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Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children

By Angie Junck

ABSTRACT

Special Immigrant Juvenile Status is a form of immigration relief available to undocumented children who are under the jurisdiction of a state juvenile court (defined broadly), who cannot be reunified with one or both parents due to abuse, neglect, or abandonment, or similar basis under state law, and in whose best interest it is to remain in the United States. Although immigration is a federal issue, Congress has directed that state juvenile courts make the factual findings that establish basic SIJS eligibility. Without these findings, children may never be able to legalize their status in the U.S. and become productive, contributing members of society.

INTRODUCTION

Special Immigrant Juvenile Status (SIJS) is a form of immigration relief that allows undocumented children to remain in the United States to obtain lawful permanent residency when (1) they are under the jurisdiction of a state juvenile court (defined broadly as a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles);[1] (2) they cannot be reunified with one or both parents due to abuse, neglect, or abandonment, or similar basis under state law; and (3) their best interests require that they remain in the United States. Lawful permanent residency confers the right to live and work in the United States, as well as many of the benefits that U.S. citizens hold. The application process requires that state juvenile courts enter specific findings before children can petition for SIJS with immigration authorities. If these prerequisites are not fulfilled, these children may be precluded from ever gaining legal status in the United States, and thus may live under the constant shadow of deportation. This article discusses the purpose and requirements of Special Immigrant Juvenile Status and the juvenile courts' role in ensuring that undocumented youth apply for such relief.[2]

1 8 C.F.R. § 204.11(a).

2 To read more about Special Immigrant Juvenile Status, consult Angie Junck, Sally Kinoshita, & Katherine Brady, Immigration Benchbook for Juvenile and Family Court Judges (Immigrant Legal

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I. BACKGROUND ON UNDOCUMENTED YOUTH IN THE UNITED STATES

The intersection of children and immigration in the United States is a growing phenomenon. Of the total undocumented population in the U.S., approximately 16%, or 1.8 million, are children.[3] In 2008, one in four children in the U.S. lived in immigrant families, and 5.5 million children had at least one undocumented parent.[4] Yet the legal, social, and emotional challenges facing children who are undocumented or whose parents are undocumented often lack social visibility.[5]

Immigrant children come to the United States in a variety of ways. Some come with their parents as infants or young children; these children have grown up almost entirely in the U.S. and consider this country their only home. Other immigrant children may travel to the U.S. with an adult relative or a family friend to be reunited with their families already in the U.S. Unfortunately, some children cannot establish contact with their families once they have entered the U.S. and therefore remain without any support. Others begin their journeys with their parents but lose them along the way, as Elian Gonzalez did when he arrived in the U.S. alone after his mother perished in the journey from Cuba.[6]

Children may also travel to the U.S. unaccompanied because they are fleeing their home countries to escape poverty, violence, and persecution, or because their parents have abandoned, abused, or neglected them. Additionally, some children are forced into the U.S. against their will as victims of sex and labor trafficking, or are forced into such situations after arrival.[7] Unaccompanied and undocumented, these children are especially vulnerable to harm and exploitation.

Regardless of the way children arrive in the U.S., they face severe challenges if they are undocumented. As a whole, undocumented youth are more likely to live in poverty, less likely

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Resource Center, 2010), *available at* http://www.ilrc.org/files/2010_sijs_benchbook.pdf [hereinafter IMMIGRATION BENCHBOOK] or ANGIE JUNCK, SALLY KINOSHITA, & KATHY BRADY, SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH, chs. 4-7 (Immigrant Legal Resource Center, 2010) [hereinafter SIJS AND OTHER OPTIONS].

3 Stephanie Hapeman Scott, *Executive Summary: Resilience in Undocumented, Unaccompanied Children: Perceptions of the Past and Future Outlook* 2 (Sept. 2009) (unpublished Ph.D. dissertation, on file with the National Catholic School of Social Service), *available at* http://www.brycs.org/documents/upload/Resilience_in_UndocUnaccompaniedChildrenPerceptionsofthePastand.pdf.

4 Howard Davidson, *Immigration Issues Impacting Child Welfare and Child Trafficking* (National Resource Center for Child Protective Services, 2010).

5 *See* Action Canada for Population and Development & the Colegio de Michoacán, *Migrant Children: Human Rights, Protection and Services in the Member Countries of the Regional Conference on Migration, The Mexico-Canada Joint Study on Migrant Children in the Region* 11 (2002), *available at* http://www.rcmvs.org/documentos/investigacion/Can_Mex_study_FINAL.doc.

6 *Elián González Affair*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Eli%C3%A1n_Gonz%C3%A1lez_affair (last visited July 11, 2011).

