



2nd Edition



# Child Welfare Law and Practice

Representing Children,  
Parents, and State Agencies in  
Abuse, Neglect, and Dependency Cases

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# Chapter 20: Immigration Issues— Representing Children Who Are Not United States Citizens

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## § 20.1 Introduction

Representing noncitizen children and their families presents both opportunities and challenges. Practitioners who identify immigration issues and seek timely assistance from immigration experts can make a tremendously positive impact. Lack of lawful immigration status has real consequences for children and families. In some instances, involvement with family courts and child welfare systems provides unique, often fleeting, opportunities for children to achieve legal immigration status. Recognizing immigration opportunities and seeking timely assistance from immigration experts may change a child's life.

At the same time, reliance on incorrect assumptions about the import of a noncitizen's immigration status can overemphasize the role of immigration status in the lives of noncitizen children. Those representing noncitizen children must be wary of claims that their clients do not have certain legal rights<sup>3</sup> or that they can be denied certain public privileges or benefits due to immigration status.<sup>4</sup> It is vital for attorneys to cultivate awareness of the real implications of immigration status to effectively represent noncitizen children and families.

Family law and immigration law constantly and inevitably interact. Family relationships, especially the parent-child relationship, play a critical role in the framework that delineates who is permitted to enter and remain in the United States under immigration and nationality law. In turn, the operation of immigration law has a tremendous impact on family integrity because it intrudes into decisions about where children and families live. Yet family law and immigration law are motivated by

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<sup>3</sup> See David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453 (2008).

<sup>4</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (establishing that all children living in the United States, regardless of immigration status, have the right to K-12 public education in the United States); Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), 42 U.S.C. § 1786, 7 C.F.R. §§ 246.1 *et seq.* (allowing anyone to access WIC, regardless of immigration status, so long as the applicant meets income eligibility standards and risk factor priorities set by each state).

divergent and often conflicting policies that often prove difficult, and on occasion impossible, to reconcile. A complete review of ways in which immigration issues impact the lives of children is far beyond the scope of this chapter. Yet awareness of some the ways that immigration law interacts with family law, coupled with a willingness to seek assistance from immigration attorneys, can be instrumental.

## § 20.2 Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS) provides a means for children to obtain legal permanent residence status (a "green card") in the United States. Such status provides authorization to remain permanently in the United States, gives eligibility for employment authorization and student financial assistance, and places the child on a path to citizenship. Special Immigrant Juvenile Status is not conferred automatically on state dependents. To ensure that windows of opportunity to obtain permanent residence through this provision are not missed, it is important to identify eligible state dependent children who lack lawful immigration status. Applying for this status is not without risk. If an application to U.S. Citizenship and Immigration Services (USCIS) is denied, it is possible, although not likely, that the child might be referred for deportation proceedings. Therefore, it is highly advisable to seek the assistance of an immigration attorney to help children who appear to be eligible.

State dependency in itself does nothing to alter federal immigration status. Prior to 1990, undocumented children in state care routinely found themselves in an immigration predicament. They remained in state care until their majority, and then found themselves turned out to face the world without legal immigration status and all its associated benefits. In 1990, Congress created Special Immigrant Juvenile Status to provide an avenue of immigration relief for undocumented children who are juvenile court dependents.<sup>5</sup>

The process of obtaining Special Immigrant Juvenile Status uses a unique hybrid system of state and federal collaboration, incorporating state court child welfare expertise into federal decision-making on immigration matters. Federal immigration law places critical fact finding functions about the child's best interests and the possibility of family reunification with state "juvenile courts," defined as "court[s] located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles."<sup>6</sup>

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<sup>5</sup> See 8 U.S.C. § 1101(a)(27)(J).

<sup>6</sup> 8 C.F.R. § 204.11(a). "The reliance upon state juvenile courts anticipated in the SIJ statutory scheme signals Congress' recognition that the states retain primary responsibility and administrative competency to protect child welfare." Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 609 (2000). The federal government "lacks the professional staff and administrative support to make assessments of individual children's mental and physical conditions and their welfare needs." *Id.* at 611.

