

# Quick Guide to Federal Child Welfare and Immigration Law



This Quick Guide offers a brief overview of law and resources for child welfare attorneys and others. In addition to highlighting how common stages to a dependency case may affect immigrant children or parents, this tool describes forms of federal immigration relief that may be unfamiliar to child welfare practitioners but are potentially critical resources for their clients. Depending on the jurisdiction, attorneys may be able to access the assistance of immigration experts or, at minimum, walk clients through potential options.

\*\*\*This resource was created in 2016 and updated on March 15, 2017. Practitioners should note that immigration relief options and enforcement priorities are in a state of flux and should seek confirmation of existing options before advising clients.\*\*\*

## Federal Child Welfare Law & Resources

### ***Child Protective Services***

Federal law does not base eligibility for reimbursement of state child protection services, which include prevention services, on a parent or child's immigration status if certain conditions are met.<sup>1</sup>

### ***Reunification with Parents***

The first goal under the Adoption and Safe Families Act (ASFA) is reunification with parents, when consistent with the child's health and safety,<sup>2</sup> and no part of Title IV-E prohibits reunification with parents who are undocumented or who live outside the U.S.

### ***Notice to Relatives***

Child welfare agencies must notify all adult relatives when a child is removed from care of the parent within 30 days of the removal. The agency must exercise due diligence to identify and locate all adult relatives of the child. No exception is included in the statute for relatives who live outside the U.S.; a sole exception is articulated for family or domestic violence cases.<sup>3</sup>

### ***Relative Placements***

Title IV-E does not preclude placements with (or seeking other assistance from) relatives who are undocumented or living outside the U.S.<sup>4</sup>

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<sup>1</sup> See 8 U.S.C. § 1611(b)(1)(D) and Attorney General Order No. 2049 (1996) (see 61 Fed. Reg. 45985-01) for those conditions. Title IV-B parts 1 and 2 are not considered Federal public benefits and can be provided regardless of a parent's or child's immigration status; this includes preventive services. U.S. Dept. of Health and Human Services, Admin. for Children's Services, Child Welfare Policy Manual section 7.1 #2; ACYF-CB-PIQ-99-01 (1/14/99).

<sup>2</sup> 42 U.S.C. § 671(a)(15)(A)&(B).

<sup>3</sup> 42 U.S.C. § 671(a)(29).

<sup>4</sup> 42 U.S.C. § 671(a)(19); ACF Child Welfare Policy Manual, 8.4B Title IV-E, General IV-E Requirements, Aliens/Immigrants.

## Immigration Relief Options

### ***Special Immigrant Juvenile Status (SIJS)***<sup>5</sup>

SIJS provides a path to lawful permanent residency for unmarried non-citizens under age 21, who are under the jurisdiction of a State juvenile court, for whom the court has made these findings:

- the child has been declared dependent on a juvenile court or the court has placed the child in the custody of a state agency, individual, or entity appointed by a state or juvenile court;
- the child’s reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
- the child’s best interest would not be served by being returned to his or her country of origin.

A “juvenile court” is defined as “a court located in the United States having jurisdiction under State law to make judicial decisions about the custody and care of juveniles.”<sup>6</sup> Because many juvenile courts lose jurisdiction of youth at age 18 or 21, it is important to seek the special eligibility findings for SIJS as soon as possible.

NOTE: The law governing SIJS was changed significantly in 2008. Prior to 2008, it required an applicant to have been deemed “eligible for long-term foster care” by the court, which in turn was interpreted to mean that family reunification was no longer viable. Under the current law, the child need not be in actual state foster care to be SIJS-eligible, and could, in fact, be residing with one parent. Because the current statute requires only that reunification not be viable with *one or both* parents, the juvenile court can make the SIJS findings as soon as the court deems reunification not viable with *one* of the parents, even if the other parent is still receiving reunification services. This change in law means that many more children in the child welfare system are potentially eligible for SIJS.

### ***Asylum***<sup>7</sup>

A person, including a child, may qualify for this form of immigration relief if he or she has a well-founded fear of persecution due to race, religion, nationality, membership in a particular social group, or political opinion if returned to the home country, or if she experienced such persecution in the past. After a year, an asylee may apply for lawful permanent residency (green card status). *Refugee* status is conferred while a person is outside the U.S.; *asylee* status is sought via an application adjudicated while the person is already in the U.S.

