SIJ UPDATES AND PRACTICE POINTERS

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I. INTRODUCTION TO SPECIAL IMMIGRANT JUVENILE STATUS

Special Immigrant Juvenile Status (SIJS) is a path to lawful permanent residence and U.S. citizenship for certain abused, abandoned, and neglected children. Congress created SIJS in 1990 to facilitate greater access to social services and improved opportunities for legal adoption for abused and abandoned non-citizen juvenile court dependents. As discussed below in greater detail, amendments to the SIJS statute in December 2008 were designed to improve and expand access to SIJS by changing some requirements, codifying some of the SIJS regulations, and streamlining SIJS procedures.

In effect, SIJS allows a juvenile court dependent to "self-petition" for lawful permanent residence, acknowledging that the child lacks the traditional family relationships that immigration law typically requires for children to derive immigration status in the United States.

The cornerstone of an SIJS case is a state court order issued by the presiding juvenile judge or magistrate. It must contain the following key findings:

1) The child is unable to be reunited with one or both parents due to past parental abuse, abandonment, neglect, or a similar basis under state law;
2) It is *not* in the best interests of the child to be returned to his or her (or his or her parents') country of origin;
3) The child is a "dependent" of a competent juvenile court, or has been legally committed to, or placed under the custody of, an agency, department, or individual by a juvenile court; and
4) The child is unmarried and under 21 years of age.[1]

Lawful permanent residence via SIJS is obtained through two separate applications, which may be filed concurrently with U.S. Citizenship and Immigration Services (USCIS) so long as the young applicant is not in removal proceedings and the applicant's priority date is current. A petition establishing eligibility for SIJS and an application demonstrating eligibility for lawful permanent residence must both be approved for a child to become a lawful permanent resident. In extremely rare cases, if a child is found to be "in the custody of the Secretary of Health & Human Services (Office of Refugee Resettlement)" while a state juvenile court is seeking to determine the "custody status or placement" of the subject child, a "specific consent" request must first be granted by the Office of Refugee Resettlement *before* the state juvenile court can make findings relating to said custody status or placement.

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[1]. *See* 8 U.S.C. § 1101(a)(27)(J), INA § 101(a)(27)(J), as amended, and 8 C.F.R. § 204.11. Note that proposed draft regulations have been published (Sept. 2011). Advocates are encouraged to check the status of the regulations and for any other new/changed guidance memoranda and other relevant authority, as this is an area of emerging law.

A. Benefits of SIJS and Adjustment of Status

Lawful Permanent Residence

The most important benefit of applying for SIJS and adjustment of status is obtaining lawful permanent residence (a green card). A lawful permanent resident has the right to live and work permanently in the United States and to travel in and out of the country. While public benefits (Medicaid, TANF, etc.) for permanent residents have been drastically curtailed since 1996, permanent residents are eligible for some benefits initially (particularly in the case of children in foster care) and more as time goes on. Also, after five years, many lawful permanent residents may apply for U.S. citizenship.

Public Benefits Eligibility in Some Cases

County social services departments receive neither state nor federal funding for services provided to undocumented children. Upon a grant of SIJS and lawful permanent residence, a child in foster care in a "qualified" foster home is eligible for both state and federal Medicaid and Title IV-E federal foster care reimbursement funds,[2] which greatly reduces the burden of services on individual county funds. Furthermore, a grant of SIJS may be used to apply for a child's designation as an "Unaccompanied Refugee Minor" (URM). URMs are cared for by the federal Office of Refugee Resettlement, primarily through foster care.

Protection Against Removal and Employment Authorization

A child or juvenile with a pending SIJS petition cannot be removed from the United States until a final decision is made on the case, and once an SIJS petitioner has a properly pending adjustment of status application, he or she is eligible for work authorization. A juvenile with work authorization may obtain a Social Security number and a state identification card or driver's license, which is very much on the mind of many older teens!