As a prerequisite for a child present in the United States to file for Special Immigrant Juvenile Status, a juvenile court must make the following three factual determinations:

- (1) The child has been “declared dependent on a juvenile court” or the child has been “legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States.”
- (2) The child’s “reunification with [one] or both of the [child’s] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”
- (3) It “would not be in the [child’s] best interest to be returned to the [child’s] or parent’s previous country of nationality or last habitual residence.”<sup>7</sup>

In making these findings, the juvenile court does not make any immigration decision. Rather, these preliminary factual determinations are simply prerequisites to the filing of an application for immigration relief from USCIS. With these findings, an application for admission to the status of legal permanent resident status can be filed with USCIS.

### § 20.2.1 Juvenile Court Dependency

When a juvenile or family court accepts jurisdiction to make a decision about the care and custody of a child, for immigration purposes the child is dependent on a juvenile court. Establishing dependency on a juvenile court does not require state intervention or a decision to place the child in any particular form of care. A juvenile is dependent on the juvenile court if he or she “[h]as been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court.”<sup>8</sup> In other words, the

acceptance of jurisdiction over the custody of a child by a juvenile court, when the child’s parents have effectively relinquished control of the child, makes the child dependent upon the juvenile court, whether the child is placed by the court in foster care or, as here, in a guardianship situation.<sup>9</sup>

While children placed in formal foster care certainly are dependent on a juvenile court, so are children for whom a court has appointed a guardian. This longstanding interpretation of “state dependency” for Special Immigrant Juvenile purposes was confirmed in a 2008 amendment to the statutory language to specify eligibility for

<sup>7</sup> 8 U.S.C. § 1101(a)(27)(J).

<sup>8</sup> 8 C.F.R. § 204.11(c)(6).

<sup>9</sup> *In re Menjivar*, 29 Immig. Rptr. B2-37 (1994).

children placed under the custody of "an *individual* . . . appointed by a State or juvenile court."<sup>10</sup> A child for whom a guardianship is established may qualify for Special Immigrant Juvenile Status even if he or she was never removed from a parent or placed in foster care.

Juvenile courts make decisions about the care and custody of children in a variety of ways, including but not limited to foster care placements and guardianship. Qualifying guardianships may be established through any court empowered under state law to make decisions regarding the care and custody of children, including probate courts in many jurisdictions. Moreover, among the courts that make decisions about the care and custody of children are those that adjudicate delinquency petitions. A decision adjudicating a child delinquent and making determinations about the custody of the child can serve to establish the requisite dependency on the juvenile court. The key here is that although the particular form or name of the proceeding may vary, a court is taking jurisdiction to make a decision about the care and custody of a child. In theory, even more limited forms of guardianship, such as testamentary guardianships or voluntary guardianship established for school residency purposes, might suffice to establish dependency if a juvenile court is involved. Such limited guardianships, however, are not likely to support the next required finding that reunification with a parent is not viable.

### § 20.2.2 Viability of Reunification with Parent

Eligibility for Special Immigrant Juvenile Status requires a finding that "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."<sup>11</sup> Previously, the statute required a finding that the child was "eligible for long-term foster care," a confusing term that was defined by federal immigration regulation to mean "that family reunification is no longer a viable option."<sup>12</sup> This statutory language was recently amended, and likely will be the subject of litigation to determine its scope and meaning. In particular, the shift in language from "family reunification" to "reunification with [one] or both parents" has great potential significance, yet was accomplished without a trace of legislative history.<sup>13</sup>

First, a finding for Special Immigrant Juvenile 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

<sup>10</sup> See 8 U.S.C. § 1101(a)(27)(J), as amended by the Trafficking Victims Protection Reauthorization Act of 2008, § 235(d), Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d). See also Donald Neufeld & Pearl Chang, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions* (USCIS Memorandum, Mar. 24, 2009) (acknowledging Special Immigrant Juvenile eligibility for a child "on whose behalf a juvenile court appointed a guardian").

<sup>11</sup> 8 U.S.C. § 1101(a)(27)(J)(i).

<sup>12</sup> 8 C.F.R. § 204.11(a).

