Chapter 8

Protection-Based Relief:

Forging a Path to Permanent Status

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Before joining The Advocates, Lindsey spent many years working internationally on human rights programs, including: work with the International Organization for Migration (IOM) on human trafficking research; the International Labour Organization (ILO) on labor rights and gender equity; and the US Department of State on conflict prevention programming and research. In addition, she worked on Internally Displaced Persons (IDP) reintegration as well as access to justice projects with local NGOs in East Timor (Timor-Leste). Lindsey also brings experience in private immigration practice where she provided representation on a range of immigration cases including humanitarian, family-based, and employment-based matters as well as naturalization and citizenship. Lindsey has co-authored two research guides on legal research in Timor-Leste in addition to co-authoring a piece on second generation security sector reform in international development.

Lindsey graduated magna cum laude from the University of Minnesota Law School with a concentration in human rights law and received her Bachelor of Arts in international studies from the University of Denver with magna cum laude honors. While in law school, Lindsey served in the Immigration & Human Rights Clinic, where she worked on asylum cases and helped to start a working group on pro bono representation for detained migrants. She also worked as a teaching assistant for an undergraduate International Human Rights Law course, interned for the judges at the International Criminal Tribunal for Rwanda (ICTR), and assisted Amnesty International USA on human rights research and advocacy. Lindsey currently serves as an adjunct professor of immigration law at the University of St. Thomas School of Law in Minneapolis and is a member of the American Immigration Lawyers Association (AILA).

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§ 8.1 GENERAL INFORMATION

Several sections of the United States immigration laws provide a means for clients to remain in the United States indefinitely, or temporarily with the possibility of eventual permanency in the case of U/T visas and special immigration juvenile status, for purposes of protecting the client from harm. The types of harm and the criteria to determine whether protection will be afforded vary. The initial benefits, if relief is granted, vary as well, but all of the forms of relief presented in this chapter ultimately lead to an opportunity to seek an indefinite, if not permanent status in the United States.

This chapter provides an overview of the basic forms of protection-based relief: asylum, withholding of removal, relief under the Convention Against Torture, U Nonimmigrant Status, and T Nonimmigrant Status, and special immigrant juvenile status.

As part of an initial consultation with a potential client, the lawyer should always screen for protection-based relief. Clients may not be intuitively aware that past harms or future fears would allow them an opportunity to remain in the United States. Moreover, rapidly shifting policies on protection-based relief require careful consideration before pursuing a claim. The past few years have seen sweeping changes to policies and regulations, often followed by intense litigation efforts to minimize their impact. Below are a few of the major changes impacting asylum-seekers.

- **Asylum Regulation Overhaul:** On Oct. 20, 2020, the Trump Administration issued final regulations designed to eviscerate the United States' asylum system. The rules, set to go in effect on Nov. 20, 2020, are the latest attempt to undermine the right to seek and enjoy asylum from persecution guaranteed in federal statute and international treaty.

- **Changes to Work Permit Eligibility and Processing:** New regulations impacting asylum seekers' access to an Employment Authorization Documents (EAD) went into effect on August 21, 2020 and August 25, 2020, though several provisions have been partially enjoined through litigation in *Casa de Maryland Inc. v. Wolf*, Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020). Key changes include dropping the 30-day processing time for initial EAD filings and limiting access to work permits for those who do not meet the one-year deadline, enter the U.S. illegally, and expand limitations for those with criminal histories.

- **COVID Bars to Asylum:** Proposed regulations were released in July 2020 to expand the ability of Department of Homeland Security (DHS) to prevent access to the asylum process during pandemics. The rule proposes to allow Customs and Border Patrol (CBP) to consider emergency public health concerns based on communicable disease as a bar to asylum. Specifically, it would allow CBP to bar asylum seekers whose entry they determine pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States, pose a significant danger to the security of the United States.

- **Safe Third Country Bar:** In July 2019, the United States implemented a new regulation requiring any refugee seeking asylum at the southern U.S. border who has passed through another country to have first asked for and been denied asylum in that country before seeking asylum in the United States. This policy, in effect, removes asylum as an option for individuals from Honduras, El Salvador, Guatemala, and others who are fleeing violence and persecution in their home countries and seeking safety in the U.S. The United States Supreme Court ruled in September 2019 that the proposed DHS rule may stand while being litigated in U.S. courts. On June 30, Judge Timothy Kelly of the U.S. District Court for the

District of Columbia struck down President Trump's second asylum ban, ending a restrictive policy that had virtually halted asylum at the southern border for the last year. The Ninth Circuit affirmed a preliminary injunction in the *East Bay* case in July 2020.