B. Risks of Applying for SIJS and Adjustment of Status

Filing applications for SIJS and adjustment of status alert immigration officials in USCIS to the fact that the applicant child is residing unlawfully in the United States. If the applications are denied, the child could be placed into removal (deportation) proceedings. On June 28, 2018, USCIS issued updated guidance on when it will refer an individual to Immigration and Customs Enforcement or issue a Notice to Appear.[3] The new guidance requires USCIS to issue an NTA in any case in which "upon issuance of an unfavorable decision on an application, petition, or benefit request, the alien is not lawfully present in the United States."[4] Although this new guidance does not specifically address SIJS petitions, it appears to include children whose SIJS petitions or SIJS-based applications for adjustment of status have been

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[2]. Child Welfare Policy Manual 8.4B, General Title IV-E Requirements, Aliens/Immigrants, www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/index.jsp.

[3] USCIS, *Policy Memorandum: Updated Guidance for the Referral of Cases and Issuances of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens* PM-602-0050.1 (June 28, 2018).

[4] *Id*., at 7.

denied.[5]

It is essential to determine the child's eligibility for SIJS and to assess the probability of a grant of lawful permanent residence before submitting affirmative applications. In cases where a child is *already* in removal proceedings, there is nothing to be lost by submitting a borderline SIJS case as a *defense* to removal — although there may be other difficulties in presenting this type of case.

A child granted immigration status via SIJS will *never* be able to confer immigration status to either of his or her biological parents.[6] In cases where parents have died or parental rights have been terminated, this may not be an issue. However, in instances of abandonment or parental disappearance, a child may still hope to locate and reunite with his or her parents at some point in the future. Even in the case of a "one-parent" SIJS order, wherein the child may be living with the non-abusive parent, the child is prohibited from petitioning for the non-abusive parent. Be sure to discuss this with the client and his or her guardian *ad litem* (GAL) so that the child understands this consequence of seeking lawful permanent residence via SIJS.

II. SIJS ELIGIBILITY — EXPLANATION OF STATUTE AND REGULATIONS

Note: The SIJS regulation, 8 C.F.R. § 204.11, has not yet been changed to reflect statutory changes effective December 23, 2008, via the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Pub. L. No. 110-457, 122 Stat. 5044. However, draft regulations have been published. The draft regulations currently are used by advocates as persuasive authority, particularly insofar as the amended statute and existing regulations are inconsistent. Best practice calls for following and citing the amended statute, INA § 101(a)(27)(J), and the relevant sections of TVPRA themselves, while also trying to adhere to the existing regulations as much as possible/practicable, and citing the draft regulations as persuasive authority as needed. The following information attempts to instruct attorneys as to best practices under existing law until new regulations are promulgated.

In addition, on October 26, 2016, USCIS issued updated policy guidance in its official policy manual for government adjudicators of SIJS petitions and related adjustment of status applications.[7] The policy manual changes are discussed below, as are other recent developments in USCIS' processing of SIJS cases. Because the 2011 draft regulations remain unimplemented, best practice continues to call for attorneys to refer primarily to the SIJS statute, TVPRA (2008), and existing regulations insofar as they are consistent with TVPRA as binding legal authority. The proposed regulations and updated policy manual are not binding legal authority, and particularly with regard to the policy manual, attorneys can and should only use it to the extent it

[5] For more information on the intersection of this new NTA guidance and SIJS, *see* Rachel Prandini and Alison Kamhi, *Risks of Applying for Special Immigrant Juvenile Status (SIJS) in Affirmative Cases*, Immigrant Legal Resource Center Practice Advisory (September 2018).

[6]. INA § 101(a)(27)(J)(iii)(II), 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

[7]. USCIS Policy Manual, Volume 6, Part J, *available at* https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html (hereinafter 6 USCIS-PM J).

is helpful to clients, and argue it is contrary to the statute and regulations when appropriate.

