if a suitable sponsor is available. The sponsors may be one of the following, in order of preference:

1. a parent;
2. a legal guardian;
3. an adult relative;
4. an unrelated adult or an entity designated by a parent or legal guardian;
5. a licensed program; or
6. an adult or entity approved by ORR if no other alternative to long-term detention is available.¹

Once a child is placed with a sponsor, ORR considers its responsibility as terminated. At that point the sponsor becomes responsible for the care and safety of the child, and if the child becomes involved in a dependency case, all further decisions with regard to the placement of the child and any services required for the child will fall under the jurisdiction of the juvenile court and the relevant state or local child protection agencies.²

DHS/Immigration and Customs Enforcement (ICE) may seek to deport a UAC. If so, immigration court proceedings will continue even after a minor is placed with a sponsor. Many of the children admitted into ORR custody may be eligible for some form of legal relief from removal, such as asylum, Special Immigrant Juvenile Status (SIJS), U visas for victims of crime, or T visas for victims of human trafficking.

Juvenile courts, particularly in border states, are expecting to experience a substantial increase in filings on behalf of UACs seeking dependency determinations and juvenile court orders specifying the findings required for application for SIJS. It is likely that, with the continued increase of UACs and placements with sponsors around the United States, other states either are, or will soon be, experiencing a similar phenomenon. The remainder of this memorandum discusses how that process works and how it affects state juvenile courts.

Special Immigrant Juvenile Status (SIJS)

SIJS is an immigration benefit that provides a pathway to lawful permanent resident (LPR) status for abused, neglected, or abandoned juveniles who meet certain statutory

¹ See Byrne, O. and Miller, E., *The Flow of Unaccompanied Children Through the Immigration System*, (Vera Institute of Justice: New York, 2012)

² Statement by Mark Greenberg, Acting Assistant Secretary, Administration for Children and Families, U.S. Department of Health and Human Services, before the Committee on Homeland Security and Governmental Affairs, United States Senate, July 9, 2014

requirements. The issue will come before a state juvenile court judge in the form of a motion by the attorney for the juvenile requesting the judge issue an order with certain required statutory findings that enable the juvenile to file for SIJS, along with the supporting factual basis for each finding.³

There is a three-step process for the juvenile to obtain LPR status.

- First, the juvenile must obtain the order with the required findings described below and the factual basis for each finding, signed by the juvenile court judge. This order permits the juvenile to file an application for SIJS with United States Citizenship and Immigration Services (USCIS), but it does not guarantee that USCIS will approve the application.
- Second, the juvenile must file the application to USCIS for the grant of SIJS. The decision by USCIS to approve the SIJS application is discretionary and will be based in part on the factual bases for the juvenile court findings and in part on other concerns that USCIS may consider under federal immigration law. The approved SIJS application makes the juvenile eligible to file an application with USCIS for adjustment to LPR status but does not guarantee that the child will be eligible to remain in the United States.
- Third, the juvenile must file an application with USCIS for adjustment to LPR status. The decision by USCIS to grant LPR status is based on a variety of statutory requirements and is not automatic just because the juvenile has been granted SIJS. In many cases, the juvenile completes the second and third steps concurrently.

Note that neither the grant of SIJS nor the grant of LPR status is automatic based on juvenile court findings. Both require independent decisions by USCIS.

Required State Court Findings for Eligibility

The process for obtaining SIJS begins with a finding in a state court in the United States with juvenile jurisdiction that the juvenile meets the three required court findings for eligibility. For eligibility for SIJS, there must be a finding by a court in the United States with juvenile jurisdiction, signed by the judge, that:

³ See 8 U.S.C. § 1101(a)(27)(J) and 8 C.F.R. § 204.11.

- The court has declared the juvenile dependent on the court, or has legally committed the juvenile to, or placed the juvenile under the custody of, an agency or department of a state or an individual or entity appointed by the state or a juvenile court located in the United States.
- Reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis found under state law.
- There has been an administrative or judicial finding that it would not be in the best interest of the juvenile to be returned to the juvenile's or parent's previous country of nationality or country of last habitual residence.⁴

The juvenile is eligible to apply for SIJS if reunification is not viable with one parent. A juvenile may be eligible to apply for SIJS if declared dependent due to abuse, neglect, or abandonment by one parent even if the juvenile is still living with the other parent.

A “juvenile court” is defined as a court having jurisdiction under state law to make judicial determinations about the care and custody of juveniles.⁵ Dependency, guardianship, probate and delinquency courts are examples.

A “dependent” is a child legally committed to, or placed under the custody of, an agency or department of the state, or an individual or entity appointed by a state or juvenile court. Placements in foster homes, group homes, with relatives or with guardians qualify.

The dependency filing may be made by a state agency, such as law enforcement, social services, or child protective services, or by a private individual, such as a family member or friend, even if no state agency is involved in the case.

In addition, for USCIS to grant SIJS, the following requirements must be met:

- The juvenile must be declared dependent while present in the United States and under the jurisdiction of the court.
- The juvenile must file for SIJS (USCIS Form I-360) before reaching the age of 21.
- The juvenile must be unmarried at filing and remain so until SIJS is granted.

