

SPECIAL IMMIGRANT JUVENILE STATUS FOR CHILDREN UNDER JUVENILE COURT JURISDICTION

Introduction and Overview

Special Immigrant Juvenile Status (SIJS) is a federal law that helps certain undocumented children in the state juvenile system obtain lawful immigration status. This chapter provides basic information about SIJS. It also directs you to other chapters that discuss different aspects of SIJS in more detail.

For many children's welfare workers, this section will provide all the information you need. The next sections are designed to answer more specific questions. Other sections provide information on the application process and how to complete the forms. The last section provides information on other ways besides SIJS that children can obtain lawful status, such as immigrating through an adoptive parent or applying for asylum.

The **Appendices** to this manual contain many useful items, such as a sample court order and other papers that you can present to a Juvenile Court judge, a handout in English and Spanish that you can use to discuss the risks and benefits of this program with the applicant, a copy of the law, regulations, and INS memoranda, and sample completed copies of application forms. Note that it is easy to obtain the INS forms you'll need for the application from the INS website, by calling a toll-free number, or from an immigration practitioner.

Lawful Immigration Status: What is It and Why is It Important? The Stories of Julia and Martin

Immigration is controlled by a federal law -- the Immigration and Nationality Act¹ -- and enforced by a federal agency -- the Immigration and Naturalization Service (INS).

Under our immigration laws, any person who is not a U.S. citizen is referred to as an **alien**. An alien who has a **green card** has permanent lawful immigration status and is called a **lawful permanent resident**. An alien with no lawful immigration status is said to be **undocumented**.

Life in the United States can be terribly difficult for an undocumented person. He or she might be **deported** (forced to leave the United States) if caught by INS. Further, the person cannot obtain **employment authorization**, and so cannot work legally. Undocumented young people are not eligible for **in-state tuition at state colleges and universities**, and therefore usually cannot go to college.

The Special Immigrant Juvenile Status law permits undocumented children who have come under the jurisdiction of a Juvenile Court and meet other requirements to become lawful permanent residents.

Examples: The Stories of Julia and Martin. When “Julia” was fourteen years old, she became a dependent of a Juvenile Court due to her parents’ abuse. The court terminated her parents’ rights and placed Julia in long-term foster care. She recovered from her abuse and adjusted well to life. She got good grades and was accepted to a state university.

However, just before Julia’s eighteenth birthday the county workers discovered that she had been born in Mexico and brought into the U.S. illegally. Although Julia spoke English perfectly and seemed very “American,” she was an undocumented immigrant. Because of this, it looked like everything Julia had worked for would be destroyed. As an undocumented person, Julia was not eligible to pay in-state tuition and so could not afford college. Further, she could not work legally, and so faced a future of being exploited in the underground economy or working with fake papers and hoping she was not discovered. Finally, if the INS ever located her, they could deport her back to Mexico, where she had no one.

Luckily, one of her Social Workers had heard of SIJS. Although right before Julia’s eighteenth birthday was a very late date to apply, county Social Workers and local immigration attorneys working together were able to successfully complete the SIJS application process before Julia was released from dependency. Julia became a lawful permanent resident through SIJS. The end of the story is that the real “Julia” went on to a successful college career, became an accountant, and has made a great life for herself!

“Martin” was placed in juvenile delinquency proceedings when he was arrested after a fight. When it came time for the Juvenile Court to release him on probation, the court found that it could not send him back to his parents because of their record of physical abuse and illegal actions. The court instead placed Martin in a foster care group home. Although the INS has not published guidance on this, under the statute and the regulation Martin also meets all the requirements for a green card through SIJS.

Who is Eligible to Become a Permanent Resident Through "Special Immigrant Juvenile" Status?

Persons under the jurisdiction of a Juvenile Court who are “deemed eligible for long term foster care” may be able to obtain special immigrant juvenile status and, based on that, apply for lawful permanent residency (a green card).² To do this, they must submit two applications and meet two sets of requirements:

1. They must apply for **special immigrant juvenile status**, and
2. Based on the special immigrant juvenile application, they also must apply for **permanent residency** (the green card). In immigration terminology, applying for permanent residency is called applying for **adjustment of status** to that of a lawful permanent resident.

The two applications usually are filed at the same time, although in some circumstances the SIJS petition might be submitted first.

Petition for Special Immigrant Juvenile Status (SIJS)

A federal statute (law) provides that an applicant must meet the following criteria to qualify for SIJS.

1. Dependencies, Delinquency, or Other Juvenile Court Proceedings

The applicant must be under the jurisdiction of a Juvenile Court. While INS has not made a written policy about this, this should include children in delinquency as well as dependency proceedings. (The statute says that the applicant either must be a dependent of a Juvenile Court, or a Juvenile Court must have had the applicant legally committed to, or placed under the custody of, an agency or department of a state.) In either delinquency or dependency proceedings, the child applicant must meet all of the requirements for SIJS, including the requirement discussed below that she is “deemed eligible” for long term foster care.

Example: Samy is a dependent of a Juvenile Court due to neglect by his parents. Rose is in delinquency proceedings for auto theft, and the court has found that it can’t return her to her parents’ custody on probation due to their abuse. Both children may be eligible for SIJS.