The Immigration Court and Asylum Office have initiated new policies to maximize efficiency in processing claims. Asylum claims filed after January 2018 can expect priority scheduling for interviews. *See* U.S. Citizenship and Immigration Services, *USCIS to Take Action to Address Asylum Backlog* (Jan. 21, 2018), *available at* <www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog>. The Director of the Executive Office for Immigration Review has instituted performance measures for immigration judges based on case completion times. *See* James R. McHenry, *Memo: Case Priorities and Immigration Court Performance Measure*, (Jan. 17, 2018), *available at* <www.justice.gov/eoir/page/file/1026721/download>. This will speed up the processing times for asylum claims filed following a credible fear interview. It will also impact the ability of respondents to continue a removal case while awaiting a decision on a benefit over which USCIS has jurisdiction, including U visas, T visas, and Special Immigrant Juvenile Status.

§ 8.2 ASYLUM, WITHHOLDING OF REMOVAL, AND RELIEF UNDER THE CONVENTION AGAINST TORTURE

Asylum, withholding of removal, and relief under the Convention Against Torture (CAT) are related forms of relief designed to protect individuals who fear returning to their country of origin due to persecution or torture. Each form of relief has separate elements to satisfy the legal standard, but the lawyer can prepare a request for all three forms of relief simultaneously using the application Form I-589 available on the USCIS website, <www.uscis.gov>.

The lawyer should keep in mind that asylum can be granted by USCIS asylum officers (Department of Homeland Security) or the immigration judge (Department of Justice), while withholding of removal and CAT relief can only be granted by the immigration judge.

Asylum offers the most protection of these three forms of relief. It is the only one that creates a path to permanent residence, reunification with some family members, and the opportunity to travel outside of the United States without forfeiting the protection offered under the immigration laws. Not all clients will be eligible for asylum, however, so it is important that the lawyer evaluate and pursue withholding of removal and CAT as alternative forms of relief if colorable claims exist.

PRACTICE TIP

Although the legal standards governing eligibility for asylum and refugee status are the same, refugee status can only be sought by individuals who are outside of the U.S. at the time they file their application for protection. *See* U.S. Citizenship and Immigration Services, *Flow Chart: United States Refugee Admissions Program*, *available at* <www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27l%20Ops/USRAP_FlowChart.pdf> (explaining how refugees apply for status and the process they undergo prior to being admitted to the United States). In contrast, the asylum process exists to permit individuals already present in the U.S. or who present at a U.S. port of entry seeking protection, to apply for that protection from inside the United States. *See* INA § 208(a).

PRACTICE TIP

In September 2016, USCIS accepted the USCIS Ombudsman's recommendation to implement a parole policy for U visa petitioners and qualifying relatives who live abroad. The policy is intended to allow individuals to enter or re-enter the United States while they are on the waitlist. USCIS has yet to issue detailed guidance on the procedures to request parole in this context.

G. Appeals

If a U visa application is denied, it can be appealed to the Administrative Appeals Office (AAO) for paper review.

§ 8.5 SPECIAL IMMIGRANT JUVENILE STATUS

Special immigrant juvenile status (SIJS) is a form of protective relief that may only be granted by the U.S. Citizenship and Immigration Service (USCIS). It is one of several "special immigrant visas" that USCIS has designated for specific groups of individuals. SIJS is designed to protect children who have been abused, neglected, or abandoned by one or both of their parents. The abuse, abandonment, and/or neglect could happen either in their home country or in the United States, provided that the child meets the other eligibility requirements to receive SIJS. Unlike many forms of immigration relief, it requires special findings from a state court before the child can apply for SIJS status through a self-petition with USCIS. Once the child's self-petition is approved, the child may immediately apply for permanent residency if the proper visa is available, without having to leave the country to adjust status through the U.S. consulate in their country of origin. *See* INA § 101(a)(27)(J); 8 C.F.R. § 204.11; INA § 245(h).

Attorneys should ensure that they review the USCIS Policy Manual Sections on special immigrant juvenile status and special immigrant-based adjustment of status before submitting any documentation to an adjudicator. Both sections of the USCIS Policy Manual are available at the USCIS website, <www.uscis.gov>.

CAVEAT

SIJS regulations appear to be in their final stages and the authors expect a final rule soon. The comment period closed in 2019 and it is still unclear what the final rule will entail. That said, if attorneys have any I-360s that are close to being finished, it may be best for to file these applications as soon as feasible. The proposed regulations contained restrictive prohibitions that may negatively impact adjudication. For example, the proposed regulations changed the consent function so that it denied all one-parent cases. To read more about the proposed rules visit the Office of Information and Regulatory Affairs website, <www.reginfo.gov/public/do/eoDetails?rrid=131233>.

Regulations are typically set to be effective/implemented 30 days after the final rule is published. Any practitioners who have recently received predicate orders should finalize their SIJS applications and file them as soon as they are able.

A. Eligibility Requirements and State Court Process

1. Child Must be Under 21 Years of Age at the Time the Application is Filed

The child must be under 21 years of age at the time the application for special immigrant juvenile status is filed. *See* 8 C.F.R. § 204.11(c)(1); USCIS Policy Manual, section on Special Immigrant Juvenile Status.