7 Approximately 600,000 to 800,000 victims are trafficked annually across international borders worldwide and approximately half of these victims are younger than age 18. Heather J. Clawson, Nicole Dutch, Amy Solomon, & Lisa Goldblatt Grace, *Human Trafficking Into and Within the United States: A Review of the Literature* (U.S. Dep't of Health & Human Services, 2009), *available at* http://aspe.hhs.gov/hsp/07/humantrafficking/LitRev/index.shtml.

to have health insurance, and more likely to encounter barriers to accessing public benefits and social services than U.S. citizen youth.[8]

Undocumented children are extremely vulnerable when they have been abused, neglected, or abandoned. In addition to living with fear of deportation that drives them and their families into the shadows, they deal with the trauma and burdens of abuse, neglect, or abandonment often inflicted upon them by those who they rely upon for care and support. The need to remain invisible marginalizes these children and their families and undermines their ability to access basic necessities and protection from law enforcement.

To address this untenable position, in 1990 Congress created a form of immigration relief called Special Immigrant Juvenile Status (SIJS) to meet the needs of undocumented children who have been abused, neglected, or abandoned. It is important that undocumented youth apply for SIJS if they are eligible because approval means that they will be able to remain legally in the United States. SIJS eliminates barriers to pursuing higher education, enables the child to lawfully get a job and access specified public benefits, and removes the constant fear of deportation to a country where they may have little or no experience or connections. Legalizing these children also benefits society at large by permitting them to integrate into the U.S. openly and become productive members of society.

II. BACKGROUND ON SPECIAL IMMIGRANT JUVENILE STATUS

Special Immigrant Juvenile Status originated in 1990 as amendments to the Immigration and Nationality Act, in response to the inability of unaccompanied children to petition for immigration legal status without their parents under the family-sponsored immigration framework. By passing SIJS, Congress intended to permit children, due to their unique status, to obtain such an immigration benefit. Since then, the statute has been substantively amended twice, in 1997 and in 2008.

In 1997, due to perceived end runs to improperly legalize certain undocumented youth, statutory language was added to clarify that SIJS applies specifically to abused, neglected, or abandoned children.[9] Due in part to the problematic and limiting language of the 1997 amendments, revisions to the SIJS statute were made in 2008 by the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA).[10] The TVPRA, in providing critical protections for the tens of thousands of unaccompanied minors who come to the U.S. each year, clarified and expanded the definition of Special Immigrant Juvenile Status and superseded the previous SIJS statutory definition. Many more children are now eligible for SIJS under the TVPRA.

8 "According to the official poverty measure, 21% of those with immigrant parents live in poverty, compared with 14% of those with U.S.-born parents. If families with incomes up to twice the poverty level are included, the differences are even more dramatic: 49% of those with immigrant parents live in poverty, compared with 34% of those with U.S.-born parents." Margie K. Shields & Richard E. Behrman, *Children of immigrant Families: Analysis and Recommendations*, 14 Future Child., 2, 2004 at 4, 7. *See also* David B. Thronson, *You Can't Get Here from Here*, 14 Virg. J. Soc. Pol'y L., 58, 77-78 (2006).

9 Pub. L. No. 105-119, §113 (1997).

10 Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, § 235(d), 122 Stat. 5044 (2008).

TABLE 1
Number of Immigrants Granted Lawful Permanent Residency pursuant to the SIJS Statute by Fiscal Year

Fiscal Year	*New Arrivals*	*Adjustments*	*Total*
2010[11]	12	1,480	1,492
2009[12]	13	1,144	1,157
2008[13]	29	989	1,018
2007[14]	24	772	796
2006[15]	18	894	912
2005[16]	19	660	679
2004[17]	10	624	634
2003[18]	25	445	470
2002[19]	11	510	521
2001[20]	15	541	556
2000[21]	1	658	659
1999[22]	3	345	348
1998[23]	4	283	287
1997[24]	0	430	430

11 2010 Yearbook, *supra* note 11.

12 Office of Immigr. Stat., Dep't of Homeland Sec., 2009 Yearbook of Immigration Statistics 22, tbl. 7 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

13 Office of Immigr. Stat., Dep't of Homeland Sec., 2008 Yearbook of Immigration Statistics 22, tbl. 7 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf.

14 Office of Immigr. Stat., Dep't of Homeland Sec., 2007 Yearbook of Immigration Statistics 22, tbl. 7 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf.

15 Office of Immigr. Stat., Dep't of Homeland Sec., 2006 Yearbook of Immigration Statistics 22, tbl. 7 (2007), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf.

16 Office of Immigr. Stat., Dep't of Homeland Sec., 2005 Yearbook of Immigration Statistics 21-22, tbl. 7 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf.

17 Office of Immigr. Stat., Dep't of Homeland Sec., 2004 Yearbook of Immigration Statistics 18, tbl. 5 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf.