2. The Applicant Must Have Been “Deemed Eligible For Long-Term Foster Care.”

The statute says that the child must be “deemed eligible for long term foster care” by the court. This phrase has a specific legal meaning for SIJS. The INS regulation on SIJS defines “deemed eligible for long term foster care” to mean that the court has found that Family Reunification is not a viable option and, usually, the child will go on to foster care, adoption or Guardianship.

3. Thus, the child generally must be in the Permanent Placement phase, and not reunified with a parent or still going through reunification.

Example: Sondra is in Permanent Placement now that reunification efforts with both parents have ended. She is in long-term foster care but might be adopted. She is “deemed eligible for long-term foster care” and therefore eligible for SIJS. Esteban’s mother is being offered reunification services. He has been living in foster care for months, but since the judge has not yet found that reunification is not viable, he is not eligible for SIJS.

4. The court or some administrative agency must rule that it is not in the child’s best interest to be returned to his or her home country.

Generally the Juvenile Court will include in its SIJS order (discussed below) that it is not in the child's best interest to be returned to the home country. The evidence for this finding may range from a home study conducted by a foreign social service agency to determine that a grandparent's home is not appropriate, to simply interviewing the child to learn that there are no known appropriate family in the home country.

5. The court should make it clear that it made its findings and orders based on abuse, neglect or abandonment of the child, as opposed to just to get the child immigration status.

The requirement of a specific finding about "abuse, neglect and abandonment" was added to the SIJS law in 1997. The Juvenile Court judge's order should specifically identify whether abuse, neglect or abandonment was the basis for the dependency or placement order, and for "deeming the child eligible for long term foster care" (i.e., determining that reunion with the parents was not viable). For example, the judge's order could state, "The minor is deemed eligible by this Court for long term foster care, based on abuse" or "The above orders and findings were made due to abandonment and neglect of the minor."

6. The Juvenile Court judge should sign an order making the above findings.

The Juvenile Court judge will sign a special order, usually prepared by the child's attorney or other advocate, stating that all the findings required for SIJS have been made. The child will submit this order to the INS as part of the child's application for special immigrant juvenile status.

7. Other Requirements: Juvenile Court Must Retain Jurisdiction, Applicant Must be Under Age 21 and Unmarried.

The INS added some requirements of its own, that were not written in the federal law. Some of the INS requirements might be dropped in the future, but they apply to all applications now...

The Juvenile Court Must Retain Jurisdiction.

Current INS regulation requires that the applicant remain under Juvenile Court jurisdiction until the immigration application is finally decided and the applicant is a lawful permanent resident.

Juvenile Court lawyers must ensure that judges retain jurisdiction over the applicant until INS grants the SIJS application after the interview. The INS interview may take place from six to thirty-six months, or even longer, after the SIJS application is filed.

Some Juvenile Court judges will want to, or must under state law, terminate dependency proceedings when the child reaches a certain age. Children's advocates need to fight to keep the child under Juvenile Court jurisdiction. Note that immigration attorneys may be

able to persuade the INS to speed up (“expedite”) the interview if the child is about to age out of the Juvenile Court system. When the child goes to the INS interview, s/he should have a copy of the minutes from his or her most recent court hearing to establish that s/he remains under Juvenile Court jurisdiction.

The INS regulation creates a difficult situation and needlessly costs juvenile systems time and energy by requiring children to stay in longer in the Juvenile Court system than they otherwise would. It is possible that better rules will appear in the future. The INS was considering regulations that would offer relief to persons who age out of Juvenile Court jurisdiction before the INS makes its final decision. Advocates should keep abreast of developments.

Applicants who are 18, or who are 21. State laws generally require that a youth be under age 18 at the time he or she first is declared a Juvenile Court dependent. State laws vary as to how long a child can remain a Juvenile Court dependent, once he or she has been declared a dependent. Some states end dependency at age 18; others extend it to age 19 especially if the child must complete high school, and others potentially can extend the age to 21. Similarly, different states have different laws for how old a young person must be to enter or stay under Juvenile Court jurisdiction in a delinquency case.

Under INS regulations, any person under 21 who meets the SIJS requirements can apply for SIJS. Thus as far as the INS is concerned, a 19 year old could file a SIJS application and attend the INS interview -- *so long as s/he remains under the jurisdiction of a Juvenile Court, eligible for long term foster care, and the subject of a court order declaring that it is not in his or her best interest to return to the home country.*

Example: Julia entered the foster care system when she was 14 years old. Because Social Workers had not heard about SIJS earlier, Julia did not apply for SIJS until she was 19. The Juvenile Court retained jurisdiction over Julia until she was 20 and the INS granted her SIJS application.

Marriage. Under INS regulations, applicants for SIJS must remain unmarried until the entire process is completed and the INS grants permanent residency.

Application for Permanent Resident Status

Besides meeting the above requirements for SIJS, the children must fulfill other requirements that apply to all persons who become lawful permanent residents of the United States (get a green card).