PRACTICE TIP

Though the age limit is 21 years of age, most state court proceedings in Minnesota that establish dependency of the juvenile are not accessible after the child turns 18. As such, the attorney should work swiftly to pursue the state court findings if the child has already reached the age of 17. However, in certain Minnesota "dependency" proceedings, such as proceedings for a child in need of protective services (CHIPS), jurisdiction over the child as a juvenile can extend beyond the age of 18 and the child could possibly obtain the required predicate order after the child has turned 18, but federal law requires that the child obtains the predicate order before reaching the age of 21. As such, it is important to carefully review the relevant statutes and procedures governing the state court proceeding in which the client will be pursuing both relief from the state court and the requisite predicate order. It is also highly recommended that the attorney partner with a mentor familiar with the type of state court proceeding in which the client is seeking special findings.

ETHICAL CONSIDERATIONS

Some lawyers are retained to file both the state court pleadings and the immigration applications. In Minnesota, many state court petitions are brought by an adult seeking a finding on behalf of a juvenile, and therefore, handling both proceedings would require representation of multiple parties. Under these circumstances, the lawyer should consider ethics rules related to conflicts of interests and representation of multiple parties. The Volunteer Lawyers Network (VLN) has a program set up to provide legal services to a parent seeking sole custody of a child or to other adults seeking third-party custody in the state court proceedings, for families that income qualify for their services. If the attorney represents both the proposed custodian and the child eligible for SIJS, they will want to ensure that they have discussed carefully with the clients at the time representation begins how any conflicts of interest would affect representation. The attorney may also want to ensure both parties review, understand, and sign a dual representation waiver that memorializes the discussion about the impact on representation in the case of conflicts of interest.

EDITOR'S COMMENT

The Deskbook Editors second the author's recommendation regarding examination of conflict of interest and use of the VLN. One Editor had a recent SIJS case in which the juvenile's adult sister was going to need to file a third-party custody petition in district court. After careful reflection on the ethical issues, the Editor decided not to handle the third-party petition, but needed a referral that was not only trustworthy but also could render pro bono representation to the adult sister. Fortunately, VLN was able to place the adult sister with a pro bono attorney volunteer to handle the third-party custody matter. VLN is a valuable resource and should be seriously considered by the lawyer in these types of situations.

2. The Child Must be Unmarried

The child must be unmarried. *See* 8 C.F.R. § 204.11(c)(1).

PRACTICE TIP

Unmarried children include children who are divorced or widowed. Because the SIJS process can take many years, it is encouraged that the attorney representing a child seeking SIJS classification discuss this requirement with the client, and reiterate the requirement to older children. Children who may have children of their own are not restricted from receiving SIJS. However, children who marry at any time before receiving SIJS will become ineligible for SIJS. The child must remain unmarried until granted permanent residency based on the SIJS application. If the child married prior to receiving SIJS, the petition will be denied. If the child marries before becoming a permanent resident, the status will be revoked. However, note that the requirement is that the child be "unmarried," not "never married." As such, a divorced child could qualify for SIJS. For more information, it is suggested that practitioners review the Immigrant Legal Resource Center's *Manual on Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, an excellent resource for practitioners working on these cases.

The child must be under the jurisdiction of a juvenile court. *See* INA § 101(a)(27)(J); 8 C.F.R. § 204.11(a), (c).

This information was provided via the Immigrant Legal Resource Center's *Manual on Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, an excellent resource for practitioners working on these cases. *See* Angie Junck, Alison Kamhi & Rachel Prandini with Kristen Jackson & Helen Lawrence, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, Immigrant Legal Resource Center (Mar. 20, 2015), *available at* <https://www.ilrc.org/publications/special-immigrant-juvenile-status-1>.

3. The Child Must be Under the Jurisdiction of a State Juvenile Court

The child must be under the jurisdiction of a juvenile court. *See* INA § 101(a)(27)(J); 8 C.F.R. § 204.11(a), (c).

The regulations broadly define "juvenile court" to include any court that has jurisdiction under that state's law to "make judicial determinations about the custody and care of juveniles." *See* 8 C.F.R. § 204.11(a). Minnesota law provides this jurisdiction to courts handling a variety of proceedings, including family court custody actions, juvenile delinquency proceedings, adoption proceedings, juvenile court CHIPS proceedings, and probate guardianship actions. *See Matter of the Welfare of D.A.M.*, No. A12-0427, 2012 WL 6097225, at *5 (Minn. Ct. App. Dec. 10, 2012).