<sup>13</sup> Similarly, there is "no contemporaneous legislative history . . . which explains why SIJ status was originally created in 1990." *Yu v. Brown*, 92 F. Supp. 2d 1236, 1246 (D.N.M. 2000).

would not qualify for a finding that reunification is not viable, the possibility or even the stated goal of a child's return to a parent need not deter a finding that reunification presently is not viable. Given the lack of temporal specificity in the current statutory language, it is feasible to advocate that the requirement is satisfied based on any significant separation.

Second, reunification must not be viable "due to abuse, neglect, abandonment, or a similar basis found under State law." The words "due to abuse, neglect, or abandonment" were added to the statute in 1997.<sup>14</sup> The House Conference Report on this amendment states that "[t]he language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children."<sup>15</sup> This language prohibits establishing Special Immigrant Juvenile eligibility based on collusion to create juvenile court dependency for children not otherwise in need, but does not require that formal charges of abuse, neglect, or abandonment be levied against the 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 2008 addition of the language "or similar basis found under State law" accommodates the range of statutory language used in various jurisdictions to determine when a juvenile court can intervene to make decisions about the care and custody of children.<sup>16</sup>

Third, by rejecting the use of "family reunification" in favor of "reunification with one or both parents," the new statutory language appears to permit eligibility for Special Immigrant Juvenile Status on the basis of the nonviability of reunification with one parent due to abuse, neglect or abandonment, even while the child remains in the care of the other. Certainly, this language clarifies that children placed in kinship care can meet this requirement. While some such situations may well fall within the plain language of the statute, they fall outside more traditional conceptions of state dependent children for whom Special Immigrant Juvenile Status originally was conceived. Moreover, even if a child may qualify as a Special Immigrant Juvenile while still with one parent, the statutory provision remains that "no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter."<sup>17</sup> This means that a child who receives lawful permanent resident status as a Special Immigrant Juvenile can never petition for a parent to receive such status, even later in life when the child has become an adult U.S. citizen, reflecting the origins of Special Immigrant Juvenile Status as a means to address the situation of children separated from parents. Whether Special Immigrant Juvenile Status now will extend to

<sup>14</sup> See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2460.

<sup>15</sup> H.R. Conf. Rep. No. 105-405, at 130 (1997), reprinted in 1997 U.S.C.C.A.N. 2941, 2981.

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

<sup>17</sup> 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

children separated from one parent but not the other remains unclear and is almost certainly an issue that will be litigated.

### **§ 20.2.3 Best Interests of the Child**

Eligibility for Special Immigrant Juvenile Status requires a finding that it is not in the child's best interest to be returned to his or her "previous country of nationality or country of last habitual residence."<sup>18</sup> This is the only provision in U.S. immigration law in which eligibility for immigration status takes the best interests of the child into consideration, in part explaining why responsibility for this determination is placed with the juvenile court and not immigration authorities. In short, this is not an immigration determination but rather the sort of best interests calculation that family courts routinely make. In many cases, the lack of known appropriate family to care for the child in the home country alone is sufficient to determine that it is in the best interests of the child to maintain the status quo. Also, in this context it is entirely appropriate for the court to consider potential future opportunities for the child in the United States in comparison to the home country.

### **§ 20.2.4 Age and Continuing Dependency**

To qualify for Special Immigration Juvenile Status, an applicant must be a child, defined for immigration purposes as unmarried and under age 21.<sup>19</sup> Historically, this meant that applicants needed to complete the immigration adjudication process prior to age 21. The Trafficking Victims Protection Reauthorization Act of 2008, however, provided age-out protection to Special Immigrant Juvenile applicants.<sup>20</sup> "*Officers must now consider the petitioner's age at the time of filing to determine whether the petitioner has met the age requirement. Officers must not deny or revoke SIJ status based on age if the alien was a child on the date the SIJ petition was properly filed if it was filed on or after December 23, 2008, or if it was pending on December 23, 2008.*"<sup>21</sup>

This new age-out protection, however, is in tension with a regulatory interpretation of the statute requiring that until the end of the immigration processing the child must "continue to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended."<sup>22</sup> In the past, this provision has meant that for many applicants in jurisdictions where courts did not maintain jurisdiction over them until age 21, the de facto age limit was set by the age at which the court relinquished

<sup>18</sup> 8 U.S.C. § 1101(a)(27)(J)(ii).