Applicants might be barred from permanent residency if they have a record of involvement with drugs, prostitution, or other crimes, if they are HIV positive, committed visa fraud, were previously deported, or have certain other “bad marks” against them. These children need advice from expert immigration counsel before applying. They may well win their case – but they need to get good advice to make sure of that before they apply. Immigration lawyers should note that special waivers of inadmissibility are available to special immigrant juveniles that do not require a qualifying relative.

The following types of cases deserve special attention and expert advice:

- children who soon will turn 18, or are over 18
- children who soon will be released from Juvenile Court jurisdiction
- children who currently are in deportation (“removal”) proceedings
- children who are or have been in juvenile delinquency proceedings or have a juvenile or adult criminal record
- children who are or might be HIV positive
- children who were “paroled” in to the United States by immigration authorities
- children who have been previously deported or removed

What Are the Benefits of Applying For Special Immigrant Juvenile Status?

The most important benefit of applying for SIJS is obtaining lawful permanent resident status -- a green card. Special immigrant juvenile status might be the only route for an undocumented child to gain lawful permanent immigration status in the United States.

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** (e.g., welfare, MediCare) for permanent residents have been drastically curtailed since 1996, permanent residents are eligible for some benefits initially and more as time goes on. Also, after five years permanent residents can apply for **U. S. citizenship**.

Lawful permanent resident status is **permanent** -- a special immigrant juvenile who obtains permanent residency will keep it after he or she is no longer under Juvenile Court jurisdiction. The person remains a permanent resident for her entire life. The only reason it would end would be if the person became deportable for some reason, such as conviction as an adult of certain criminal offenses.

The above benefits come with the green card, but two important benefits come as soon as the person submits the application forms to the INS. Applicants who have submitted the application for SIJS and adjustment of status and are waiting for an interview are **protected against deportation** and are granted **employment authorization** until their cases are decided.

Counties benefit when a child wins SIJS because they can access federal foster care matching funds, which they cannot do for undocumented children.

What Are the Risks of Applying?

The greatest risk to the child is that, if the application is turned down, the INS might attempt to “remove” (deport) the child from the United States.

When a child files a petition for SIJS, the child is alerting the INS to the fact that he or

she is in the U.S. Since these petitions are not confidential, the INS has the right to use that information to place the child into removal proceedings for deportation if the SIJS and adjustment of status applications are denied.

It is crucial to make sure that the child is likely to win the status before submitting an application, so that you don't unintentionally cause the child to be deported. Note that children who are not eligible for SIJS still may be eligible to get lawful status in some other way, such as through adoptive parents, or through abusive U.S. citizen or permanent resident parents even if the child does not come or remain under Juvenile Court jurisdiction.

Who Should Apply?

Children who will qualify for both special immigrant status and adjustment of status to permanent residency should submit applications. Generally children should not apply under this program if the advocate is not confident that the applications will be granted. In case of doubt, the advocate should be sure to consult with competent immigration counsel. For example, children with juvenile delinquent or adult criminal records, records of extensive immigration violations, or children with HIV should consider strategy with an expert before filing.

There is one exception to this cautious advice: *children who are already in deportation ("removal") proceedings have nothing to lose by submitting an application*, since INS is already trying to deport them. They should apply for special immigrant status if there is any chance of qualifying, so that their deportation is stopped. Note that if these children are already in INS actual or constructive custody, Juvenile Courts will have to get permission to take jurisdiction over the children.

What is the Application Procedure?

The child must file two applications, one for special immigrant juvenile status and one to adjust status to lawful permanent residency. The applicant does not have to travel outside of the United States, but can apply locally. Currently, both the SIJS and the adjustment of status applications are filed at the same time at the local INS district office with jurisdiction over the child's residence. Besides the forms, the applicant must submit the results of a set medical exam conducted by an INS-approved doctor (which includes a test for HIV and tests for the presence of some illegal drugs), various filing fees unless they are waived, and some proof of age such as a birth certificate. Applicants generally are required to have a photo-identification at the interview.

As soon as the application is filed with INS, the applicant can obtain employment authorization. INS will schedule an appointment for the applicant to get fingerprinted for an FBI check of any criminal or delinquency record or prior deportation. The wait for the interview itself can be long – depending on the INS office, it may be from six months to three years, or even longer. When the applicant finally gets to the interview, he or she often can have a Social Worker, and certainly an attorney, attend if desired. The INS might approve the case right at the interview, or might request further information. If the

INS denies the case, it might or might not refer the child to a judge for deportation (“removal”) proceedings. The applicant can apply again in front of the judge, and can appeal denials at any stage.

**The child will submit two applications at the same time:
One for special immigrant juvenile status, and
One for adjustment of status to permanent resident.**

Talking with the Child Applicant and Child’s Attorney About SIJS

Before a petition for special immigrant juvenile status is filed for a child, the child should understand what the application is about, and what are the risks and benefits of filing. Any attorney for the children must be consulted, and the child’s Social Worker, probation officer, CASA volunteer, foster parent, or other interested advocate should be involved.

Original Parents, and Maybe Siblings, Cannot Benefit Through Grant of SIJS to Child

A child who immigrates as a special immigrant juvenile ceases to be the “child” of the original parents for immigration purposes. INA § 101(a) (27) (J). This means that the child will not be able to use her new lawful immigration status to help her original parents to get lawful status. For example, a special immigrant juvenile who becomes a permanent resident and then a U.S. citizen will not be able to immigrate his or her natural mother. Usually a U.S. citizen of at least 21 years of age would have that right.