18 Office of Immigr. Stat., Dep't of Homeland Sec., 2003 Yearbook of Immigration Statistics 23, tbl. 5 (2004), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003Yearbook.pdf.

19 Office of Immigr. Stat., Dep't of Homeland Sec., 2002 Yearbook of Immigration Statistics 24, tbl. 5 (2003), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2002/Yearbook2002.pdf.

20 Office of Immigr. Stat., Dep't of Homeland Sec., 2001 Yearbook of Immigration Statistics 29, tbl. 5 (2002), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf.

21 Office of Immigr. Stat., Dep't of Homeland Sec., 2000 Yearbook of Immigration Statistics 31, tbl. 5 (2001), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2000/Yearbook2000.pdf.

22 Office of Immigr. Stat., Dep't of Homeland Sec., 1999 Yearbook of Immigration Statistics 32, tbl. 5 (2000), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1999/FY99Yearbook.pdf.

23 Office of Immigr. Stat., Dep't of Homeland Sec., 1998 Yearbook of Immigration Statistics 32, tbl. 5 (1999), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1998/1998yb.pdf.

24 Office of Immigr. Stat., Dep't of Homeland Sec., 1997 Yearbook of Immigration Statistics 36, tbl. 5 (1999), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997YB.pdf.

SIJS was created over 20 years ago, but it is still an underused form of immigration relief. In 2010, a total of 1,492 immigrant youths obtained lawful permanent residency through SIJS (see Table 1).[25] This was a 29% increase from 2009, but the number is small compared to the total of 265,808 immigrants under 21 who obtained lawful permanent residency in 2010.[26]

There are several reasons why only a relatively few juveniles obtain lawful permanent residency through SIJS, but two key reasons are the lack of knowledge of its existence among persons who work with such children, and a lack of resources to help these persons navigate the SIJS process.

First and foremost, persons who serve youth (such as child welfare attorneys, teachers, social workers, and health workers) frequently do not know that SIJS exists. Some juvenile court judges and others who work with children are familiar with SIJS, but the vast majority of individuals who come into regular contact with these children may have never heard of SIJS. There are tragic stories of undocumented immigrant youth who grew up in the U.S. foster care and related systems, and may have been eligible for SIJS and other immigration relief, but did not legalize their status before discharge. Most of these youth will forever be undocumented and therefore cannot pursue higher education or legally work, and live with the constant fear of deportation.[27]

Second, even if persons working with these children know about SIJS, they may not have the available resources to help the children obtain SIJS, including the technical knowledge or the assistance of local pro bono immigration counsel to file the case with the relevant federal immigration agency. Even if an SIJS-related case is presented to local juvenile courts, advocates report that it is often hard to obtain SIJS-related findings due to confusion about the juvenile court's role in the SIJS process.

III. REQUIREMENTS FOR SPECIAL IMMIGRANT JUVENILE STATUS

Juvenile courts play a crucial role in SIJS applications because they make the factual findings that allow children to apply. Immigration is generally a federal matter; federal immigration authorities must ultimately decide whether a minor will be granted SIJS, but a minor may not even petition the U.S. government for SIJS until specified findings have been made in state administrative or judicial proceedings.[28]

25 Office of Immigr. Stat., Dep't of Homeland Sec., 2010 Yearbook of Immigration Statistics tbl. 7 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/table7d.xls.

26 Office of Immigr. Stat., Dep't of Homeland Sec., 2010 Yearbook of Immigration Statistics tbl. 8 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/table8.xls.

27 Persons who applied for SIJS on or after May 13, 2005 and whose petitions were denied or revoked on account of one of the following three bases may be eligible to file a motion to reopen the denied SIJ petition or application for adjustment of status. (1) Petition was denied or revoked due to age if under 21 at the time of filing, (2) dependency status, if at the time of filing he or she was the subject of a valid dependency order that was subsequently terminated based on age, or (3) due to specific consent. *See* Settlement Agreement in *Perez-Olano*, et al. *v. Holder*, et al., 2:05-cv-03604-DDP (C.D. Cal.).

28 8 U.S.C.A. § 1101(a)(27)(J)(ii). *See also In re Antowa McD.*, 50 A.D.3d 507, 856 N.Y.S.2d (1st Dept. 2008) (reversing trial court that "refused to make the factual findings that would enable appellant to apply for Special Immigrant Juvenile Status.")

The required SIJS factual findings are enumerated in federal statute (8 U.S.C.A. § 1101(a)(27)(J)) and its implementing regulations (Code of Federal Regulations at 8 C.F.R. § 204.11).[29] The court:

- must declare the child a dependent of the court, place the child under the custody of a state agency or department, or grant custody of the child to an individual or entity because the child cannot be reunified with one or both parents;
- must find that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law; and
- must determine that return to the child's or parent's country of nationality or country of last habitual residence is not in the child's best interest.

