

# SPECIAL IMMIGRANT JUVENILE STATUS

## *in a Nutshell*

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State court judges are asked to do many different things on any given day. Some types of hearings occur daily and routinely. But some are infrequent, come without warning, are complicated, and require knowledge of a novel area of law. For many, hearings involving special immigrant juvenile findings are infrequent and challenging. In 10 questions, this article addresses Special Immigrant Juvenile Status and provides guidance for the busy state court judge when such a hearing arises.

### What is Special Immigrant Juvenile Status?

Special Immigrant Juvenile Status (SIJS) was created as a means of securing lawful immigration status in the United States for children in state foster care.<sup>1</sup> SIJS is defined in the Immigration and Nationality Act at section 101(a)(27)(J), with regulations at 8 C.F.R. § 204.11, first enacted in 1990 and later amended several times.<sup>2</sup> To be eligible for SIJS, federal law requires findings by a state court that (1) a juvenile is dependent or placed under the custody of an agency or department of a state, or an individual; (2) reunification of the juvenile with a parent is not viable due to abuse, neglect, abandonment, or a similar basis found under state law; and (3) it would not be in the juvenile's best interest to be returned to the juvenile's or his or her parents' country of nationality or last habitual residence.<sup>3</sup>



Then the individual may take that state court order and, through a federal immigration administrative process, seek SIJS, which will put the individual on a path to become a lawful permanent resident.

### Why does SIJS require state court involvement?

By statute and regulation, the state court (not the U.S. Citizenship and Immigration Services (USCIS), the federal adjudicating entity) is designated as the entity best suited to make findings concerning the care and custody of a juvenile.<sup>4</sup> As indicated in its policy manual, USCIS generally defers to the state courts on matters of state law and does not go behind court orders to reweigh evidence and make independent determinations about abuse, abandonment, or neglect.<sup>5</sup>

The expectation is that the state court will make detailed findings supported by evidence provided. As stated in its policy manual, USCIS "requires that the juvenile



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court order or other supporting evidence contain or provide a reasonable factual basis for each of the findings necessary for classification,” leaving to the state court issues of state law.<sup>6</sup> Typically, counsel will provide a proposed order containing the detailed findings required. In reviewing orders, USCIS is looking to see citation to state law as the basis for jurisdiction and for the

necessary findings, with the expectation that the orders will “not just mirror or cite to the immigration law and regulations.”<sup>7</sup>

#### **Can an individual be granted SIJS if he or she is living with a parent?**

Yes. A child may be eligible for SIJS so long as reunification is not viable with one parent due to abuse, abandonment, neglect, or a similar basis under state law. As made plain in the USCIS Policy Manual, juveniles petitioning for SIJS “do not need to be eligible for or placed in foster care and . . . may be reunified with one parent or other family members.”<sup>8</sup> Indeed, practitioners working with children outside the child welfare system may rely on custody proceedings, where custody is awarded to the nonoffending parent, in order to obtain SIJS findings. These “one-parent” cases are regularly approved by USCIS so long as all of the SIJS eligibility requirements are met.

#### **Can an individual be granted SIJS if he or she is over 18?**

Yes. An individual must be under 21 years of age in order to establish eligibility for SIJS.<sup>9</sup> Whether an individual can obtain the required state court order after turning 18 is another matter. This will depend on state law, and whether a court is able to exercise jurisdiction over the individual after age 18 for purposes of making the required findings. Some states have provisions for extending jurisdiction over the custody and care of juveniles past 18 years of age under certain circumstances.<sup>10</sup> In addition, some states have adopted statutes extending jurisdiction until the age of 21 for SIJS cases.<sup>11</sup>

#### **Why is the state court (and not USCIS) asked to find that it is not in the juvenile’s best interest to return to his or her home country?**

Some judges have expressed concern that the best-interest finding requires them to assess the safety of a child’s home country. It may seem that a finding that the child should remain with his or her caregiver in the United States should suffice. However, the USCIS Policy Manual provides that “[t]he court’s finding that a particular custodial placement is the best alternative

available to the petitioner in the United States does not necessarily establish that a placement in the petitioner’s country of nationality would not be in the child’s best interest.”<sup>12</sup> Accordingly, USCIS requires some discussion, in the state court order, about the availability and adequacy of custodial placement in the home country.

#### **Why is the state court being asked to find that reunification is not viable in a case where there is no request for termination of parental rights?**

Without a termination of parental rights, a state court judge may question having to make a nonreunification finding. In SIJS cases, however, unless that finding is made, USCIS may deny the visa petition. According to the USCIS Policy Manual, although actual termination of parental rights is not required, the temporary unavailability of a child’s parent does not meet the eligibility requirement that reunification is not viable.<sup>13</sup>

A state court judge may award a parent sole custody of a child without terminating the mistreating parent’s rights. In such a case, a judge will often allow the mistreating parent some noncustodial access to the child. Arguably, awarding sole custody to one parent while limiting access by the offending parent is akin to nonviability of reunification in a custody suit.