Congress enacted this rule to make sure that parents, who abused, neglected or abandoned their children would not benefit from the fact that the children qualified for SIJS. The parents don’t lose any immigration benefit that they otherwise would have had, because without SIJS their undocumented child could not have helped his or her parents to immigrate.

Unfortunately, it also may be that the child is barred from using her new status to assist a brother or sister to immigrate. Immigration law defines siblings as persons with a common parent. Since the SIJS recipient is no longer the “child” of the abusive parent, the INS may assert that he or she no longer has a sibling relationship with brothers and sisters. A U.S. citizen who is at least 21 years old can petition for permanent resident status for a sibling. The main drawback is that sibling or “fourth preference” petitions generally have a long waiting period of from 12 to 20 years after the petition was filed before the sibling receives any legal rights.

Children in INS Actual or Constructive Custody

If an immigrant child is *already in INS actual or constructive custody* before coming to Juvenile Court, a Juvenile Court judge cannot make custody decisions about the child without INS’ permission. This is a very unusual federal law, depriving state courts of

jurisdiction over children within the state. As amended in 1997, the SIJS statute provides that no state Juvenile Court

“Has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General [INS] unless the Attorney General specifically consents to such jurisdiction.”

Thus, juveniles who are in INS actual or constructive custody must obtain INS consent before a Juvenile Court can take jurisdiction over the minor. Juvenile Court orders made without this consent are invalid according to INS standards.

What is “actual or constructive” INS custody? Actual custody means that INS has the child in a detention facility run by INS. Constructive custody has not been defined in official INS memoranda, but INS authorities appear to agree that this refers only to children housed in a special INS-sponsored foster care setting that INS has created in some states as an alternative to regular detention for children. In these settings, the INS pays a private or non-profit group to run a “soft detention” group home expressly for unaccompanied immigrant children under INS authority. Often the home meets state foster care licensing requirements. If a child is not in such a setting, the child is not in “constructive” INS custody and a Juvenile Court judge does not need permission to rule on the child’s placement. The INS does not appear to take the position that a child is in constructive custody if the child once was in INS custody but has since been released. Thus a child who was arrested by INS but was then released on bond or to a relative, and who still has to go to immigration court hearings, is not in actual or constructive custody, and a Juvenile Court should not have to get INS permission to take the child.

Requests for INS consent for a court to take jurisdiction over a child in INS custody must be made in writing to the INS District Director with jurisdiction over the juvenile’s place of residence. According to an official INS Memorandum, the District Director should consent to the Juvenile Court taking jurisdiction over the child if:

1. it appears that the juvenile would be eligible for SIJ status if a Juvenile Court order is issued; and
2. in the judgment of the district director, the dependency proceeding would be in the best interest of the juvenile.

Since dependency proceedings are expert governmental deliberations dedicated to identifying and implementing a plan that is in the best interests of the child, it should be an extremely rare case where the District Director decides that holding such proceedings are not in the child’s best interest. In practice, however, some District Directors have denied such cases.

Judges and advocates dealing with children who may be in INS custody should contact a resource center for information on how to best prepare a request for consent from the District

ELIGIBILITY FOR SPECIAL IMMIGRANT JUVENILE STATUS AND ADJUSTMENT OF STATUS TO PERMANENT RESIDENCY

This section takes a closer look at who is eligible to apply for special immigrant juvenile status and adjustment of status to permanent residency.

Eligibility for Special Immigrant Juvenile Status

Statutory Requirements

Under the federal statute the requirements for special immigrant juvenile status are:

1. The child must be declared dependent on a Juvenile Court, or the court must have legally committed the child to or placed the child under the custody of a state department or agency.
2. The child must be “deemed eligible for long-term foster care”; and
3. A judge or administrative authority must have determined that return to the previous home country is not in the child's best interest.
4. The judge should make clear that all of the above findings and determinations were made because of the neglect, abuse or abandonment of the child.

The above findings should be set out specifically in an **order signed by the Juvenile Court judge** or other presiding judge. It may be necessary to explain the need for such an order to the judge, since the factors may go beyond the usual formal requirements of dependency or delinquency proceedings. A memorandum discussing the program from the Presiding Judge of the Juvenile Court in Los Angeles and copies of the applicable law may be helpful. It is often most efficient to draft and **bring the court order to the hearing ready for the judge to use and sign**. The signed order will be submitted to the INS with the application for special immigrant juvenile status.

Under the Jurisdiction of a Juvenile Court: Dependency and Delinquency; Need to Retain Juvenile Court Jurisdiction

Dependency Proceedings

The immigration statute makes it clear that a child who is a dependent of Juvenile Court, and who meets the other requirements, is eligible for SIJS. (As discussed below, children who are not dependents but are under the jurisdiction of any Juvenile Court that makes custody decisions for them – such as delinquency proceedings -- also are eligible.)