### ***Victims of Human Trafficking (T Visas)***<sup>8</sup>

The T Visa is available for a victim of human trafficking who:

- is the victim of a severe form of trafficking;<sup>9</sup>
- is physically present in the United States on account of trafficking;

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<sup>5</sup> U.S. Citizenship and Immigration Services (USCIS), Memorandum from Donald Neufeld re: TVPRA of 2008: Special Immigrant Juvenile Status Provisions (March 24, 2009); Immigration and Nationality Act (“INA”) § 101(a)(27)(J); 8 C.F.R. § 204.11; see also USCIS Policy Manual, Vol. 6, Part J, 2016, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html>.

<sup>6</sup> 8 CFR § 204.11(a).

<sup>7</sup> U.S. Dept. of Justice, Memorandum for Asylum Officers: Guidelines for Child Asylum Claims (Dec. 10, 1998); U.S. Dept. of Homeland Security, Instruction Sheet for Unaccompanied Alien Child in Immigration Court to Submit an I-589 Asylum Application to USCIS; INA §§ 101(a)(42), 208; see also <http://www.uscis.gov/humanitarian/refugees-asylum/asylum>.

<sup>8</sup> 8 U.S.C. § 1101(a)(15)(T)(i)(III)(cc); see also USCIS Victims of Human Trafficking: T Nonimmigrant Status.

<sup>9</sup> Federal law defines “severe forms of trafficking in persons” to mean: “(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” The William Wilberforce Trafficking Victims Reauthorization Act, P.L. 113-126 (2010), codified in 22 U.S.C. §7102.

- has complied with any reasonable requests for assistance in investigating or prosecuting trafficking (unless the person is not yet 18 years of age); and
- would suffer extreme hardship involving unusual and severe harm upon removal from the U.S.<sup>10</sup>

### ***Crime Victim (U Visas)***<sup>11</sup>

The U Visa is available to an undocumented person in the U.S. who:

- was the victim of qualifying criminal activity in the United States;
- has suffered substantial physical or psychological abuse as a result of the crime;
- has been, is being, or is likely to be helpful to a federal, state, or local investigation of the criminal activity; and
- has a signed certification from a federal, state, or local judge, prosecutor, law enforcement officer, or other law enforcement official involved in prosecuting or investigating the criminal activity, indicating that the victim has been, is being, or is likely to be helpful.<sup>12</sup>
- If a child was the victim of a crime, he or she may include parents and siblings in his or her petition as derivative applicants. In the case of a U.S. citizen child victim of crime, his or her parent could be considered an “indirect victim” who can apply for a U Visa, if the child is incapacitated due to age and the parent assists with the investigation or prosecution and has suffered substantial physical or mental harm as a result of the crime.
- A child may also access a derivative U Visa if his or her sibling was the victim of a crime, the sibling was under the age of 21, and the child is under the age of 18, or if the child’s parent was the victim of a crime, and the child is under the age of 21.

### ***Temporary Protected Status (TPS)***<sup>13</sup>

The Secretary of Homeland Security may designate a foreign country for TPS due to conditions that temporarily prevent the country’s nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately.

### ***Violence Against Women Act (VAWA)***<sup>14</sup>

VAWA allows an abused spouse or child of a U.S. Citizen or Lawful Permanent Resident (LPR) to petition for lawful status in the U.S., without the involvement of the abusive spouse/parent.

### ***Deferred Action for Childhood Arrivals (DACA)***<sup>15</sup>

DACA is available to an individual who:

- was under the age of 31 on June 15, 2012, and is currently at least 15 years old (unless in removal proceedings);
- came to, and began residing in, the U.S. before reaching his or her 16<sup>th</sup> birthday;

<sup>10</sup> INA §101(a)(15)(T)(I)-(IV); Victims of Trafficking and Violence Protection Act (VTVPA), P. L. No. 106-386 (October 28, 2000).

<sup>11</sup> P. L. No. 106-386, 114 Stat. 1464 (2000) (including the Battered Immigrant Women’s Protection Act of 2000, P. L. No. 106-386, 114 Stat. 1518 (2000)); see also <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

<sup>12</sup> The U.S. Department of Homeland Security has indicated that child and adult protective services agencies may sign the certifications needed for the U Visa application process. See Dept. of Homeland Security, [U Visa Law Enforcement Certification Guide](#), at p. 9; see also 8 C.F.R. § 214.14(a)(2) (defining “certifying agency” to include child protective services).

<sup>13</sup> See <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status>

<sup>14</sup> INA § 204(a)(1)(A) & (B); see also <http://www.uscis.gov/humanitarian/battered-spouse-children-parents>.