<sup>19</sup> 8 U.S.C. § 1101(b)(1); 8 C.F.R. § 204.11(c).

<sup>20</sup> Trafficking Victims Protection Reauthorization Act of 2008, § 235(d), Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d)(6).

<sup>21</sup> Donald Neufeld & Pearl Chang, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions* (USCIS Memorandum, Mar. 24, 2009) (emphasis in original).

<sup>22</sup> 8 C.F.R. § 204.11(c)(5).

jurisdiction. Moreover, courts have been urged to delay finalization of adoptions for children with pending Special Immigrant Juvenile petitions to ensure continuing court dependency until the immigration processing is complete.

While it seems clear that that statute now intends to protect a child from aging out of eligibility, it remains to be seen if the age provision will force reconsideration of the regulatory requirement of continuing jurisdiction. The potential conflict may be minimized by another new mandate that requires U.S. Citizenship and Immigration Services to process SIJ applications within 180 days of filing.<sup>23</sup> Still, until clarification or regulatory reform is achieved it remains best practice to proceed as expeditiously as possible in pursuing Special Immigrant Juvenile Status to complete processing while the child continues to be court dependent.

### **§ 20.2.5 Application to USCIS and Grounds of Inadmissibility**

After children receive the requisite juvenile court findings, they still must apply to U.S. Citizenship and Immigration Services for recognition as a Special Immigrant Juvenile and adjustment of status to legal permanent resident. This application involves completing immigration forms, obtaining a special medical exam, capturing biometrics including fingerprints and photographs, and providing proof of age.<sup>24</sup> The application must include a juvenile court order setting forth the findings discussed above.<sup>25</sup> Parts of the application involve hefty filing fees, but fee waivers are available. U.S. Citizenship and Immigration Services will schedule a date for an adjustment interview at which the application is reviewed and adjudicated, though the application can be granted without an interview.

This process includes scrutiny to see if applicants are disqualified from obtaining legal immigration status by any of the long listing of grounds of inadmissibility. Some of these grounds of inadmissibility are automatically waived for Special Immigrant Juveniles, and others are potentially waivable upon application. For example, Special Immigrant Juveniles are exempted from grounds of inadmissibility related to becoming a public charge, working without labor certification, being present in the United States without inspection, misrepresentations to immigration authorities, stowing away, possessing certain documents, and being unlawfully present in the United States.<sup>26</sup>

Other grounds of inadmissibility are not waived and raise particular concerns for children in delinquency proceedings. In particular, activity involving the sale or possession of drugs is problematic under immigration law. Findings regarding prostitution or sex offenses also can cause difficulties. Other issues that serve as red flags include testing positive for HIV, past deportations or denied immigration

<sup>23</sup> Trafficking Victims Protection Reauthorization Act of 2008, § 235(d), Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d)(2).

<sup>24</sup> For the proof of age requirement, see 8 C.F.R. § 204.11(d)(1).

<sup>25</sup> 8 C.F.R. § 204.11(d).

<sup>26</sup> 8 U.S.C. § 1255(h).

applications, falsely claiming U.S. citizenship, and mental conditions posing a threat to self or others. Any child who is considering applying for Special Immigrant Juvenile status and who has delinquency adjudications or other red flags should seek expert immigration advice.

## **§ 20.3 VAWA, U and T Visas, and Other Immigration Relief**

A number of provisions in immigration law provide avenues to obtain lawful immigration status for children who have been subjected to abuse or are victims of other crimes. Unlike Special Immigrant Juvenile Status discussed above, these provisions do not necessarily turn on the involvement of family courts or child welfare systems. The provisions, however, are highly applicable to many of the experiences that result in the involvement of child welfare and court systems in the lives of children. This section will not attempt to set forth these provisions in detail, but will provide brief descriptions of each for purposes of flagging situations in which the provisions might apply and for which consultation with an immigration attorney is advised.