Getting a Child Into Dependency Proceedings. If you are evaluating a child that you feel should be made a dependent of a Juvenile Court; remember that the question is one of state children's law. Do not look to immigration law or immigration lawyers to define which children the Juvenile Court can "take in." The process may be different in each state or county. One can alert the county Child Protective Services (or, under whatever name, the part of the county social services network that evaluates children for dependency). Even if the county office does not want to recommend dependency, the court can hear petitions filed by others. See if there is a legal aid type office in your area for children. If there is not, consult court-appointed attorneys who practice in dependency proceedings.

Juvenile Delinquency and Other Juvenile Court Proceedings

Often SIJS is seen as a form of relief available only for children in dependency proceedings. As a result, relatively few children in delinquency proceedings apply for SIJS. However, the statute specifically makes SIJS available to children in Juvenile Court proceedings other than dependency. The statute defines a special immigrant juvenile as an immigrant who is in the U.S. and

"Who has been declared dependent on a Juvenile Court located in the United States or whom such court has legally committed to, or placed in the custody of, an agency or department of a State, and who has been deemed by that court eligible for long-term foster care due to abuse, neglect or abandonment"

A child in delinquency proceedings comes squarely within the statute as someone whom a Juvenile Court "has legally committed to, or placed in the custody of, an agency or department of a State." (The second, separate issue, of when a delinquent child has been "deemed eligible for foster care" is discussed below.) Many children in delinquency have been granted SIJS, and local INS may well be sympathetic toward those children.

The INS, however, has not addressed the delinquency issue in writing. Therefore, children in delinquency who apply for SIJS may be at greater risk of being denied by local INS. For this reason it is safest for children in delinquency who may be eligible for SIJS to secure placement in dependency or concurrent dependency/delinquency status, if this is permitted under state law. This eliminates any legal question. Children in delinquency who are unable to obtain placement in dependency and are considering applying for SIJS should be informed of the possible risks of submitting an application.

Deemed Eligible for Long-Term Foster Care. For the child to qualify for SIJS, the delinquency judge must issue a court order ruling on the child's eligibility for long-term foster care due to abuse, neglect or abandonment, and on the fact that it is in the child's best interest not to be returned to the home country. Remember that under INS regulation, "eligible for long-term foster care" means that Family Reunification is no longer a viable option, and that the child normally will go on to foster care, adoption or Guardianship. In many states delinquency court judges frequently make rulings such as this, when it comes time to determine where to place the child on probation. For example, in California

children in delinquency proceedings will be placed in long-term foster care, often in group homes, if parental reunification is not viable due to abuse, neglect, or abandonment. Or, the abused child may go on to Guardianship or adoption, which are also acceptable alternatives under the SIJS regulation.

Example: Samuel is brought to delinquency proceedings and the court finds that he has committed theft and battery. Because Samuel has been severely neglected by his parents, when it is time for Samuel's release from custody the court rules that parental reunification is not viable and places Samuel in foster care. The court is considering releasing Samuel to his uncle as guardian. Either way, Samuel should be found eligible for SIJS, even though he was never in dependency proceedings.

Dangers of Delinquency. Note that a few types of delinquency findings are dangerous because they are "grounds of inadmissibility" that can make a child ineligible for SIJS. The most dangerous finding is sale or possession for sale of drugs (as opposed to simple possession). A finding regarding prostitution or sex offenses can also cause problems. However, many juvenile delinquency dispositions, including many offenses involving violence or theft, do not cause immigration problems. Because of the danger that the local INS will not understand this legal issue and attempt to make a wrong ruling (e.g. try to deny a child based on a juvenile disposition of robbery), we advise that any child with a delinquency record have an expert immigration attorney on the case and at the INS interview.

Juvenile Court Must Retain Jurisdiction until INS Final Decision

Under INS regulation, the SIJS applicant must remain under the Juvenile Court's jurisdiction until the SIJS petition and application for permanent residency both are approved. In many jurisdictions, the INS interview at which this might occur does not take place until six months or even up to thirty-six months or more, after the SIJS application has been filed. Advocates must persuade Juvenile Court judges to retain jurisdiction over the SIJS applicant until the INS has finally approved the applications. In some cases the court might be willing to retain jurisdiction over an older child if foster care funds were no longer being paid out. Or, the INS might agree to move the interview date up if a child is about to "age out" of dependency. This difficult rule may improve in the future, through legislation or regulatory change. Advocates should keep abreast of developments.

"Deemed Eligible for Long-Term Foster Care" Family Reunification, Foster Care, Adoption, Guardianship.

The statute provides that the applicant must be "deemed eligible for long term foster care due to abuse, neglect or abandonment." The regulation defines this term simply to mean that the court has found that Family Reunification is not a viable option, and the child normally would be placed in foster care, Guardianship or adoption.

Definition of “Deemed Eligible for Long-Term Foster Care”

The INS regulation interpreting the statute provides that a child is deemed eligible for long-term foster care once the court has found that Family Reunification is no longer a viable option. The regulation states that “normally” this will mean that the child would remain in foster care until the age of majority, unless the child is adopted or placed in Guardianship. Thus a child who has been adopted or placed in a Guardianship after parental reunification efforts have been ended will be considered to be “eligible for long term foster care.” A child who remains a Juvenile Court dependent but is no longer supported by foster care might also qualify.