<sup>15</sup> See <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>. DACA protects a person from deportation and provides work authorization, but is not a permanent immigration status.

As of March 2017, the government continues to accept and approve DACA applications. Individuals interested in applying should consult with an attorney, as additional risks may be present and the program may end at any time. For more information and updates, see <https://www.ilrc.org/daca-current-status-and-options>.

- has continuously resided in the U.S. since June 15, 2007, up to the present time;
- was physically present and not in lawful immigration status in the U.S. on June 15, 2012, and at the time of making the request for consideration of DACA with USCIS;
- is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a GED certificate, or is an honorably discharged veteran of the armed forces or Coast Guard of the U.S.; and
- has not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.

## **Coordination of ICE, Child Welfare Agencies & the Courts**

- ***ICE Parental Interest Directive:***<sup>16</sup> The 2013 directive emphasizes that “ICE personnel should ensure that the agency’s immigration enforcement activities do not unnecessarily disrupt the parental rights of” parents and guardians.<sup>17</sup> The policy directs ICE, when appropriate, to consider parental/guardianship status in making decisions about deportation and detention and to:
  - consider whether it should arrest and prosecute parents for immigration violations;
  - consider refraining from detaining parents initially;
  - attempt to keep detained parents/guardians near children or their child’s court case (including both child welfare proceedings and private custody cases);
  - arrange and ensure detained parents’ court participation;
  - arrange visitation with children as required by the court or the child welfare agency;
  - if a parent or guardian will be deported, allow him or her to contact others to help plan for the child(ren); and
  - consider facilitating return for previously deported parents who are facing termination of their parental rights.
  - To contact ICE with questions regarding the Parental Interests Directive, email [Parental.Interests@ice.dhs.gov](mailto:Parental.Interests@ice.dhs.gov).
- ***Online Detainee Locator System*** to locate parents: [www.ice.gov/locator](http://www.ice.gov/locator)
- ***Children’s Bureau Information Memorandum 15-02: Immigration Enforcement and Child Welfare; Case Planning; Foster Care:***<sup>18</sup> This resource guides agencies’ work with families when a parent has been or is at risk of being detained or deported. The IM encourages: screening children for Special Immigrant Juvenile Status; working with ICE; training staff to perform culturally competent services; and adopting best practices for working with immigrant families.

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<sup>16</sup> U.S. Immigration and Customs Enforcement, *111064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities*, August 2013 (“ICE Directive”).

Portions of the Directive may become inapplicable as a result of 2017 ICE policy changes and expanded immigration enforcement efforts.

<sup>17</sup> ICE Directive at 1.

<sup>18</sup> U.S. Dept. of Health and Human Services, Admin. for Children and Families, Admin. on Children, Youth and Families, Children’s Bureau, [ACYF-CB-IM-15-02](#), February 20, 2015.

## Federal Financial Support & Services That May Affect Case Planning<sup>19</sup>

States are obligated to provide for the well-being and safety of immigrant children. Federal reimbursement is available for many services that support children and their families; when it is not, funds must come from state or local agencies.

- Public benefits available regardless of immigration status include: Migrant Head Start, Victim Witness or Violence of Crime Assistance (VOCA), the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), immunization and/or treatment of communicable disease, and the Early Periodic Screening, Diagnosis, and Treatment (EPSD&T) program.
- Undocumented immigrants are generally not eligible for federal nonemergency Medicaid, for food stamps, Supplement Security Income (SSI), and Temporary Assistance for Needy Families (TANF).
- Federal support for foster care: Children must be citizens or qualified aliens in order to receive federal Title IV-E foster care or adoption assistance reimbursement.<sup>20</sup> (Federal law does allow for federal reimbursement for the state cost of foster care for children granted SIJS or U nonimmigrant status, though that would not alter the child's IV-E eligibility status.<sup>21</sup> And no funds are currently appropriated for that purpose.)
- Chafee Independent Living Services: For eligibility for Chafee Services, the youth must have qualified alien status as defined at 8 U.S.C. § 1641.



<sup>19</sup> [www.firstfocus.net/sites/default/files/PublicBenefits\\_0.pdf](http://www.firstfocus.net/sites/default/files/PublicBenefits_0.pdf)

<sup>20</sup> See Child Welfare Policy Manual, 8.4B Title IV-E, General IV-E Requirements, Aliens/Immigrants.

<sup>21</sup> See 8 U.S.C. §1232(d)(4)(B).