These enumerated findings must be set out specifically in *an order signed by the juvenile court judge* or other presiding judge.[30] The signed order will be submitted to a federal immigration agency called the Office of Citizenship and Immigration Services (USCIS) with the petition for Special Immigrant Juvenile Status and an application for lawful permanent residency. Importantly, the factual findings concerning the child that are required at this step of the process are findings that "may only be made by the juvenile court."[31] The juvenile court, however, does not make an immigration decision such as whether the child is eligible for SIJS or may stay in the U.S., as such decisions rest with the federal government.[32]

In addition to these findings for an SIJS order, federal regulations pre-dating the TVPRA provide additional requirements for SIJS applicants that juvenile courts should understand, including the following[33]:

1) The applicant must be under 21 when he or she files the SIJS petition;
2) Juvenile courts should continue to maintain jurisdiction until lawful permanent residency is granted unless termination of jurisdiction is due to age. If jurisdiction is

29 It is important to note that although the statutory definition of a Special Immigrant Juvenile was amended by the TVPRA in 2008, final regulations implementing the new SIJS statutory language have not yet been issued. The federal government issued proposed regulations on Sept. 6, 2011 and received public comments by November 2011. *See* 76 Fed. Reg. 54978 (Sept. 6, 2011) (proposed rule). Until such regulations are finalized, requirements under the old regulations that do not conflict with and are not addressed by the revised SIJS statute remain in place. Those juvenile court judges who have signed SIJS orders in the past should be aware that post-2008 SIJS cases will require compliance with these new statutory provisions.

30 8 C.F.R. § 204.11(d)(2).

31 Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, Final Rule, Department of Justice, Immigration and Naturalization Service, Supplementary Information, 58 Fed. Reg. 42, 847 (Aug. 12, 1993). *See also In re Juvenile 2002-098*, 148 N.H. 743, 813 A2d 1197 (2002) (upholding trial court's exercise of jurisdiction to issue special immigrant juvenile findings in case where abuse occurred in Romania); *SH v. Dep't of Children and Families*, 880 So.2d 1279, 1281 n. 2 (Fl. Dist. Ct. of Appeal 2004) (noting that "the court did have subject matter jurisdiction over 16-year-old child's request for special immigrant juvenile findings based on abandonment in Guatemala").

32 *Matter of M.C.* 3/4/2010 N.Y.L.J. 25, (col. 3)(March 4, 2010 Fam. Court, Suffolk County) (noting that "the ultimate determination as to an immigrant juvenile's status rests squarely within the purview of the federal government").

33 These requirements are set forth under federal regulations pre-dating passage of the TVPRA. The federal government has introduced proposed regulations based on the new SIJS statutory language in the TVPRA, but they have not been finalized. *See* 76 Fed. Reg. 54978 (Sept. 6, 2011) (proposed rule).

terminated due to age, juvenile courts should specify in the court order that termination is due to age;[34]

3) The applicant must remain unmarried pending the completion of the process; and
4) If a youth is in federal immigration custody, "specific consent" for a juvenile court determination changing the custody/placement status of that child is required from the federal Office of Refugee Resettlement (ORR), Division of Unaccompanied Children's Services (DUCS).

To become a lawful permanent resident under SIJS (an application that may be submitted at the same time as SIJS), the child is subject to specified "grounds of inadmissibility," which are bars under immigration law. However, even if a ground of inadmissibility applies, a waiver may nonetheless be available under a generous standard for Special Immigrant Juveniles.[35]

The following discussion describes in greater detail many of these SIJS statutory and regulatory requirements.

A. Under the Jurisdiction of a Juvenile Court: Dependency, Guardianship, Delinquency, and Adoption

To be eligible for SIJS, a child must be dependent on a juvenile court, defined broadly as a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.[36] Whether a court is a "juvenile court" under the federal definition is not determined by the label that the state gives to the court, but rather by the court's function. In many states, qualifying courts include various courts that handle different matters involving juveniles including dependency, guardianship, delinquency, or adoption. Judges handling all of these types of cases, not just judges traditionally labeled or who consider themselves to be "juvenile court" judges, must understand that SIJS is an option for undocumented youth subject to their proceedings, and thus, these courts can enter SIJS findings.

When a juvenile court accepts jurisdiction to decide about the care and custody of a child, the child is dependent on the court for immigration purposes. The federal act recites that a juvenile is dependent upon the court if she "[h]as been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court."[37] Establishing dependency on a juvenile court does not require state intervention or a decision to place the child in any particular form of care.