CAVEAT

The child must remain under the jurisdiction of the juvenile court until the SIJS application is adjudicated; however, under the *Perez-Olano* settlement agreement, there may be an exception to the continuing jurisdiction requirement if juvenile court jurisdiction terminates because of age. *See also* Trafficking Victims Protection Reauthorization Act (TVPRA) § 235(d)(6). The USCIS Policy Manual provides guidance consistent with the *Perez-Olano* settlement and the TVPRA, indicating that, so long as "[t]he petitioner was the subject of a valid order that was terminated based on age before or after filing the SIJ petition (provided the petitioner was under 21 years of age at the time of filing the SIJ petition)," USCIS will not find the order invalid for lack of continuing jurisdiction. However, this policy based on the *Perez-Olano* settlement agreement contains sunset provisions. While these protections for SIJS-eligible children from aging out of status if the courts' jurisdiction ends based on age are still protected under the TVPRA, it is advised as a best practice that the I-360 petition be filed with USCIS so that it arrives before the state court's jurisdiction over the child terminates based on age.

If the child is already under the jurisdiction of a state court through juvenile delinquency or CHIPS proceedings, the immigration lawyer should consult with the child's lawyer in these proceedings to seek the requisite findings. More commonly, the lawyer will need to initiate a state court action.

The state court must also make the below special findings in an order that complies with the requirements laid out in the USCIS Policy Manual.

4. Special Findings in State Court

In order to be eligible to apply for SIJS status with USCIS, the court must include the following special findings as part of its order in whichever proceedings are appropriate for the child's situation. The findings are made based on testimony, documentary evidence, and in some cases, briefing. Some types of proceedings, such as those involving a petition for sole custody by a parent or third-party custodian, require that someone other than the child file the state court petition. However, the lawyer representing the child should be involved in development of these documents, regardless of whether the lawyer is also representing the custodian. In some cases, the lawyer representing the child will draft an affidavit including the child's testimony providing the relevant facts related to abuse, abandonment, and neglect, inability to reunify with one or both parents, and the best interests of the child. An affidavit

from the child might be needed in cases where the proposed custodian is unaware of the facts forming the basis for allegations of abuse, abandonment, and/or neglect, and that testimony must come from the child. Affidavits from children are not a regular part of Minnesota state court custody proceedings, and are not needed in every SIJS case. Where such an affidavit is sought, it is best that this affidavit be drafted by the child's immigration attorney. Having this affidavit be drafted by the child's attorney has the advantage of avoiding re-traumatization of the child, avoiding conflicts of interest, and ensuring that the adjudicator is fully informed regarding the facts supporting the child's eligibility to receive the relief requested from the state court as well as the requisite predicate order. The child's lawyer also should review the pleadings and proposed order before the attorney appearing in state court submits these documents in order to ensure that the facts alleged in those documents are consistent with any other filings the child's attorney may have made with USCIS or the immigration court on the child's behalf, and to ensure that the request for the predicate order is properly presented per the requirements of USCIS.

The lawyer should keep in mind, and remind the court as necessary, that all special findings requested are made by applying relevant state law to the facts presented in a particular case and that the state court findings do not confer SIJS status to the child.

PRACTICE TIP

If the state court attorney is appearing before an adjudicator unfamiliar with SIJS and requests for special findings, the attorney may need to educate the court on SIJS. In addition to filing a brief outlining the requirements for SIJS and relevant Minnesota case law, the attorney may consider providing or citing to resources created for state courts assessing requests for special findings. The American Bar Association has published a helpful *Guide for State Court Judges and Lawyers on Special Immigrant Juvenile Status* that clarifies the state court's role in the process, available at the ABA website, <www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/mar-apr-2017/a-guide-for-state-court-judges-and-lawyers-on-special-immigrant-/>.

USCIS has exclusive authority to grant or deny SIJS status. The attorney appearing in state court should speak with experienced local practitioners to determine whether a particular adjudicator is already familiar with SIJS and take steps to educate the adjudicator if necessary on the role of the state court in the SIJS process, such as filing a memorandum of law citing to relevant Minnesota case law on SIJS.

Finding 1: The child suffered abuse, neglect, and/or abandonment (or similar basis under the law) that makes reuniting the child with one or both parents not viable. *See* INA § 101(a)(27)(J)(i).

PRACTICE TIP

The 2008 amendments to the TVPRA reaffirmed eligibility based on abuse by one parent only. Single-parent claims are most commonly filed as part of a custody petition for sole custody.

PRACTICE TIP

Abuse, abandonment, and neglect are evaluated based on their definitions under the state law of the state making the findings in the predicate order, rather than any definition under federal law. Thus, a Minnesota court would apply Minnesota law to the facts in a particular case to evaluate whether to issue the requested predicate order.