A. Under the Jurisdiction of a Juvenile Court until SIJS and Adjustment of Status are Granted

"Juvenile court means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles."[8]

Retaining Jurisdiction

The current (outdated) SIJS regulation requires that an applicant must remain under the juvenile court's jurisdiction until the SIJS petition and adjustment of status application are both approved.[9] The draft regulations and USCIS policy manual both now require only that petitioners must be under the jurisdiction of a valid current juvenile court order at the time of filing the SIJS petition, but not necessarily at the time of adjudication of the petition or application for adjustment of status.[10] This is clearly true where juvenile court proceedings are terminated due to age or legal adoption, and likely true where there is assignment of a permanent legal guardian or allocation of parental rights to one (non-abusive) parent. There are other cases that do not fit into these four scenarios, and attorneys must continue to be mindful of the ongoing jurisdiction requirement, particularly with regard to delinquency proceedings, where a possible strategy to maintain court jurisdiction is to consider extending a juvenile's probation, which allows the court to keep the case open until probation is completed. Until adjudication trends emerge, best practice calls for keeping a juvenile case open throughout the entire immigration case if at all possible.

Juveniles at Risk of "Aging Out"

TVPRA § 235(d)(6) prohibits USCIS from denying an SIJS petition solely based on age, so long as the petitioner was a "child" on the date the petition was filed. This provision is at odds with the ongoing jurisdiction requirement found at 8 C.F.R. § 204.11(c)(5), and under proposed 8 C.F.R. § 204.11(b)(1)(ii) it is clear that SIJ classification only requires the petitioner to be under 21 at the time of filing.

B. "Reunification with One or Both Parents Not Viable Due to Abuse, Neglect, Abandonment, or Similar Basis Under State Law"

This is perhaps the most significant change made to the SIJS statute in 2008, which used to require that a child be deemed "eligible for long-term foster care" by a juvenile court, even in cases where a child or juvenile was not in need of foster care. Some juvenile courts refused to make the finding of eligibility for long-term foster care in cases involving guardianships or emancipating youth in "independent living" arrangements where the youth involved would not need "foster care." Note that the existing regulation still references the old statutory language, stating that "eligibility for long-term foster care" normally means that the child would remain in foster care until reaching the age of majority, unless

[8]. 8 C.F.R. § 204.11(a).
[9]. 8 C.F.R. § 204.11(c)(5).
[10]. *See* 6 USCIS-PM J.2(D)(1)-(2) and (4).

the child is adopted or placed into a guardianship.[11] In any event, focus should now be on ensuring that the juvenile court determines that reunification with one or both parents is no longer a viable option due to abuse, neglect, abandonment, or similar basis under state law.

USCIS requires evidence that a juvenile court issued SIJS findings with a reasonable factual basis. The policy manual instructs adjudicators to ensure that the court made specific factual findings with regard to the reasoning for each of the following: (1) child's placement, (2) circumstance of SIJS eligibility (parental abuse, abandonment, neglect, a similar basis under state law, or any combination of these), and (3) inability to return to country of origin.[12] USCIS' request for evidence of a factual basis for SIJS findings in a juvenile court order should be considered with deference to the child's privacy, confidentiality requirements under state law, and awareness that USCIS generally should defer to the expertise of state courts on child welfare, custody, and juvenile justice matters.

"Abuse, Abandonment, or Neglect, or Similar Basis in State Law"

"Abuse," "abandonment," and "dependent and neglected child" are concepts defined by state law,[13] and a juvenile court order finding that these state standards are met in a given case should be sufficient for USCIS' purposes. While great detail of the underlying facts is unnecessary and should not be provided to USCIS, the court's order should indicate that the findings issued were based upon the results of investigation and all other relevant evidence. A letter from the child's caseworker providing a brief overview of the child's history with the department of social services may bolster a skeletal order with only the bare legal findings.[14]

"One Parent" SIJS Cases

The TVPRA amendments in 2008 provide for "one-parent" SIJS cases. "One-parent" cases typically allege abuse, abandonment, and/or neglect by one parent and court-ordered placement with the other, "non-abusive" parent. The recently updated USCIS policy manual explains that the state court record must establish that the persons in the state court order are the child's parents. For example, if the state court SIJS findings are based on a father not listed on the child's birth certificate, a determination that the claimed father is the father under state law should be established in the juvenile court SIJS order.[15]

C. "Not in The Child's Best Interest to Be Returned to His or Her Home Country"

A finding that it is not in a child's best interest to return to home country or country of last habitual residence must be based on evidence. While it is not necessary to go into detail regarding home country conditions, some basis for the finding should be provided. If a child has physical, developmental, or emotional disabilities that would not be adequately addressed in the home country, these should be mentioned briefly in the order. Similarly, if a child would be subjected to homelessness, persecution, or other harm upon return to another country, these findings also should be included.