Abuse, Neglect or Abandonment: While the grammar is somewhat confusing, the 1997 amendment appears to add the requirement that the child is deemed eligible for long term foster care due to abuse, neglect or abandonment (as opposed to due to a desire to get SIJS status).

Timing of the Order: Sometimes there is no parental involvement in Juvenile Court proceedings because the parent is dead or has conclusively abandoned the child. In these cases, some state courts may make a finding that Family Reunification efforts can be terminated earlier in the process than they would if the parents were actively involved. (See, for example, Calif. Welf. & Inst. Code § 36621(e)). This would allow the child to be "deemed eligible for long term foster care" and able to apply for SIJS earlier in the process. This would be especially helpful to older children who might “age out” of the system before becoming a permanent resident.

Parents Outside the United States. For a dependency court to terminate parental rights is of course a serious process requiring notice to the parents. In practice, if a court or children’s agency thinks there is close family in the home country it will go through a process of investigating conditions there to evaluate whether it is in the child’s best interest to return. For example, some county workers in California have developed a working relationship with the staff of the family welfare system in Mexico, and may obtain a home study of a parent or grandparent’s house. Other agencies depend upon interviewing the child and/or adults who know the situation to determine whether such family exists and can be notified, and for information about the family. Foreign consulates may provide help to agencies in locating the child’s parents in other countries to advise them of the proceedings. Children's welfare workers normally will describe efforts to locate and evaluate close family in other countries in their reports to the court. This information also may be relevant to the court’s determination that it is not in the child’s best interest to return to the home country.

Issues Relating to Adoption

This section will discuss several issues pertaining to adoption and immigration status. The material is relevant to any noncitizen adopted child, regardless of whether the child immigrates through the adoption or through SIJS.

For an SIJS Applicant, the Juvenile Court Must Retain Jurisdiction until the INS Grants the Application, Presumably Even After Adoption. The federal immigration regulation permits children who have been adopted to apply for SIJS, but it still imposes the requirement that the Juvenile Court retain jurisdiction over the case for the months or years until the INS finally approves the application. Usually a Juvenile Court would terminate its jurisdiction over a child's case once an adoption was completed. To comply with the INS regulation, some Juvenile Courts have either delayed completing the final step of the adoption until the INS granted its approval, or simply retained jurisdiction over the case despite the completion of the adoption. This requirement may be eliminated in the future through legislative or regulatory change; advocates should keep abreast of developments.

Immigrating through Adoption as an Alternative to Immigrating Through SIJS. A child will be able to immigrate through adoptive parents instead of through SIJS if the child is under 16 years old when the adoption is completed and is not otherwise inadmissible. The child also must live in the legal custody of the adoptive parents for two years before the papers are filed. However, immigration through adoptive parents has several disadvantages compared to SIJS. It may involve a long waiting period if the parents are permanent residents rather than citizens, it may require the child to return to the home country for at least a few days to obtain the immigrant visa, and the child will be subject to more grounds of inadmissibility, including the "public charge" ground in which the adoptive parents must prove they have certain income. For this reason, most children adopted after Juvenile Court custody choose to immigrate through SIJS rather than through their new parents, if possible.

If SIJS or the Violence Against Women Act provisions are not an option, however, immigrating through an adoptive parent may be the best choice. See discussion below regarding:

- a. why any child going to be adopted would like the adoption to be completed by her 16th birthday, even if she doesn't immigrate through the adoptive parents and
- b. how undocumented adoptive parents might be able to immigrate through their adopted child.

Any Immigrant Child Being Considered For Adoption by a U.S. Citizen May Benefit From Having the Adoption Completed By Their Sixteenth Birthday – Even if the Child Already Has a Green Card or Is Immigrating Through SIJS or Other Means. The advantage the child may gain is automatic U.S. citizenship. A child automatically becomes a U.S. citizen if, while under the age of 18, she

- a. Is a permanent resident, through SIJS, family immigration, or any means;
- b. Is legally adopted by a U.S. citizen before she reaches the age of 16, and has resided at any time in the legal custody of the citizen for two years;¹⁷ and
- c. Is residing in the legal and physical custody of the U.S. citizen parent.¹⁸

States Should Not Oppose Adoption Based on the Adoptive Parents Undocumented Status. Adoptive Parents Potentially Could Immigrate Through The Adopted Child. At least in California, undocumented parents may adopt children despite the parents' lack of lawful immigration status. If you encounter problems with this issue anywhere in the country, contact the National Immigration Law Center in Los Angeles, which brought successful legal action against California on this matter (213-487-2531). **A**

Note that an adopted child who becomes a permanent resident (through SIJS or some other means) will ultimately be able to help her undocumented adoptive parents to immigrate (get a green card), as long as the family meets certain requirements. First, a "parent/child" relationship for immigration purposes must be established, which means that the adoption must have occurred before the child's 16th birthday, and the child must have resided in the adoptive parent or parents' lawful custody for two years, at any time. Second, the child must become a U.S. citizen and be at least 21 years of age to file for her parents.