PRACTICE TIP

The SIJS statute permits attorneys to seek SIJS findings based on a "similar basis under state law" to abuse, abandonment and/or neglect. The USCIS Policy Manual Vol. 6, Part J, Chapter 3.A.1 states that "[i]f a juvenile court order makes the determinations based upon a state law similar to abuse, neglect, or abandonment, the petitioner must establish that the nature and elements of the state law are indeed similar to the nature and elements of laws on abuse, neglect, or abandonment." Some practitioners have reported that it has been difficult to establish to USCIS' satisfaction that, where a state court found a "similar basis under state law" was present, that "similar basis" was sufficiently similar to abuse, abandonment, or neglect to meet the requirements of the INA. Thus, practitioners should always ensure that there are facts presented in their state court filings that meet the Minnesota state law definition of abuse, abandonment and/or neglect, in addition to any "similar basis under state law" they might alleged.

Finding 2: It is not in the best interest of the child to be returned to their country of origin or nationality, or their parents' country of origin or nationality. *See* INA § 101(a)(27)(J)(ii).

PRACTICE TIP

The USCIS Policy Manual Vol. 6, Part J, Chapter 3.A.2 states that "the order (or orders) should use language establishing that the specific findings (conclusions of law) were made under state law. The order (or orders) should not just mirror or cite to immigration law and regulations." As such, it is recommended that the lawyer drafting the proposed predicate order cite only to state law and not to federal law.

The Policy Manual also suggests that the finding that it is not in the best interest of the child to be returned to their country of origin or nationality combines the analysis of who would be the ideal caregiver for the child with an analysis of other relevant factors relating to the child's best interests under state law. The Manual states that "the 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." As such, the attorney seeking the predicate order should include facts in the record specifically

PRACTICE TIP, CONTINUED

establishing why it would not be in the child's best interest to return to their country of origin, in addition to addressing why the proposed custodial placement or dependency arrangement would be in the child's best interest. The attorney should also ensure that the proposed predicate order specifically contains a factual basis both for the proposed placement/dependency arrangement and for the finding that it would not be in the child's best interests to return to their country of origin or nationality.

PRACTICE TIP

It is important to ensure that a brief factual basis for each finding is included in the predicate order signed by the state court adjudicator. As part of its review of the child's subsequent application for SIJS to USCIS, the USCIS adjudicator looks at the court's order to determine that the child sought the juvenile court order for the purpose of relief from abuse, neglect and/or abandonment. USCIS defers to the state court in its interpretation of state law. USCIS indicates in its Policy Manual that "nothing in USCIS guidance… should be construed as instructing juvenile courts on how to apply their own state law. Juvenile courts should follow their state laws on issues such as when to exercise their authority, evidentiary standards, and due process." *See*, *e.g.*, USCIS Policy Manual Vol. 6, Part J, Chapter 3.A.1. However, for USCIS to conduct its review and exercise consent, USCIS looks to see whether the order includes a "reasonable factual basis" for each finding. As such, it is recommended that a summary of the facts that support each finding immediately follow that finding in the predicate order. This will require the state court attorney to include more detail than might typically be contained in a proposed order to a state court judicial officer.

For children in removal proceedings, it is recommended that all facts submitted to the family court be compared with the record of the child's interview with Border Patrol (called the Form I-213) to ensure that any inconsistencies are addressed. See further information in section 8.5.B, Federal Immigration Process, *infra*.

In general, it is important to note that the USCIS adjudicators carefully review records of the child's border interview (especially Form I-213) and any other documentation submitted to USCIS (such as applications for other forms of immigration relief). Additionally, USCIS can schedule the child for an interview related to their SIJS petition (although this is rare since adjudications are now centralized in the National Benefits Center). As such, it is very important that the facts as presented to the family court fully reflect the attorney's own thorough interview of the child and are consistent other documentation to which USCIS may have access.

Finding 3: The child must be declared dependent on the juvenile court or have been legally committed to or placed in the custody of a state agency or department, or an individual or entity declared by the court.

The lawyer should note that "custody of the state" includes being in the custody of an individual appointed by a state or juvenile court. *See* INA § 101(a)(27)(J)(i).

B. Federal Immigration Process

Once the lawyer obtains the state court order with the necessary special findings, the child is eligible to apply for SIJS with the USCIS. If the child is not in removal proceedings and has a visa currently available permitting the child to adjust their status, the lawyer may be able to file an application for permanent resident status (Form I-485) together with the SIJS petition (Form I-360) (known as a "one-step" application). Both applications are available on the USCIS website, <www.uscis.gov>.

Generally, if the child is not in removal proceedings at the time of filing and adjudication of their application and has a visa immediately available allowing the child to adjust their status, the lawyer may file a one-step application. All qualifying special immigrant juveniles are considered by law to have been paroled into the United States, and thus do not have to provide their lawful entry or admission to the United States as do many other applicants for adjustment of status. *See* INA § 245(h). This permits these children to immediately apply for adjustment of status without having to pursue a waiver for unlawful entry or pay a fine related to an unlawful entry as is required for some other types of adjustment of status applications.