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[11]. 8 C.F.R. § 204.11(a).
[12]. *See* 6 USCIS-PM J.3(A)(3)-(4).
[13]. *See, e.g.*, C.R.S. §§ 19-1-103(19) and (78) and C.R.S. § 19-3-102.
[14]. Memorandum #3, *supra* n. 39, at 5.
[15]. 6 USCIS-PM J.2(D)(2).

D. "Unmarried and Under 21" until Adjustment of Status Is Granted

According to the existing and proposed regulations, an SIJS applicant must be unmarried at the time that adjustment of status is granted.[16]

> **Practice Pointer**
> Remember that some states recognize common law marriage! Also, it is a good idea to discuss this requirement thoroughly with teenage applicants who sometimes think that by marrying their U.S. citizen boyfriend or girlfriend they can achieve the same result (lawful permanent residence) as the SIJS petition package. In most cases this will *not* be true!! Several strict immigration law requirements regarding unlawful entry and presence in the United States, receipt of public benefits, and more, are automatically waived for SIJS applicants, which is *not* the case for typical family petitions.[17] Be sure to thoroughly evaluate and carefully answer questions about the advisability of marriage in this context — seek assistance from experienced immigration counsel, if needed!

As mentioned above, current regulations require an SIJS applicant to be under 21 years of age at the time that adjustment of status is granted.[18] However, this requirement is in contradiction to TVPRA § 235(d)(6), which prohibits USCIS from denying an SIJS petition based solely on the applicant's age, so long as the applicant was a "child" on the date the petition was filed. To the extent possible, efforts should be made to ensure USCIS adjudicates the SIJS petition and adjustment of status application prior to the client's 21st birthday, but if unavoidable, reference should be made to TVPRA § 235(d)(6) for age-out protection.

Proof of Age

USCIS regulations and guidance memos currently require every applicant for SIJS to submit some documentary proof of age. The evidence can take the form of a "birth certificate [with certified translation], passport, official foreign identity document issued by a foreign government, such as a Cartilla or Cedula, or other document which in the discretion of the director establishes the beneficiary's age."[19] Birth certificates are preferred, but not required.

> **Practice Pointer**
> Start searching for "proof of age" immediately after getting an SIJS case! The search for documents can be very time consuming, depending on the client's country of origin and individual circumstances.

Tips for Getting Foreign Birth Certificates

1) Contact any helpful family members in the home country — of course, sadly, many abused

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16. 8 C.F.R. § 204.11(c)(2).
17. See § 28.5.1 for further details regarding automatic SIJS waiver provisions.
18. 8 C.F.R. § 204.11(c)(1).
19. 8 C.F.R. § 204.11(d)(1).

children may not have these connections;
2) Contact the local consulate for the client's country of residence;
3) Contact nonprofit children's organizations operating in a client's area of birth. Occasionally, an internet search can connect attorneys with an organization that can help. In particular, if looking for Central American birth certificates, a useful resource is Casa Alianza; and
4) Check the U.S. Department of State's Foreign Affairs Manual (FAM) to determine document availability and procedures for obtaining them (available at https://fam.state.gov/).

For a list of other acceptable substitute documents, see 8 C.F.R. §§ 204.1(f) and (g)(2). Note however, that the standard for proof of age for SIJS is more flexible — a state court order with an age finding based on the child's testimony and other relevant indicators should also suffice if it is impossible to obtain other documentation.