### **§ 20.3.1 Violence Against Women Act**

Immigration provisions in the Violence Against Women Act (VAWA) allow certain noncitizens to file for immigration relief when they have been battered or subjected to extreme mental cruelty by a parent or spouse who is a U.S. citizen or lawful permanent resident.<sup>27</sup> This is referred to as “self-petitioning” and can be accomplished without the abuser’s assistance or knowledge. This form of immigration relief is applicable only where the abusive family member is a U.S. citizen or lawful permanent resident. VAWA, in essence, allows the abused person to access immigration benefits that the parent or spouse should be working to achieve for the abused person. The application process requires, among other things, proof of the abuse and that the abused person is of good moral character. The successful VAWA applicant first receives notice of approval of her prima facie case, then approval of the VAWA petition which permits adjustment of status to lawful permanent residence. Immigration relief under VAWA also can qualify recipients for some forms of public assistance at various stages in the application process, and can provide waivers to bars to benefits that apply to many lawful permanent residents who achieve their status through other provisions of immigration law.<sup>28</sup>

As with Special Immigrant Juveniles above, grounds of inadmissibility apply to VAWA petitioners, and careful screening by an immigration attorney usually is warranted. Waivers of some grounds of inadmissibility, such as public charge and

<sup>27</sup> 8 U.S.C. § 1154(a)(1)(A)(iii), (B)(iii).

<sup>28</sup> See, e.g., Tanya Broder, National Immigration Law Center, *Immigrant Eligibility for Public Benefits* (2005), available at [http://www.nilc.org/immspbs/special/imm\\_elig\\_for\\_pub\\_bens\\_aila\\_0305.pdf](http://www.nilc.org/immspbs/special/imm_elig_for_pub_bens_aila_0305.pdf).

unlawful presence, are available but waivers in this context are not as generous as in the Special Immigrant Juvenile context.

Importantly, derivative status is available under VAWA, so parents of children who qualify and children of parents who qualify also may obtain lawful immigration status. This establishes VAWA as an important option to help families stabilize their immigration status and maintain family integrity.

### § 20.3.2 U Visas

Congress authorized the U visa in the Trafficking Victims of Trafficking and Violence Protection Act of 2000.<sup>29</sup> These visas are available to noncitizens who have suffered substantial physical or mental abuse as a result of qualifying criminal activity that occurred in the United States or violated U.S. law; possess information concerning that activity; and have been helpful, are being helpful, or are likely to be helpful with the investigation or prosecution of the criminal activity.<sup>30</sup> The U visa provides authorization to remain in the United States, with employment authorization, for up to four years.<sup>31</sup> After three years in U visa status, the holder may qualify to adjust his or her status to lawful permanent residence.<sup>32</sup>

The range of criminal activity covered by this provision is broad, including many crimes against children and their parents. The list includes activity in violation of federal, state, or local laws relating to:

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.<sup>33</sup>

Importantly, while cooperation with law enforcement is required, a prosecution and conviction related to the activity is not. The child, or in the case of children under age 16 a parent or guardian, must cooperate in the “investigation or prosecution” of the activity with a prosecutor, judge, or any law enforcement official investigating the activity.<sup>34</sup> This reaches child protective services investigations, without regard to whether criminal charges are ever filed.

<sup>29</sup> Pub. L. No. 106-386, 114 Stat. 1463 (Oct. 28, 2000).

<sup>30</sup> 8 U.S.C. § 1101(a)(15)(U)(i).

<sup>31</sup> 8 U.S.C. § 1184(p)(6).

<sup>32</sup> 8 U.S.C. § 1255(m)(1).

<sup>33</sup> 8 U.S.C. § 1101(a)(15)(U)(iii).

<sup>34</sup> 8 U.S.C. § 1101(a)(15)(U)(i)(III).

Unlike VAWA, U visas are available without regard to the immigration status of the person engaged in the criminal conduct, and no particular relationship with this person is required. For example, a child subjected to abuse would qualify even if the abuser is without lawful immigration status and is not the child's parent.

The U visa derivative provisions are the most generous in immigration law and permit the extension of U visa status from the direct victim to spouses, parents of children under 21, and even unmarried siblings under the age of 18 of children victims under the age of 21.<sup>35</sup> The reach of the U visa makes it an important tool to consider when immigration status concerns extend to other family members in the home.