If the child is in removal proceedings, or does not have a visa immediately available, the lawyer must file a standalone SIJS petition with USCIS. The regulations give the immigration judge exclusive jurisdiction over the I-485 adjustment application for a non-arriving alien. *See* 8 C.F.R. § 1245.2(a)(1). The lawyer may request that the removal proceedings be continued, administratively closed or terminated while the lawyer is pursuing the SIJS petition. Several recent BIA and Attorney General decisions impact the availability of administrative closure and termination of proceedings and the arguments attorneys must make to seek continuances of proceedings for purposes of SIJS adjudication. Attorneys representing special immigrant juveniles in removal proceedings must ensure that they are familiar with this case law and are addressing it in any requests they make of the court for additional time their client may need for their application to be adjudicated.

COMMENT

Recent decisions by the BIA and Attorney General are available at the U.S. Department of Justice website, <www.justice.gov/eoir/ag-bia-decisions>.

Once SIJS is approved, the lawyer may request that the court terminate proceedings in order to file the permanent residence application with USCIS. The motion to the immigration court should explain whether the child has an immediately available visa allowing the child to adjust status. The motion should explain why termination is an effective court docket management tool and appropriate given the findings that the child qualifies for the protection of SIJS. Given recent BIA case law governing termination of proceedings, the court may in some cases decline to grant the motion for termination of proceedings. If this occurs, the child's attorney should be prepared to request a brief individual hearing for the immigration judge to review and adjudicate the child's application for adjustment of status. If the child is pursuing adjustment of status before the immigration court and is not eligible for a fee waiver, the child will need to pay the application fee to USCIS and provide proof of payment to the immigration court. For instructions on this process, see the USCIS website, <www.uscis.gov/sites/default/files/files/article/PreOrderInstr.pdf>. To determine whether the client will qualify for a fee waiver based on their household income, see the USCIS

Fee Waiver Instructions, available at <www.uscis.gov/i-912>, and the 2020 HHS Poverty Guidelines applicable to I-912 fee waiver requests, available at <www.uscis.gov/i-912p>. For more on motions before the immigration court, see the Immigration Court Practice Manual at <https://www.justice.gov/eoir/eoir-policy-manual/part-ii-ocij-practice-manual>, which is publicly available online, and consult with local immigration practitioners.

PRACTICE TIP

For a child in removal proceedings, jurisdiction over the I-485 permanent resident (adjustment) application remains with the immigration court. The lawyer may seek termination of the removal proceedings in order for USCIS to adjudicate the adjustment application. The immigration court will often continue proceedings while the lawyer is pursuing the I-360 SIJS petition. Once granted, a new motion is required to fully terminate proceedings.

CAVEAT

If the client is an arriving alien, USCIS will have jurisdiction over the I-485 application regardless of whether the removal proceedings are terminated. *See* 8 C.F.R. § 1245.2(a)(1).

PRACTICE TIP

With some exceptions, an individual who enters the country without inspection cannot adjust status to permanent residence from within the United States. They must apply for an immigrant visa at a United States Consulate abroad. Children who receive SIJS status are able to adjust status even if they entered the United States without inspection or were apprehended upon entry. This is because an application for SIJS status effectively paroles the child into the United States for purposes of pursuing the adjustment of status application. *See* INA § 245(h); 8 U.S.C. § 1255(h); 8 C.F.R. § 245.1(e)(3).

See Chapter 2, Permanent Residency Through Family-Based Applications, for information on the adjustment of status process, generally.

One-step applications that include both the SIJS petition and the adjustment application need to include the following with the application:

- Form G-28, Notice of Entry of Appearance as Attorney;
- cover letter and brief case history;
- Form I-360, Self-Petition;

- Form I-485, Application for Adjustment of Status;
- state court order with SIJS special findings;
- birth certificate or other proof that the child is under 21 years of age;
- Form I-693 Civil Surgeon Medical Exam Results in a sealed envelope;
- Form I-765, Application for Employment Authorization;
- filing fee or fee waiver request with supporting documentation; and
- two passport-style photographs.

PRACTICE TIP

Attorneys must remember that any documents provided in a language other than English, such as birth certificates or other identity documents, must be accompanied by a translation into English, accompanied by a certificate of translation signed by the translator.

Depending on the situation of the client, the attorney may also file the following forms:

- Form I-912, Request for a Fee Waiver (which would allow the client to seek a waiver of USCIS' filing fee, depending on their financial situation).
- Form I-601, Application for Waiver of Grounds of Inadmissibility (if the client needs to seek a waiver of grounds of inadmissibility that are waivable for special immigrant juveniles but not automatically waived). For more about assessing relevant grounds of inadmissibility, see section 8.5.D, *infra*.

PRACTICE TIP

As application forms, fees, filing locations, and supporting documentation requirements change frequently, the lawyer should always review the most current instructions for the form associated with the application on the USCIS website, <www.uscis.gov/forms>.