34 "In accordance with the Settlement Agreement, USCIS will not, based on age or dependency status, deny or revoke any SIJ petition if, at the time the class member files or filed the petition, the class member was under 21 years of age and was the subject of a valid dependency order that was later terminated based on age. Similarly, USCIS may not, based on age or dependency status, deny an SIJ-based application for adjustment of status if the class member files or filed the application when he or she was under 21 and was the subject of a valid dependency order." U.S. Dep't of Homeland Sec., *Policy Memorandum on the Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement* 2 (April 4, 2011), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/2011/April/perez-olano-settlement.pdf.

35 See 8 U.S.C.A. § 1182 for immigration bars and waivers.

36 8 C.F.R. § 204.11(a).

37 8 C.F.R. § 204.11(c)(6).

Children for whom a court has appointed a guardian are also eligible for SIJS. Specifically, the TVPRA specifies SIJS eligibility for children placed under the custody of "an *individual* . . . appointed by a state or juvenile court."[38] A USCIS memorandum as well as proposed federal SIJS regulations confirm this interpretation.[39] A child for whom a guardianship is established may qualify for SIJS even if the state never formally removed her from a parent or placed her in foster care.[40]

Because SIJS is often mistakenly seen as relief available only for children in dependency proceedings and, increasingly, in guardianship proceedings, relatively few children in delinquency proceedings apply for SIJS. The plain language of the federal statute, however, allows for the grant of SIJS to children in juvenile delinquency proceedings: "[T]he court must have legally committed the child to or placed the child under the custody of, an agency or department of a state. . . ."[41] State juvenile courts often place delinquent children under the custody of probation departments, which constitute state agencies or departments.

In addition, statutory language providing that the child cannot be reunified with one or both parents "due to abuse, neglect, or abandonment, or *similar basis found under state law*" provides the basis for a delinquency court to enter SIJS findings.[42] Some courts in delinquency cases have hesitated to enter the requisite SIJS findings because the former statutory language required courts to make findings exclusively regarding abuse, neglect, or abandonment. Some courts concluded that these findings were in the sole jurisdiction of dependency courts and thus did not have the authority to make them in delinquency proceedings. The TVPRA, however, through the phrase "a similar basis found under state law," gives delinquency courts broader leeway to enter similar findings within their jurisdiction. USCIS has approved such SIJS petitions granted in delinquency proceedings.[43]

Finally, just as children in guardianship proceedings can qualify for SIJS, so can children in adoption proceedings. These children have been placed under the custody of "an *individual* . . . appointed by a state or juvenile court."[44] Many times before a juvenile court finalizes an adoption for a child, the juvenile court judge will place the child formally in the legal and physical custody of the prospective adoptive parents. If this happens, the child may be eligible for SIJS presuming all other requirements are met. The court handling the adoption is clearly

38 8 U.S.C.A. § 1101(a)(27)(J), as amended by the TVPRA, § 235(d) *supra* note 10. *See* Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations and Pearl Chang, Acting Chief, Office of Policy & Strategy, to Field Leadership at 2 (March 24, 2009), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf (Hereinafter the "Neufeld Memorandum").

39 Neufeld Memorandum, *id.*, at 2; and 76 Fed. Reg. 54978 (Sept. 6, 2011) (proposed rule).

40 *See In re Menjivar*, 29 Immig. Rptr. B2-37 (1994).

41 8 U.S.C.A. § 1101(a)(27)(J)(i).

42 *Id.*

43 As one former INS official remarked, "We took sociology. We know that a lot of kids end up in delinquency for the same reason they could have ended up in dependency: because of abuse in the home." Junck et al., SIJS and Other Options, 4-7, *supra* note 2. *See also* 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, Ch. 7 (National Association of Counsel for Children, 2d. ed., 2010).

44 8 U.S.C.A. § 1101(a)(27)(J), as amended by the TVPRA § 235(d), *supra* note 10. Neufeld Memorandum, at 2, *supra* note 38 (acknowledging Special Immigrant Juvenile Status eligibility for a child "on whose behalf a juvenile court appointed a guardian").

a "juvenile court" for SIJS purposes, and the custody order clearly places a child in the custody of an individual (or individuals) appointed by the juvenile court.

USCIS has long taken the position that children who are going to be, or have been, adopted can qualify for SIJS, and many children who were ultimately adopted have been granted SIJS. Granting SIJS to children in adoption proceedings confers an important benefit. It significantly eases the legal process for parents adopting a child born outside the U.S. If they are unable to obtain SIJS for an adopted child, they face serious international and immigration legal hoops that can discourage adoption altogether.