⁴ See USCIS Guide: *Special Immigrant Juvenile Status: Information for Juvenile Courts* and 8 U.S.C. 1101(a)(27)(J)

⁵ 8 C.F.R 204.11(a)

- The child must remain under juvenile court jurisdiction until SIJS has been granted by USCIS, subject to exceptions for age-related cases and certain other circumstances.
- The dependency case must have been filed primarily to obtain relief from abuse, neglect, or abandonment and not primarily to obtain an immigration benefit.

When the juvenile files an application with USCIS for SIJS, the order of the juvenile court making the required juvenile court findings, signed by the judge, must be attached to the application. The USCIS then makes the determination of eligibility for SIJS. USCIS will review the basis of each finding to assure that there was a genuine dependency issue.⁶ Note that the approval of an SIJS application by the USCIS does not constitute a termination of parental rights (TPR).

The Application for Adjustment of Status to Lawful Permanent Resident (LPR)

The grant of SIJS makes the juvenile eligible to apply for adjustment to LPR status, either concurrently or later. The grant of adjustment to LPR status is discretionary with USCIS and is not guaranteed even if the juvenile has been granted SIJS. If the juvenile is in removal proceedings, only the immigration judge can grant the adjustment of status. The juvenile court judge does not have the power to grant adjustment of status.

To be eligible for adjustment to LPR status, an applicant must meet the grounds of admissibility to the United States under federal immigration law. With regard to juveniles, USCIS can waive many of those grounds.⁷ Still, some of the grounds for inadmissibility under federal immigration law will apply to a juvenile applying for LPR status on the basis of an approved grant of SIJS. In particular, an alien juvenile who engages in any of the following areas of conduct, some of which may appear in the context of a delinquency hearing, may be ineligible for adjustment of status to LPR even if the juvenile has been granted SIJS:

- known or reasonably believed to have engaged in drug trafficking;
- being a drug addict;
- having engaged in prostitution⁸;

⁶ See USCIS Guide: *Special Immigrant Juvenile Status: Information for Juvenile Courts*

⁷ 8 U.S.C 1255(h); also see USCIS Web Page, *Green Card Based on SIJ Status*;

⁸ While engaging in prostitution can make a juvenile ineligible for adjustment of status, the USCIS may waive this when the offense was committed by a juvenile as a result of being a victim of human trafficking.

- violation of protection order;
- use of false documents; or
- having a mental condition that is a threat to others.

Violent offenses, sex offenses, and gang activity can be particularly problematical for the juvenile, as these offenses can lead to denial of any immigration benefits.

Requirement of HHS/ORR Consent

The juvenile court can take jurisdiction over a juvenile and make the findings to enable the juvenile to apply for SIJS, even if the juvenile is in the custody of ORR. However, if the juvenile is in the physical and legal custody of ORR, the juvenile court needs the specific consent of ORR before it can make custody or placement decisions for the juvenile. ORR is considered to have physical and legal custody of UACs who are physically present and/or presently placed in an ORR care-provider facility or an ORR-grantee/contractor funded foster home.⁹

When ORR releases a child to a sponsor, that sponsor is given care-giving authority over the child but not legal custody. The sponsor, if not the child's parent, does not become the legal guardian of the child until named as such by an order of the juvenile court. As noted above, once a child is released to a sponsor, ORR no longer has care and custody over the child, so the juvenile court does not need the consent of ORR to convert the placement to legal custody.

The Issue of Age

In order for a juvenile to remain eligible for SIJS, the child must remain under juvenile court jurisdiction until the juvenile is granted or denied SIJS. If juvenile jurisdiction terminates at age 18 under state law, USCIS will not deny the petition if the record shows that the termination of jurisdiction was solely due to age.

While a person under the age of 21 may file for SIJS under federal immigration law, some states do not permit a finding of dependency for a person who has reached the age of 18. In those states, a juvenile who has not been declared dependent before reaching the age of 18 will not be eligible to apply for SIJS.

⁹ See 8 U.S.C 1101(a)(27)(J)(iii)(I); USCIS Web Page, *Green Card Based on SIJ Status*

For proof of age, USCIS regulations provide that the applicant submit documentary evidence of the alien's age, in the form of a birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of USCIS establishes the beneficiary's age.¹⁰

Effect on Family Immigration

A person who becomes a LPR through SIJS will no longer be considered the child of his or her parents for immigration purposes, even if parental rights were not terminated. This means that the child, on attaining the age of 21, will not be able to use the lawful status attained through SIJS as a means to obtain lawful status for his or her parents. This bar applies to both parents, even if SIJS was obtained due to abuse, neglect, or abandonment by only one parent. It also applies even if parental rights were not terminated.¹¹

Glossary of Acronyms Used

HHS: United States Department of Health and Human Services

LPR: Lawful Permanent Resident

ORR: Office of Refugee Resettlement

SIJS: Special Immigrant Juvenile Status

TPR: Termination of parental Rights

TVPRA: Trafficking Victims Protection Reauthorization Act of 2008

UAC: Unaccompanied Alien Children

USCIS: United States Citizenship and Immigration Services (USCIS)

¹⁰ 8 C.F.R. 204.11(d)

¹¹ 8 U.S.C. 1101(a)(27)(J)(iii)(II)

Links to Immigration Bench Cards and Human Trafficking Information Cards

Link to the Center for Public Policy Studies immigration bench cards

<http://www.centerforpublicpolicy.org/index.php?s=13877>

Link to the Human Trafficking and the State Courts Collaborative information cards

<http://www.htcourts.org/information-cards.htm>

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