After the application is filed, the child and lawyer will receive a receipt confirming the application is pending. Children over 14 years of age will be sent an appointment notice to have fingerprints and photographs taken for a background check. USCIS is required by federal statute to adjudicate I-360 petitions within six months of filing. Since adjudication of SIJS applications has shifted from local USCIS offices to the USCIS National Benefits Center, interviews prior to SIJS classification have become uncommon where an application for adjustment of status is not concurrently filed. However, if the child is scheduled for an interview, the lawyer should be prepared to defend the merits of the state court petition and remind the adjudicator of the special expertise of the state court to adjudicate the

state court claim. The language of the USCIS Policy Manual regarding the proper role of the state court and of the USCIS adjudicator in exercising USCIS consent will assist the lawyer in this respect. The lawyer should prepare the child to answer questions regarding how the child entered the United States and with whom the child now resides. If the child is in removal proceedings, the lawyer should review Form I-213 and prepare the child to address any discrepancies that may exist. A decision will be mailed to the child and lawyer following the interview. If the child is approved on both the SIJS petition and the petition for adjustment of status, the child immediately becomes a permanent resident. If the child follows all the applicable rules and waits the requisite period of years, the child will then be eligible to become a U.S. citizen.

CAVEAT

The child's immigration and custody status will affect the type of application that is filed:

Immigration Status	Custody Status	Effect on Filing
Not in removal proceedings	Not in custody of the Office of Refugee Resettlement (ORR)	I-360 and I-485 can be filed together ("one-step").
In removal proceedings	Not in ORR custody	File stand-alone I-360 with USCIS. If approved, I-485 can be filed with immigration judge or the lawyer can request that removal proceedings be terminated to file I-485 with USCIS. Please note that the child will only be able to file for adjustment of status with either adjudicator once an EB-4 visa is available. Depending on the child's country of origin, there may be a waiting period. Please see section 8.5.C., *infra*, for more information.
In removal proceedings	In ORR custody	Lawyer must seek "specific consent" from the HHS to determine/change custody status or placement of the child. *See* INA § 101(a)(27)(J)(iii)(I).

C. Visa Availability and Backlog Issues

For SIJS applicants, there are quotas on the number of applicants from each country of origin that can apply for adjustment of status each year. The Department of State publishes a list of the status of these quotas in the *Visa Bulletin*, which is available at their website, <https://travel.state.gov>. Special immigrants are classified as employment-based Fourth Preference visas. There are two sets of dates listed for each type of visa in the *Visa Bulletin*: the "Final Action Date" and the "Dates for Filing." In deciding whether to accept adjustment of status applications, USCIS can interpret the information in the *Visa Bulletin* in two different ways. USCIS publishes a notice on its website each month telling applicants how they will interpret the *Visa Bulletin* that month. The chart is available at the USCIS website, <https://www.uscis.gov/visabulletininfo>. Sometimes, USCIS will only accept applications for adjustment of status based on the "Final Action Date" listed in the *Visa Bulletin* for each category of visa. Other times, USCIS will accept applications based on the "Dates for Filing" applications. If USCIS is accepting applications based on the "Dates for Filing" chart, this permits applicants to submit an adjustment of status application to USCIS even though USCIS may not be able to issue a decision on that application until more visas become available. Therefore, in determining whether a visa is available allowing the child to seek adjustment of status, the child's attorney must review both the *Visa Bulletin* and the USCIS notice about how it will interpret the visa bulletin that month.

In the *Visa Bulletin*, "C" stands for current. This means that children from that country can immediately apply for adjustment of status. If a date is listed for the child's country, that means that the child cannot adjust their status until the priority date (listed on their SIJS approval notice) is after the date listed on the chart. For children from El Salvador, Honduras, Guatemala, and Mexico, there are currently more applications for adjustment of status based on SIJS than available visas. As such, these children have to wait to apply until their priority date becomes current or USCIS changes how it accepts applications.

D. Grounds of Inadmissibility

Before agreeing to represent a child seeking SIJS, clients should be carefully screened to determine if any grounds of inadmissibility apply which could impact their ability to adjust status based on SIJS.

Several grounds of inadmissibility do not apply to apply to special immigrant juveniles applying for adjustment of status. *See* INA § 245(h)(2)(A). No waiver application need be submitted for these grounds to be waived. They are:

- INA § 212(a)(4), public charge;
- INA § 212(a)(5)(A), labor certification;
- INA § 212(a)(6)(A), aliens present without admission or parole;
- INA § 212(a)(6)(C), misrepresentation, including false claim to U.S. citizenship;
- INA § 212(a)(6)(D), stowaways;
- INA § 212(a)(7)(A), immigrants who seek to enter the U.S. without a valid travel document;
- INA § 212(a)(9)(B), aliens who are unlawfully present: three- and ten-year bar.

For more information on these grounds of inadmissibility and the specific conduct waived, please review the Immigrant Legal Resource Center's Manual, *Special Immigrant Juvenile Status and other Immigration Options for Children and Youth*, or consult with an expert in the field.