B. The Juvenile Court Must Find that Reunification with One or Both Parents Is Not Viable

To secure SIJS status for a child, the court must find 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.[45]

A finding that reunification is not viable does not require formal termination of parental rights or a determination that reunification will never be possible.[46] In other words, the possibility of reunification in the future need not deter a finding that reunification presently is not viable for purposes of SIJS.[47]

The "one or both parents" language also signifies that the child need not be separated from both parents to be eligible for SIJS. The plain language of the statute provides SIJS eligibility based on 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. USCIS has approved such applications. The parent with whom the child remains or with whom he/she eventually reunifies, however, will not be eligible for legal status through the child in the future, even after he or she becomes a U.S. citizen.[48]

The original 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 confused both juvenile courts and USCIS. In essence, the TVPRA clarified the statute and made clear that to be SIJS-eligible, the child need not be in actual state foster care or dependency proceedings.[49] Children involved in other state court proceedings can also be eligible for SIJS.

45 8 U.S.C.A. § 1101(a)(27)(J)(i).

46 Brady & Thronson, *supra* note 43, at 418.

47 *Id.*

48 8 U.S.C.A. § 1255(h). Alternately, some children who are eligible for SIJS are also eligible for a U visa, which does not bar a parent from obtaining derivative status. The U visa is codified in 8 U.S.C.A. § 1101(a)(15)(U).

49 Neufeld Memorandum, at 2, *supra* note 38 ("Accordingly, petitions that include juvenile court orders legally committing a juvenile to or placing a juvenile under the custody of an individual or entity appointed by a juvenile court are now eligible. For example, a petition filed by an alien on whose behalf a juvenile court appointed a guardian now may be eligible.")

C. The Court's Findings and Orders Must Be Based on Abuse, Neglect, or Abandonment or Similar Basis in Law

The juvenile court's order must specify 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*.[50] Immigration authorities will not accept orders in cases where the court's jurisdiction was sought primarily to obtain lawful immigration status.

Because abuse, neglect, and abandonment or a similar condition are not defined in the SIJS statute or regulations, state law governs their meaning for SIJS purposes.[51] The relevant question for SIJS eligibility is whether a court, under the applicable state law, has found abuse, neglect, or abandonment or some other similar condition. The proposed federal SIJS regulations provide specific examples of varying state definitions of abuse, neglect, abandonment, or similar condition that will qualify children for SIJS.[52] Importantly, the abuse, neglect, abandonment, or similar condition language 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. The child may also be eligible for SIJS status even if the abuse, neglect, or abandonment took place outside the U.S.

Under TVPRA changes, 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 terms other than abuse and neglect to describe the basis for refusing to reunify a child with his or her parents. Proposed federal SIJS regulations provide an example of a similar condition under Connecticut law. In Connecticut, a child may be found to be "uncared for" if the child is "homeless" or if his or her "home cannot provide the specialized care that the physical, emotional or mental condition of the child requires."[53] Proposed regulations state that "'uncared for' may be similar to abuse, abandonment, or neglect because children found 'uncared for' are equally entitled to juvenile court intervention and protection.'"[54] Other courts, such as delinquency, may not normally enter abuse and neglect findings, but other findings for which they have jurisdiction. Additionally, children with deceased parents may not technically meet the definition of "abandonment," since such parents had no intent to abandon, but nonetheless these children have been effectively abandoned since they lack parents to care for them. The TVPRA broadened the eligibility requirements so that these state law findings using a different vocabulary and providing a legitimate basis under state law for making care and custody determinations form the basis for SIJS eligibility. However, the applicant must still establish that such a basis is in fact similar to a finding of abuse, neglect, or abandonment.[55] To avoid this extra step, if the child

50 8 U.S.C.A. § 1101(a)(27)(J).

51 *See* 76 Fed. Reg. 54978 (Sept. 6, 2011) (proposed rule) at 13 ("Specific legal definitions of the terms "abuse, neglect, or abandonment" for the purposes of juvenile dependency proceedings derive from State law and therefore vary from state to state").

52 *Id.*

53 *See* Conn. Gen. Stat. Ann. § 46b-120(9).

54 *See* 76 Fed. Reg. 54978 (Sept. 6, 2011) (proposed rule) at 13.

55 Neufeld Memorandum at 2, *supra* note 38.

was declared a dependent under some other legal term, the court would be wise to include in the SIJS order (discussed below) one of the designated statutory terms "abuse, neglect, or abandonment." The order should contain the term whose plain meaning reflects what actually happened to the child. According to USCIS, the judge's order, or other documents submitted, also must provide a very basic statement of the facts that supported the order.[56] In states that have their own state SIJS forms, a statement of facts is often not provided and nonetheless accepted by immigration authorities.