Not in the Child's Best Interest to be Returned to Previous Home Country

The court or administrative body must find that it is not in the child's best interest to return to the home country or country of most recent residence. Specifically, the immigration statute states that to qualify for SIJS, the applicant must be a person

"For whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence ..."

The easiest course is to have the Juvenile Court judge include this finding along with the others in her order that will be submitted to INS.

Obviously, the court must base this finding on evidence, so Social Workers, probation officers or others writing reports to the court should discuss their efforts to determine the conditions for the child in the home country, the conditions for the child in the United States, and the basis for their recommendation that it is not in the child's best interest to return. The "best interest of the child" determination is one to be made by state court or agency officials based on applicable children's law standards. The court or agency determination should be made on the wide range of factors usually considered in a "best interest of the child" finding, and is not limited merely to factors relating to abuse, neglect or abandonment.

It is possible that some INS offices will demand details about the situation in the home country. Such a demand conflicts with the plain language of the statute: the statute, quoted above, requires evidence that a judicial or administrative body *has determined* that it is not in a child's best interest to return, not direct evidence about the conditions in the

home country itself. Again, advocates will have to decide what information it is legal, ethical or advisable for them to disclose in the face of inappropriate INS demands.

Due to “Abuse, Neglect or Abandonment”: Legal Standards, INS Requests for Evidence and Documentation

The statute provides that a special immigrant juvenile must have been the subject of Juvenile Court orders and deemed eligible for long-term foster care “due to abuse, neglect or abandonment.”

Requirement to Show Neglect, Abuse or Abandonment.

Under 1997 amendments to the SIJS law, the child must show that the reason that court made the various orders was due to the “neglect, abuse or abandonment” of the child, and not just to help the child gain lawful immigration status.²⁶ To people involved in Juvenile Court it seems obvious that abuse, neglect and abandonment would be the basis for such orders by a Juvenile Court, but the statute requires judges or others in the system to make this finding explicit. For that reason, every Juvenile Court order to be submitted to INS should include a statement identifying the basis for the order, e.g., "On January 4, 1998 the minor was deemed eligible for long term foster care due to abandonment," or “The above orders and findings were based on the abuse of the child.”

Legal Terms Other than “Abuse, Neglect or Abandonment.” Some states use different legal terms to describe the basis for refusing to place a child with his or her parents. For example, behavior that most state statutes would term neglect or abandonment might be called “destitution” under New York state law. To be safe, until clarifying regulations are published, if the child was declared a dependent under some other legal term it still may be best to ask the judge to also include in the order one of the terms "abuse, neglect or abandonment." The judge should use the term whose plain meaning reflects what actually happened to the child.

Abuse, Neglect or Abandonment is Defined Under State Law. The state Juvenile Court

decides whether to take custody of the child due to abuse, neglect or abandonment as a question of state law. The INS cannot assert that it disagrees with Oklahoma’s definition of abuse or California’s definition of neglect. It cannot attempt to impose some federal definition. The question remains whether a judge under the applicable law of the state has found abuse, neglect or abandonment.

Where the Abuse Occurred. There is no requirement in the statute, regulation or INS memoranda that the abuse, neglect or abandonment occurred in the United States. In fact, many immigrant children lost parents or escaped abusive parents in the country of origin and came alone to the United States. Many U.S. Juvenile Courts are open to accepting these unaccompanied or abandoned children (as they are open to accepting U.S. citizen children who are living on the street, as opposed to children directly removed from

families). The only legal issue is whether the Juvenile Court has made its determinations based on abuse, neglect or abandonment of the child as defined under state law.

Evidence and Documentation Regarding Abuse, Neglect and Abandonment

In some areas of the country there has been controversy and confusion about what kind of evidence INS can require about abuse, neglect and abandonment of the child. *We feel that the best course is to provide only the judge's order, with the minimum amount of information needed to meet the legal elements of SIJS, and not to supply a lot of details about abuse, family, living situation, etc.* The statute provides that INS should be given *proof that judges have made certain findings*, not proof that children actually were abused. The reason for this is simple: INS officers are in no way trained to evaluate or interpret whether a child has been abused, is telling the truth, whether the abuse should be considered to have ended, state law definitions of children's terms, psychologist's reports, etc. Moreover giving the information to INS may violate legal and ethical rules regarding confidentiality.

However, some advocates are in a position where INS has said that without this evidence, it will not approve the case. Plus, the statute relating to INS "consent" to accept the judge's order is vague and could be read to support some INS inquiry. Hopefully in the future the INS will centralize its decision-making on this question, so that reasonable and consistent rules are applied. Until then, advocates need to decide how hard to fight and how to fight most efficiently if INS requires inappropriate information or documents. We recommend having a meeting with higher-up INS officials and personnel from the juvenile system, such as judges, court staff, directors of social work, or children's attorneys.

What evidence must the Juvenile Court include in its order to establish that it made the order due to abuse, neglect or abandonment? Many advocates feel a legal and/or ethical obligation to disclose only the legal basis for the dependency and not to give further factual information. For example, a court order could state that "the minor was made a dependent of this court and deemed eligible for long term foster care under Calif. W&I Code § 300(a) (physical abuse) and § 300(d) (sexual abuse)." This is evidence that the Juvenile Court deemed the juvenile eligible for long-term foster care due to abuse, neglect or abandonment.