Practice Pointer

If all efforts to obtain proof of age and identity fail, consider preparing an affidavit of due diligence, outlining the efforts counsel made to obtain identity documentation for USCIS. Depending on the country of origin, local USCIS officers have accepted these in lieu of any other proof of age beyond the child's bald assertion.

III. EXPRESS VERSUS SPECIFIC CONSENT IN SIJS CASES

The SIJS statute used to contain confusing language referencing two kinds of "consent." Specifically, it stated that a child was eligible for SIJS if "the Attorney General [now Secretary of Homeland Security] *expressly consents* to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that— no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General [now Secretary of Homeland Security] unless the Attorney General *specifically consents* to such jurisdiction."[20] This awkwardly worded statute confounded children's advocates and juvenile court officials across the country. The TVPRA amendments to the SIJS statute eliminate the concept of "express consent" and substitute the authority for granting "specific consent" from the Department of Homeland Security to the Department of Human Services, Office of Refugee Resettlement (ORR).[21] The following discussion regarding "specific consent" should only be of concern if an attorney finds himself or herself in one of two situations: (1) the child client is in deportation/removal proceedings and is in some form of immigration custody or federal foster care while a state juvenile judge is attempting to "determine the custody status or placement" of the child, or (2) USCIS is stating that it intends to deny a SIJS application because it is refusing to "consent" to accept the juvenile court judge's order.

Specific consent requests should be made to the ORR on behalf of children in ORR's custody for whom a state juvenile court seeks to determine custody status or placement. Instructions and a form for requesting "specific consent" in an SIJS case are available at ORR's website. Requests for "specific

[20]. Former (unamended) INA § 101(a)(27)(J)(iii)(I) (emphasis added).
[21]. INA § 101(a)(27)(J)(iii).

consent" must be made in writing and should include an outline of prospective SIJS eligibility, with accompanying supporting documentation, including a personal affidavit from the applicant; any medical documentation that indicates abuse or neglect; supplemental affidavits from friends, employers, church officials, etc. that confirm abandonment, abuse, or neglect; and similar.

IV. ADJUSTMENT OF STATUS ELIGIBILITY — REQUIREMENTS, INADMISSIBILITY, WAIVERS, AND EXERCISE OF DISCRETION

Adjustment of status is the procedure through which a person becomes a lawful permanent resident (green card holder) *without leaving the United States*. (The other procedure for becoming a lawful permanent resident, called consular processing, requires the person to travel to his or her home country to have an interview with the U.S. consulate there.) Many people who enter the country without inspection or otherwise cannot prove a lawful entry to the United States and subsequently want to lawfully immigrate through family members who are citizens or residents are not permitted to adjust status in the United States and instead must return to their home countries to consular process. This is *not* a problem for special immigrant juveniles because there is a special provision that allows SIJS applicants to apply for adjustment of status (without having to leave the United States) despite having entered illegally or worked without proper authorization.

A. Removability (Deportability) And Inadmissibility

People who fall within certain categories are penalized under U.S. immigration laws. A non-citizen can be forced to leave the United States if he or she comes within a "ground of deportability or removability." The person may be denied admission to the United States or denied adjustment of status (which is considered an "application for admission") if he or she comes within a "ground of inadmissibility." Most grounds of deportability and inadmissibility relate to criminal convictions, certain "vices" or generally disapproved of behaviors, previous immigration violations, contraction of certain diseases, and likelihood that someone may become a public charge, reliant on public benefits, upon achieving lawful residence in the United States. Grounds for deportation or removal may be found at INA § 237(a), 8 U.S.C. § 1227(a). Grounds of inadmissibility appear at INA § 212(a), 8 U.S.C. § 1182(a). These should be reviewed before any immigration application is ever submitted on anyone's behalf.