As with VAWA, waivers of grounds of inadmissibility are potentially available upon application.<sup>36</sup>

### § 20.3.3 T Visas

Along with the U visa, Congress authorized the T visa through the Trafficking Victims of Trafficking and Violence Protection Act of 2000.<sup>37</sup> This visa is available to a person who is in the United States as a "victim of a severe form of human trafficking" and meets other criteria related to cooperation with law enforcement.<sup>38</sup> A severe form of human trafficking is defined as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age" or "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."<sup>39</sup>

In design and operation, the T visa is comparable to the U visa described above, with its narrower range of victimizing activity. Indeed, any person who qualifies for a T visa likely qualifies for a U visa. Having a T visa can qualify recipients for some forms of public assistance and can provide waivers to bars to benefits that apply to persons who achieve lawful permanent resident status through other avenues.<sup>40</sup> As with all these forms of immigration relief, it is highly advisable to obtain the advice of immigration counsel regarding potential qualifications, disqualifications, and strategic advantages of various routes.

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<sup>35</sup> 8 U.S.C. § 1101(a)(15)(U)(ii)

<sup>36</sup> 8 U.S.C. § 1255(m)(1).

<sup>37</sup> Pub. L. No. 106-386, 114 Stat. 1463 (Oct. 28, 2000).

<sup>38</sup> 8 U.S.C. § 1101(a)(15)(T).

<sup>39</sup> 22 U.S.C. § 7102(8).

<sup>40</sup> See, e.g., Tanya Broder, National Immigration Law Center, *Immigrant Eligibility for Public Benefits* (2005), available at [http://www.nilc.org/immspbs/special/imm\\_elig\\_for\\_pub\\_bens\\_aila\\_0305.pdf](http://www.nilc.org/immspbs/special/imm_elig_for_pub_bens_aila_0305.pdf).

### § 20.3.4 Other Forms of Immigration Relief

In addition to the forms of relief discussed above that deal with children specifically or depend on particular forms of victimization, it is important not to reject outright the possibility that children may be eligible for immigration relief under more mainstream provisions. For example, when children have family members with lawful immigration status, it is important to learn how this status was obtained and research whether some immigration benefits might extend to the child. Moreover, children are eligible to apply for other extraordinary forms of relief that often are perceived as applicable to adults, such as asylum. Though children often are effectively handicapped in pursuing some forms of relief, they generally are not ineligible based on their age.<sup>41</sup>

### § 20.4 Immigration Issues in Child Custody Disputes

As the number of immigrants and children of immigrants in the United States grows,<sup>42</sup> it is increasingly common to find “mixed-status” families in which all family members do not share a common immigration or citizenship status.<sup>43</sup> In 2008, 16.3 million children in the United States, or 23.2% of the total population of U.S. children, had at least one immigrant parent.<sup>44</sup> The majority of these children in immigrant families, 59%, have at least one parent who is a U.S. citizen.<sup>45</sup> But about 5.5 million children have at least one parent who is an unauthorized immigrant.<sup>46</sup> Many of these children are U.S. citizens, though approximately 1.5 million unauthorized children live in the United States.<sup>47</sup> Differences in immigration status

<sup>41</sup> David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002).

<sup>42</sup> One in five children in the United States lives in an immigrant family, i.e., a family in which one or more parent is an immigrant. Federal Interagency Forum on Child and Family Statistics, *America's Children: Key National Indicators of Well-Being 2002*, available at [http://www.childstats.gov/pdf/ac2002/ac\\_02.pdf](http://www.childstats.gov/pdf/ac2002/ac_02.pdf).

<sup>43</sup> In fact, 85% of families with children and headed by a noncitizen are mixed-status families. Michael Fix, Wendy Zimmermann & Jeffrey Passel, *The Integration of Immigrant Families in the United States*, p. 15 (The Urban Institute 2001), available at [http://www.urban.org/uploadedpdf/immig\\_integration.pdf](http://www.urban.org/uploadedpdf/immig_integration.pdf).

<sup>44</sup> Aaron Terrazas & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States* (Migration Policy Institute, Oct. 2009), available at <http://www.migrationinformation.org/USfocus/display.cfm?ID=747#7>.