#### **Why are requests made for the state court to extend jurisdiction over the juvenile until lawful permanent residence is obtained?**

As a result of federal litigation and a change in the law, these requests are unnecessary. An applicant who is otherwise eligible will remain eligible for SIJS even if he or she turns 21 years of age after filing the petition but prior to the USCIS decision on the visa petition, and/or ages out of the state court’s jurisdiction prior to filing the visa petition.<sup>14</sup> The current, outdated regulations provide that an SIJS petitioner “continue to be dependent on the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended.”<sup>15</sup> This language previously prompted many in state court to request language extending

that court's jurisdiction until the juvenile received a decision on his or her application for lawful permanent residence. It is no longer necessary to include this language in the state court order.<sup>16</sup>

### What happens after the state court issues an order with the required findings?

Once an individual has a state court order including the requisite findings, he or she can file a certified copy of that order along with a visa petition (Form I-360) with USCIS.<sup>17</sup> USCIS may require an interview with the individual before approving or denying the petition,<sup>18</sup> and, where applicable, will allow the individual an opportunity to respond to concerns about his or her eligibility.<sup>19</sup>

Should USCIS approve the I-360, the individual will have SIJS. The status is not a defense to removal, nor does it provide the individual with work authorization. The status does, however, put the individual on a path to become a lawful permanent resident. Due to the limited number of special immigration visas available annually, however, it may be many years before an individual can actually file an application for lawful permanent residency (I-485).<sup>20</sup> When the individual's application for lawful permanent residence is considered, either by USCIS or by an immigration judge, his or her admissibility will be assessed.

### What does USCIS look for in the state court's order?

USCIS requires that the state court order make the required findings under state law: dependency or custody, parental reunification, and best interest. Pursuant to the USCIS Policy Manual, orders are not required to have the specific terms found in the Immigration and Nationality Act "as long as the findings have the same meaning as the requirements for SIJ classification."<sup>21</sup> USCIS has questioned orders lacking in specific factual bases with regard to the necessary findings.

### Why does counsel for the juvenile sometimes request the transcript of the proceedings?

Requests for transcripts in cases involving special immigrant juvenile findings

are often made by practitioners attempting to satisfy USCIS. Although USCIS should not second-guess a state court's findings, the agency does have statutory authority to consent to the grant of SIJS (approve or deny the visa petition). USCIS has interpreted this function to allow it to require proof from applicants that there was a reasonable basis for the state court's findings.<sup>22</sup>

An order that provides sufficient factual details supporting each finding should satisfy USCIS. However, an order that fails to indicate which parent mistreated the child and how, or why it is not in the child's best interest to return to his or her home country, may be rejected. A transcript and/or evidence provided to the state court judge as a basis for the findings should remove all doubt and may be submitted in support of the visa petition so that USCIS can confirm the factual bases for the findings. ■

### Endnotes

1. See Special Immigrant Status; Certain Aliens Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42,843 (proposed Aug. 12, 1993) (to be codified at 8 C.F.R. pts. 101, 103, 204, 205, and 245) ("No method existed for most court-dependent juvenile aliens to regularize their immigration status and become lawful permanent residents of this country, even though a United States juvenile court had found them dependent upon the court and eligible for long-term foster care, and it had determined that it was not in the children's best interest to be returned to their home countries or the home countries of their parents.").

2. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4319 (Jan. 25, 1994); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (CJS 1998 Appropriations Act), Pub. L. No. 105-119, 111 Stat. 2440 (Nov. 26, 1997); Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008).

3. 8 U.S.C. § 1101(a)(27)(J)(i)-(ii).

4. See *id.*; see also 8 C.F.R. § 204.11(a) (defining "juvenile court" as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles").

5. See *Policy Manual: Volume 6—Immigrants, Part J—Special Immigrant Juveniles, Chapter 2—Eligibility Requirements*, U.S. CITIZEN & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter2.html> (last visited Apr. 14, 2017) [hereinafter *Eligibility Requirements*].

6. *Id.* at D.5.

7. See *Policy Manual: Volume 6—Immigrants, Part J—Special Immigrant Juveniles, Chapter 3—Documentation and Evidence*, U.S. CITIZEN & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter3.html> (last visited Apr. 14, 2017) [hereinafter *Documentation and Evidence*].

8. See *Eligibility Requirements*, *supra* note 5.

9. 8 C.F.R. § 204.11(c)(1) (2016).

10. See, e.g., CAL. PROB. CODE § 1510.1 (West 2016).

11. See, e.g., MD. CODE ANN., FAM. LAW § 1-201 (West 2014).

12. See *Eligibility Requirements*, *supra* note 5.

13. *Id.* at D.2.

14. See Stipulation Settling Motion for Class-wide Enforcement of Settlement at 2, *Perez-Olano, et al. v. Holder, et al.*, Case No. CV 05-3604 (C.D. Cal. 2015); 8 U.S.C. § 1232(d)(6).

15. 8 C.F.R. § 204.11(c)(5) (2016).

16. See *Eligibility Requirements*, *supra* note 5.

17. See *Documentation and Evidence*, *supra* note 7.

18. See *Policy Manual: Volume 6—Immigrants, Part J—Special Immigrant Juveniles, Chapter 4—Adjudication*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter4.html> (last visited Apr. 14, 2017).

19. *Id.* at D.

20. See *Policy Manual: Volume 7—Adjustment of Status, Part A—Adjustment of Status Policies and Procedures, Chapter 6—Adjudicative Review*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter6.html> (last visited Apr. 14, 2017).

21. See *Documentation and Evidence*, *supra* note 7.

22. See *Eligibility Requirements*, *supra* note 5.