Many Grounds for Inadmissibility and Deportation Do Not Apply to Special Immigrant Juveniles or May Be Waived[22]

Grounds of Inadmissibility that Do *Not* Apply to Special Immigrant Juveniles

[22]. See INA § 237(c), 8 U.S.C. § 1227(c) excepting various grounds of deportation, including grounds relating to entry without proper documents, termination of conditional residency, and failure to report change of address; and INA §§ 245(h)(1) and (2)(A), 8 U.S.C. §§ 1255(h)(1) and (2)(A), added by Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 302(d)(2), creating eligibility for adjustment by deeming special immigrant juveniles to have been paroled into the United States and exempting them from the public charge ground of inadmissibility.

1) INA § 212(a)(4): Public charge;
2) INA § 212(a)(5)(A): Labor certification;
3) INA § 212(a)(6)(A): Present without admission or parole;
4) INA § 212(a)(6)(C): Fraud or misrepresentation to obtain an immigration benefit — including false claim to U.S. citizenship;
5) INA § 212(a)(7)(A): Immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document; and
6) INA § 212(a)(9)(B): Aliens unlawfully present.

Grounds of Inadmissibility Applicable to Special Immigrant Juveniles but Waivable[23]

1) INA § 212(a)(1): Health-related grounds;
2) INA § 212(a)(2)(D): Prostitution and procurement;
3) INA § 212(a)(2)(E): Certain aliens involved in serious criminal activity who have asserted immunity from prosecution;
4) INA § 212(a)(2)(G): Foreign government officials who have engaged in particularly severe violations of religious freedom;
5) INA § 212(a)(2)(H): Significant traffickers in persons;
6) INA § 212(a)(2)(I): Money laundering;
7) INA § 212(a)(3)(D): Immigrant members of a totalitarian party;
8) INA § 212(a)(3)(F): Association with terrorist organization;
9) INA § 212(a)(5)(B): Unqualified physicians;
10) INA § 212(a)(5)(C): Uncertified foreign health care workers;
11) INA § 212(a)(6)(B): Failure to attend removal proceedings;
12) INA § 212(a)(6)(E): Smugglers;
13) INA § 212(a)(6)(F): Subject to civil penalty;
14) INA § 212(a)(6)(G): Student visa abusers;
15) INA § 212(a)(7)(B): Nonimmigrants;
16) INA § 212(a)(8): Ineligible for citizenship;
17) INA § 212(a)(9)(A): Certain aliens previously removed;
18) INA § 212(a)(9)(C): Aliens unlawfully present after previous immigration violations; and
19) INA § 212(a)(10): Miscellaneous grounds (polygamists, unlawful voters, etc.).

Grounds of Inadmissibility Applicable to Special Immigrant Juveniles and *not* Waivable

If a practitioner is concerned that a child *might* fall within one of these grounds, he or she should not file an application until he or she has consulted with an expert in this area.

1) INA § 212(a)(2)(A): Conviction of certain crimes;[24]

[23]. A waiver, if required by an immigration judge or USCIS officer, should be submitted on Form I-601, available on the USCIS website. Also, it is worth noting that the grounds of inadmissibility that are waivable for SIJS applicants are listed here, in their entirety, although it is readily acknowledged that it is exceedingly unlikely that most SIJS applicants would need to worry about many of these grounds.

2) INA § 212(a)(2)(B): Multiple criminal convictions;
3) INA § 212(a)(2)(C): Controlled substance traffickers — this includes anyone USCIS has a "reason to believe" is a trafficker — there is no need for an adult conviction or a juvenile delinquency adjudication;
4) INA § 212(a)(3)(A): Entrance into the United States to engage solely, principally, or incidentally in unlawful activity, particularly espionage;
5) INA § 212(a)(3)(B): Terrorist activities;
6) INA § 212(a)(3)(C): Serious adverse foreign policy consequences; and
7) INA § 212(a)(3)(E): Participants in Nazi persecutions or genocide.