<sup>45</sup> Donald J. Hernandez, *Generational Patterns in the U.S.: American Community Survey and other Sources* (2009), available at <http://www.brown.edu/Departments/Education/paradox/documents/Hernandez.pdf>.

<sup>46</sup> Aaron Terrazas & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States* (Migration Policy Institute, Oct. 2009), available at <http://www.migrationinformation.org/USfocus/display.cfm?ID=747#7>.

<sup>47</sup> *Id.* at 6–7. Children in immigrant families live with two parents 82% of the time, compared with 71% of the time for native families. Donald J. Hernandez, *Generational Patterns in the U.S.: American*

within families and between parents can create difficulties in the best of times, but they present special challenges when families face the prospect of separation.

In decisions regarding child custody, judges and advocates can be "all too eager to attach exaggerated legal significance to immigration status with little explanation and no analysis."<sup>48</sup> While parties and courts often reflexively assume there is legal significance or advantage in the distinction, the logic of this presumed relevance rarely is explained. In general, courts "have demonstrated a willingness to consider immigration status issues in child custody disputes but have yet to articulate a rationale for whether this engagement is proper and to develop a workable framework for competent analysis if it is."<sup>49</sup>

Working with immigrant children and families can present new challenges for child welfare advocates and systems. "In any determination of child custody issues, vigilance against discrimination on the basis of immigration status is crucial, but a strict prohibition on raising immigration status issues in child custody matters would be difficult to maintain because immigration status does have an impact on the experiences of many immigrants and their families."<sup>50</sup> Rather than sweeping issues related to immigration under the table, it is important that when such considerations are at play, they are "acknowledged, understood, and, when appropriate, affirmatively addressed in legal representation."<sup>51</sup>

A full exploration of the manner in which immigration issues arise in child custody matters is beyond the scope of this chapter, but a baseline principle is important to keep in mind as a starting point: immigration status alone says nothing about a parent's fitness or the best interests of a child. Best interest determinations are highly contextual and fact specific, requiring individualized inquiry from an unbiased starting point. The presence of immigration issues rarely makes a matter simpler, but complexity and logistical difficulties must never provide cover to ignore fundamental rights of children and parents.<sup>52</sup>

## § 20.5 Resources

In most cases involving the immigration rights of children it is important to consult with immigration law experts. Given the risk of deportation inherent in

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*Community Survey and other Sources* (2009), available at <http://www.brown.edu/Departments/Education/paradox/documents/Hernandez.pdf>.

<sup>48</sup> David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 *TEX. HISP. J.L. & POL'Y* 45, 49 (2005).

<sup>49</sup> David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 *HASTINGS L.J.* 453, 456 (2008).

<sup>50</sup> David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 *WAKE FOREST L. REV.* 391, 416 (2008).

<sup>51</sup> David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 *HASTINGS L.J.* 453, 472 (2008).

<sup>52</sup> David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 *WAKE FOREST L. REV.* 391 (2008).

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submitting to the immigration authorities an application for relief that is not meritorious, it is generally not advisable to contact immigration authorities about a child until the child's immigration possibilities and rights have been thoroughly researched. Some important sources of information can be found at:

- Immigrant Legal Resource Center – [www.ilrc.org](http://www.ilrc.org)
- ASISTA – <http://asistahelp.org>
- Center for Gender and Refugee Studies – <http://cgrs.uchastings.edu>
- Families for Freedom – [www.familiesforfreedom.org](http://www.familiesforfreedom.org)
- Kids In Need of Defense – <http://www.supportkind.org>
- National Immigration Law Center – [www.nilc.org](http://www.nilc.org)
- National Immigrant Project – <http://www.nationalimmigrationproject.org/>
- United States Citizenship & Immigration Services – [www.uscis.gov](http://www.uscis.gov)

It often is difficult to find attorneys with experience in the practice of both immigration and family law. Some of the organizations above may be helpful in locating a qualified attorney in your area. Most serious immigration attorneys are members of the American Association of Immigration Attorneys, which may be able to provide referrals. Finally, many law school clinical programs are developing expertise in the representation of immigrant children and are important resources to explore.