D. The Court Must Determine that It Is Not in the Child's Best Interest To Be Returned to His or Her Home Country

The juvenile court's SIJS order should recite that it is not in the child's best interest to be returned to his or her country of nationality or last habitual residence. Judges can enter best interest findings based on a variety of factors, such as family and friend support systems, emotional well-being, and medical and educational resources in the United States. For example, for some children who have spent a significant portion of their lives in the U.S., it may be in their best interest to stay here because they may not be familiar with the conditions and language of their country of origin. The best interests findings may be based upon a range of evidence 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 no known appropriate family members live in the home country. Unless the juvenile court includes this language in its SIJS order, submitting evidence in another administrative or judicial proceeding that this finding has been made will pose significant legal and time barriers to the applicant.

E. Other Requirements for SIJS

In addition to the requirements listed above, an immigrant applying for SIJS must be under 21 when the application is filed[57] and unmarried until the process is completed.[58] The age requirement is seemingly straightforward but complicates matters when combined with other factors. For example, as far as immigration authorities are 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, as long as he or she meets the other SIJS requirements. State laws, however, generally require that a child be under 18 at the time he or she first is declared a juvenile court dependent. Because courts often do not accept jurisdiction of children 18 or older, some children may not be eligible to apply for SIJS even though they are under 21.

An SIJS applicant must remain under juvenile court jurisdiction throughout the entire immigration process—that is, until USCIS approves the SIJS petition *and* the application for adjustment to lawful permanent residency—unless the loss of jurisdiction is due to age.[59] If the

56 *Id.*

57 TVPRA § 234(e)(3)(A); ("(A) the date on which the child reaches the age designated in section 412(d)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1522(d)(2)(B))"); 8 C.F.R. § 204.11(c)(1).

58 8 C.F.R. § 204.11(c)(2).

59 8 C.F.R. § 204.11(c)(5); U.S. Dep't of Homeland Sec., *Policy Memorandum, supra* note 34.

court closes the case due to age, it should ensure that the juvenile court order terminating jurisdiction of the case contains specific language that states the case is being closed for that reason. If the court considers terminating jurisdiction for reasons other than age, judges should consider keeping the child under juvenile court jurisdiction until the entire immigration process is complete. Otherwise, the child is at risk of being denied SIJS and deported.

IV. THE ROLE OF THE JUVENILE COURT REGARDING SPECIAL IMMIGRANT JUVENILE STATUS

A. The SIJS Juvenile Court Order

As discussed in Section III, one of the most important roles of juvenile courts is to enter the requisite SIJS findings in a court order so that an undocumented child may file for SIJS and lawful permanent residency to legalize his status. Without these findings, no petition can be filed and the child may remain undocumented.

The required SIJS findings discussed in Section III are best set out in a simple order prepared especially for the SIJS application and signed by a state court judge. SIJS findings can also be incorporated in a general order establishing dependency for a child. The person who prepares the order for the court's signature will vary by jurisdiction, but often it may be the child's attorney or social worker. The findings can be simple: "The court finds that the child cannot be reunified with one or both parents due to [abuse, neglect, or abandonment or similar basis under state law], the child is dependent on the juvenile court [or placed the child in the custody of a state agency], and it is not in the best interest of the child to be returned to the home country."

Some states, including California, New York, and North Carolina, have created official juvenile court forms to be used for SIJS findings. The California State Judicial Council, for example, has issued the JV-224 Order Regarding Eligibility for Special Immigrant Juvenile Status for use in the juvenile courts. Because some of these forms pre-date changes in the SIJS statutory language, they should be either interlineated or contain an attachment reflecting the new SIJS language. Updating the forms with new SIJS language is important as USCIS will not accept orders with the old SIJS language and will require that advocates go back into the court to obtain a new order reflecting the current SIJS statutory language. Judges in states without statewide SIJS forms can work with their judicial councils to create them.

Once these findings are made and the signed order is submitted with the SIJS petition, USCIS makes the final decision whether to grant SIJS. Juvenile state court SIJS findings should not be reviewed by USCIS as they are not a matter of federal law. The USCIS Ombudsman of the Department of Homeland Security in April 2011 released a memorandum of best practices that recommended that the USCIS "[c]ease requesting the evidence underlying state court determinations of foreign child dependency."[60] While USCIS cannot deny SIJS solely based on

60 USCIS, Ombudsman, *Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices* (U.S. Dep't of Homeland Sec., 2011), *available at* http://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf.

a disagreement with the court's findings, the agency must still ensure that the child meets all other requirements for SIJS. Without the findings of the juvenile court, a juvenile will be barred from applying for SIJS.

In addition to signing such orders, judges can take other actions that can significantly impact an SIJS application. Judges may need to sign orders establishing the fact of birth for children without formal birth certificates since proof of age and identification is required in an SIJS application. Judges may have to authorize transportation of a child for immigration purposes. Finally, judges may have to release confidential juvenile court documents to assist in the SIJS process, although USCIS has acknowledged that it should have limited access to confidential material. Juvenile courts should prevent submission of such material by advocates.