Some grounds do apply, but are waivable:

- health-related grounds;
- prostitution and commercialized vice;
- association with a terrorist organization;
- failure to attend removal proceedings; and
- certain aliens previously removed.

USCIS may waive these grounds of inadmissibility for humanitarian purposes, family unity, or when otherwise in the public interest. INA § 245(h)(2)(B).

CAVEAT

INA § 245(h)(2)(B) specifically excludes consideration of the client's relationship to their natural parents or prior adoptive parents when considering whether or not the client is eligible for a waiver of one of the grounds.

Finally, there are grounds of inadmissibility that do apply and cannot be waived:

- conviction of certain crimes;
- multiple criminal convictions;
- controlled substance traffickers;
- entrance for the purpose of engaging in espionage;
- terrorist activities;
- serious adverse foreign policy consequences; and
- participation in torture, genocide, or Nazi persecution.

PRACTICE TIP

The lawyer should keep in mind that juvenile adjudications are not criminal convictions for immigration purposes; however, they may trigger conduct-based grounds of inadmissibility (i.e., drug use/abuse). The lawyer should review any juvenile records as well as any health records if the child is or was previously in ORR custody. *See Matter of Devison*, 22 I&N Dec. 1362, 1365 (BIA 2000); *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981); *Matter of C-M-*, 5 I&N Dec. 327 (BIA 1953).

E. Dependents

There is no provision that prohibits clients who adjust status based on an approved SIJS petition from including their own biological or adopted children as derivatives on their I-485 application. Since an applicant must be unmarried to receive SIJS status, there is no eligibility for a spouse to receive dependent benefits.

CAVEAT

Beneficiaries of SIJS petitions who adjust status under INA § 245(h) are barred from ever filing family petitions for biological or prior adoptive parents.

F. Denials and Appeals

If the SIJS petition is denied, the lawyer can appeal the decision to the Administrative Appeals Office. If the permanent residence application is denied, there is no direct appeal; however, the application can be renewed with the immigration judge initially filed with USCIS, if the child is referred to the court or is already in removal proceedings.

Appendix A – Application Comparison Chart

	Asylum	SIJS	T-Visa
Adjudication Process	1 month to 5 year waiting period for interview. If UAC stripped, must pursue in adversarial proceeding before the immigration judge.	Family court adjudication separately from immigration. Immigration process requires filing forms/evidence. Processing times with USCIS are 1-2 years.	Personal affidavit required with application filing, evidence of LEA reporting and eligibility as victim of trafficking. Approximately 2 year waiting process; no in-person interview.
Adjudication Substance	USCIS interview focuses on asylum eligibility – often extensive questioning regarding past trauma.	USCIS interview which focuses on biographic information and admissibility, and not on abuse/neglect/abandonment (deference to state court).	Paper application with no interview.
Green card eligibility	Can apply for green card 1 year after grant.	Backlog means long wait for green card from certain countries. Can concurrently file with green card application, if from certain countries that do not have a backlog.	Eligible to file three years after T-Visa grant or if the investigation and prosecution of acts of trafficking are completed, as determined by the Attorney General. (Written statement included with adjustment application).
International Travel	Must apply for refugee travel document while in asylee and LPR status. Advisable not to return to home country even after green card granted.*	No restrictions on travel to home country, once green card granted.	May use valid T-Visa in your expired passport along with a new valid passport for travel and admission to the United States—must get T visa in passport; cannot use approval notice alone. Can apply for advance parole. Generally should not travel during pendency of T and investigation. Travel to home country not advised as it may undermine hardship arguments, resulting in revocation of T.
Public Benefits	Access to broad array of public benefits	Access to some public benefits	Extensive benefits

	Asylum	SIJS	T-Visa
Derivatives (Family Re-unification) –Eligibility	Spouse and children <21 at time of filing.		Principal < 21: Parents, spouse, unmarried siblings under 18, unmarried children under 21; and children (any age) of other beneficiaries who face immediate danger due to trafficking. Principal > 21: Spouse, children (unmarried under 21); and children (any age) of other beneficiaries who face immediate danger due to trafficking.
Derivatives – Restrictions	Can apply for other family members after obtaining green card. After asylee obtains green card, and then U.S. citizenship, can sponsor parents and siblings for immigrant visa.	Cannot ever petition parents for an immigration benefit. (triggers at adjustment based on SIJS?).	Must be in T status to petition—cannot adjust before. Once adjusted, can petition for family members the same as any other green card holder (spouse, children) or citizen (parents, siblings, spouse and children).
Derivatives (Family Re-unification) – Process	Can include spouse and children on application or apply for them within 2 years of grant.	Cannot include derivative beneficiaries in application, but as LPR, can sponsor spouse and children.	Can file at the same time as principal application or any time after grant, so long as unadjusted T. NOTE: IOM will help coordinate/pay for travel docs and travel for derivatives.