B. Exercise of Discretion in SIJS Adjustment of Status Applications

The decision to grant an application for adjustment of status is discretionary; a person who is statutorily eligible may still be denied if it is deemed that the case does not warrant a favorable exercise of discretion. In cases involving young children, it is highly unlikely that an otherwise eligible case would be denied on a discretionary basis. In cases involving juveniles, particularly those with a history of arrests or delinquency adjudications, it is necessary to persuade the USCIS official adjudicating the case that a favorable grant of discretion is warranted. This may be done by showing rehabilitation — introducing letters from a case worker, probation officer, teachers, therapists, foster parents, GALs, employers, church officials, etc., that can attest to change or evolution in character over time. If a client has completed anger management classes, community service, or drug or alcohol treatment or performed well at school, etc., the practitioner can supply such things as certificates or awards that demonstrate this. It is also helpful if the practitioner can demonstrate that "acting out" as a young adolescent is tied to underlying parental abuse, abandonment, or neglect.

Practice Pointer

It is important to note that this evidence will not overcome a non-waivable ground of inadmissibility. Evidence of rehabilitation is appropriate in cases where a child is statutorily eligible, but may have a checkered past. Similarly, if a waiver is required for one of the grounds of inadmissibility, the same types of "good moral character" evidence should be submitted with Form I-601.

C. SIJS Immigrant Visa Number Availability

The number of young people petitioning for SIJS has increased dramatically over the past five years. This is a result of both increased awareness of this formerly underutilized statute and increased numbers of youth entering the United States. More children are in removal proceedings than at any other time in history, and attorneys and child welfare advocates are better prepared to identify and assist young

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[24]. Note that the § 212(a)(2) non-waivable bars *do not include* the part of the paragraph related to a single offense of simple possession of 30 grams or less of marijuana. In addition, adjudications in juvenile delinquency proceedings are not considered "convictions" for immigration purposes. *See Matter of Devison-Charles*, 22 I&N Dec. 1362, 1365-66 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

people in obtaining SIJS. The increase in approved SIJS petitions recently posed an unprecedented challenge in these cases. Every time an SIJS petitioner adjusts status to lawful permanent residence, an immigrant visa is allocated from the roughly 7,000 per country annually available visas in the fourth preference employment-based category, which is specifically assigned under the INA to "special immigrants."[25] For the first time ever, in 2016, all available special immigrant visas were utilized with many adjustment of status applications for SIJS petitioners still pending, causing the creation of a waiting list for those applicants for whom no visa was available.

The number of visas available in any given preference category for immigrants is typically monitored and determined on a monthly basis by the U.S. Department of State. The State Department issues a monthly "Visa Bulletin," which allows attorneys to verify if a visa will be available in any given month in any particular category. When visas are currently available, the preference category will reflect that in the visa bulletin. When visas are no longer available in a preference category, the visa availability is said to have retrogressed, and a date will be entered indicating how far back in time applications that are next in line to receive an available visa were originally submitted to either USCIS or an immigration court.

In addition to statutory limits on the numbers of visas allocated to each preference category, there are also statutory limits on the numbers of visas that can be issued to applicants from each country. The State Department addresses this by separating out certain countries with high numbers of visa applicants in any given preference category and making their waiting lines even longer by retrogressing the availability of visas to foreign nationals from those countries even farther.

By the end of FY2016, fourth preference special immigrant visa availability retrogressed significantly, particularly for SIJS petitioners from Mexico and Central America. As of the start of FY2017, however, all SIJS petitioners from all countries were advised they could proceed with their adjustment of status applications. It is anticipated that retrogression will again become and continue to be an issue in the coming months and years, so long as the number of SIJS petitioners remains steady at current levels or increases.

Practice Pointer

Due to outdated regulations and USCIS' frequent changes to SIJS-related policy and processing, attorneys must check for updates on USCIS' website prior to submitting an SIJS petition and/or an adjustment of status application. For example, a helpful overview of an SIJS Teleconference hosted by USCIS in June 2016 is available at www.dhs.gov/special-immigrant-juvenile-teleconference-recap-0 and linked on the USCIS website. Other extremely valuable and up-to-date resources are available to AILA members on its website, and to all attorneys through KIND.org, ILRC.org, and similar websites hosted by nonprofit organizations dedicated to working with vulnerable and

[25]. *See* INA §§ 101(a)(27) and 203(b)(4). Special immigrant visas are limited to "7.1% of worldwide visas per year" and in addition to special immigrant juveniles, include certain religious workers, international medical school graduates, foreign national employees of the U.S. government in Taiwan and Panama, and translators for the armed forces, among others. *Id.*

indigent immigrant populations.