Judges should also ensure that no improper immigration enforcement arises out of juvenile proceedings—that is, information from the proceedings (confidential or not) is not to be used to "punish" a child by turning them over to immigration authorities. If information from juvenile court proceedings was submitted to Immigration & Customs Enforcement (the interior immigration enforcement arm of the Department of Homeland Security), eligible children would be deterred from pursuing SIJS and legalizing their status in the U.S.

B. Building Awareness and Allocating Resources

Beyond entering the requisite SIJS court findings, the court must also take certain steps to ensure that youth, their representatives, and others who are working with them are made aware of SIJS (as well as other forms of immigration relief) and are provided resources to assist them in the process. In particular, judges can facilitate SIJS for children whose cases are before them. For example, some judges have directed children's attorneys or state agencies to investigate whether a child is SIJS-eligible and, if so, to submit the application. Correctly determining eligibility is crucial because a non-eligible child who is denied SIJS could be referred for deportation. Some courts appoint immigration counsel to handle the case. The court must also designate such persons to submit the application on the child's behalf because children are not entitled to government-appointed counsel in immigration proceedings. Some courts have also allocated funds for training and technical assistance to children's attorneys and child welfare agencies so that they can competently file SIJS applications. Finally, courts can help to organize trainings on immigration issues for other judges and other professionals who work with children generally.

SIJS-related resources that can assist courts and other professionals who work with children include:

- *Immigration Benchbook for Family and Juvenile Court Judges*[61]
- *Special Immigrant Juvenile Status and Other Immigration Option for Children and Youth*[62]

61 Junck et al., Immigration Benchbook, *supra* note 2.

62 Junck et al., SIJS and Other Options, *supra* note 2 (Ch. 3 available at http://www.ilrc.org/files/2010_sijs-chapter_03-sijs_overview.pdf).

- *Immigration Options for Undocumented Immigrant Children*[63]
- Chapter 7, 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*[64]

For a fee, judges, attorneys, and social workers can obtain technical assistance about SIJS cases from the Immigrant Legal Resource Center's Attorney of the Day service (http://www.ilrc.org/legal-assistance).

C. Ensuring Effective Assistance of Counsel to Noncitizen Children in Delinquency Proceedings

In the delinquency context, juvenile courts should ensure that defense counsel investigates and advises a child regarding the immigration consequences of delinquency and screens for immigration relief. Under the Sixth Amendment, defense counsel has the duty to provide affirmative, competent advice of the immigration consequences of a guilty plea.[65] The U.S. Supreme Court in *Padilla v. Kentucky* held that a failure to advise the client about the immigration consequences of a plea constitutes ineffective assistance of counsel.[66] The Court noted that deportation has long been recognized as a severe penalty, and that with the recent changes to immigration laws, deportation as a consequence is inextricably linked to the criminal process.[67] For these reasons, the Court concluded that the collateral and direct consequences distinction did not apply in the context of Sixth Amendment ineffective assistance of counsel claims relating to the failure to advise of immigration consequences.

Defense counsel's duty extends not only to investigating and advising of the immigration consequences, but to defending against such consequences, including preserving discretionary relief from deportation.[68] This means that defense counsel should be protecting children against ineligibility for immigration forms of relief including SIJS. Although delinquency adjudications do not always have the same immigration consequences as criminal convictions, some juvenile adjudications still can significantly impact a child for immigration purposes.

V. CONCLUSION

Although Special Immigrant Juvenile Status serves as a valuable form of immigration relief for undocumented children in the United States who have been abused, neglected, abandoned, or similarly mistreated, it seems that many children who qualify for SIJS are not petitioning for it. Applicants must overcome many hurdles to petition for SIJS and obtain

63 Immigrant Legal Resource Center, Immigration Options for Undocumented Immigrant Children (2010), *available at* http://www.ilrc.org/files/factsheets_immigrant_children.pdf.

64 Brady & Thronson, *supra* note 43.

65 *Padilla v. Kentucky* 130 S.Ct. 1473, 1483 (2010).

66 *Id.*

67 *Id.* at 1480-81.

68 *Id.* at 1482-83.

lawful permanent residency. Significant hurdles include mere awareness of the availability of SIJS and obtaining an order from a juvenile court with the requisite findings. Juvenile courts can eliminate these hurdles by requiring that child representatives identify children eligible for SIJS and provide them with resources to assist such children through the SIJS process, and then consider and approve SIJS orders when presented to them. By facilitating the SIJS process, juvenile judges can help these vulnerable children pursue legal permanent residency, work, and higher education, ultimately enabling them to become productive members of society.