D. SIJS and Adjustment of Status Interviews

Although less and less common with the centralization of I-360s and I-485s at the National Benefits Center, interviews still occur on occasion at local USCIS field offices.

The USCIS officer will typically ask questions directly of the child, or in cases involving young children, the caseworker or legal guardian. Any questions or information provided on the I-360 or the I-485 are fair game. The interviewing officer *should not* ask questions about the underlying abuse, abandonment, or neglect. In the event that this should occur, the attorney should consider the following arguments:

1) Such questioning is not appropriate and is not legally relevant so long as the findings of the juvenile court order are deemed sufficient.
2) If USCIS is requesting further details because of vagueness in the court order, the details need not come from the child, possibly re-traumatizing him or her about difficult times in his or her life.
3) Consider telling the USCIS officer that either you or the caseworker will be happy to provide further details in writing so as to avoid direct questioning of the child.[26]
4) Be sure to bring copies of the statute, regulations, and policy memoranda. An officer unfamiliar with SIJS or otherwise accustomed to typical adjustment interviews may presume that his or her role is as original fact-finder for the case, as opposed to deferring to a valid juvenile court's findings.

In a typical interview, the role of the attorney will be minimal, provided that attorneys, clients, and guardians are well prepared ahead of time. Attorneys should prepare the client in advance by role playing with him or her and asking questions like his or her full name, birth date, school, etc. Older juveniles who may have an arrest record and/or delinquency adjudications, should be fully prepared to answer questions about their behavior honestly. Ask the client directly about drug use before the interview and in the absence of guardians. Drug abuse can serve as the basis for a finding of inadmissibility (either via the public health grounds or the "reason to believe" drug trafficking ground) and admissions in this area can be problematic. Practitioners should get expert advice if they have questions or doubts.

E. Notice of Decision, Approvals, Denials, And Appeals

Approvals

If the child has a valid passport and there is an urgent need to obtain proof of status (for example, obtaining a valid Social Security number to access child protective services funds), bring it to the interview, and if the case is approved right away, the officer may put a temporary stamp evidencing lawful permanent residence until the actual green card shows up in the mail a few weeks later.

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[26]. This is USCIS' own policy, outlined in Memorandum #3, *supra* n. 39, at 5.

Denials

A denial must be issued in writing and explain the reasons for the denial. USCIS must notify the attorney and the applicant of the right to appeal the decision (on the SIJS petition) to the Associate Commissioner, Examinations. A denial may also result in the child's being placed in removal proceedings after being issued a notice to appear.

Appeals

It is important to remember that a USCIS denial of an I-360 may be in error. Denials are frequently overturned on appeal. USCIS and the immigration court have jurisdiction over different parts of the case. Under the regulations, only USCIS can decide the petition for SIJS, so appeals are directed to the USCIS Administrative Appeals Office.[27] If USCIS denies the adjustment of status application and the applicant is placed in removal proceedings, the immigration judge can decide whether to grant the adjustment (overturning USCIS). If the judge denies the adjustment application, an appeal can be taken to the Board of Immigration Appeals in Virginia. Typically, legal advocates recommend submitting a motion to reopen and/or reconsider a decision denying an I-360 to the office that made the decision. Regulations allow for this, and, if USCIS declines to reopen or reconsider its original denial, it must forward the file to the Administrative Appeals Office within 45 days of receiving the motion. Use Form I-290B to submit a motion to reopen/reconsider; alternatively, appeal.[28] Because there is no filing fee for the SIJS I-360, a fee waiver application may be made to waive the fees associated with the appeals process.

[27]. *See* 8 C.F.R. § 106(b)(2)(E), and *see generally* 8 C.F.R. § 103.3.
[28]. 8 C.F.R. § 103.3(a).