Other advocates have provided more factual information, in response to INS threats to deny the SIJS application, and depending upon privacy rules in their courts. Some INS offices routinely demand to obtain a copy, or review a copy, of the entire Juvenile Court file on the applicant. If the INS requests information that you believe is illegal or unethical to provide, we recommend that you speak with other groups in your area (including the Bar Association) and ask to meet with local INS about the issue, rather than simply give over confidential information for review by INS officers who, after all, have no training whatsoever to evaluate the information.

The INS' actions in this area are controlled by INS Memorandum #2 on Special Immigrant Juveniles, dated July 1999. Some INS offices may not have Memorandum #2.

You should supply them with a copy. INS Memorandum #2 and an ILRC memorandum discuss it. If the INS challenges your case and demands more evidence, you should closely examine Memorandum #2. While it is somewhat vaguely written, Memorandum #2 appears to provide that if the judge's order provides the basic information, the INS must "consent" to accepting the order as the basis for SIJS. If the order does not provide the necessary information, Memorandum #2 discusses alternative ways of obtaining evidence acceptable to INS, such as written statements by Social Workers.

Thus, we recommend that information about the elements of consent should be provided in the *Juvenile Court judge's order*, where possible. However, ***if a Juvenile Court order does not include information establishing all the SIJS requirements ("elements of consent")***, the INS will look to ***documents filed with the court or sworn statements by the court or state agency or department***.

Regarding documents filed with the court, the INS recognizes that while such documents would be the most reliable evidence of the elements to be proved, in many States documents submitted to or issued by the Juvenile Court in dependency or delinquency proceedings may be subject to privacy restrictions.²⁸ *Advocates who demonstrate that Juvenile Court proceedings are protected by state privacy laws should be able to avoid giving INS documents filed with court.* Regarding the sworn statement by court or state department or agency, this appears to be a safety device provided in case the Juvenile Court judge is not able or willing to provide sufficient information. According to the INS:

If a dependency order does not include information establishing these crucial elements and State laws prevent court documents from being submitted to INS, a statement summarizing the evidence presented to the Juvenile Court during the dependency proceeding and the court's findings should be sufficient to establish the elements. In order for a statement to serve as acceptable evidence of these elements, the statement should be in the form of an affidavit or other signed, sworn statement, and be prepared by the court or the State agency or department in whose custody the juvenile has been placed. All other evidence the petitioner submits to establish the consent elements must also be considered in determining whether or not to consent to the dependency order.

Thus when all else fails a Social Worker, department attorney, or other responsible party from court or state agency or department can submit a sworn statement. Immigration proceedings regularly accept un-notarized sworn statements with the following signature statement: "I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief." Again, the person providing the sworn statement must consider legal and ethical confidentiality concerns when deciding what information to include.

INS “Consent” to Accept the Judge’s Order

The following discussion is somewhat complex, and for many SIJS cases is not needed. The “consent” issue need not worry you, and you do not necessarily even need to read this section, unless you are in one of two situations:

- a. The child you are assisting is in some form of INS custody, or
- b. The INS is stating that it intends to deny your SIJS application because it is refusing to “consent” to accept your Juvenile Court judge’s order.

INS Consent that Children in INS Custody Proceed to Juvenile Court Jurisdiction.

The SIJS law provides for two types of INS “consent.” One consent involves the fairly unusual case in which a child was first in the INS’ custody, and now wants to go on to Juvenile Court jurisdiction.

General INS Consent for SIJS.

The other kind of consent, which we’ll call “general” consent, applies to every SIJS case. Basically, the law provides that the INS must “consent” to (i.e., accept) the Juvenile Court judge’s order to serve as the basis for SIJS if the applicant establishes the required legal elements, and not consent if the applicant doesn’t. The INS makes this “consent” just in the act of approving the SIJS petition; there is no separate application for consent. That is why in the majority of cases the consent issue does not come up; the INS just “consents” when it grants the SIJS petition. Unless there is a problem, advocates do not need to concern themselves with the issue, or to write the INS anything about it. We present the following fairly detailed discussion of consent only to help advocates in situations in which the INS is threatening to withhold consent or may be misinterpreting the consent provision.

A 1997 amendment to the SIJS law provides that the INS must “consent” to granting SIJS to an applicant based on the Juvenile Court judge’s order. ³⁰ This kind of consent is linked to whether there was abuse, neglect or abandonment. The legislative history to this amendment states that to consent, the INS must find that the court’s actions were made due to abuse, neglect and abandonment of the child, rather than primarily for the purpose of obtaining SIJS. The INS has stated that it agrees that the only reason it would not “consent” would be some doubt about the issue of abuse, neglect or abandonment. In its 1999 “Memorandum #2” on SIJS, the INS noted that the dependency order should establish that the juvenile is deemed eligible for long term foster care due to abuse, neglect or abandonment and that it is not in the child’s best interest to be returned to the home country. The INS states, “If both elements are established, consent to the order serving as [a basis for SIJS] must be granted.” Memorandum #2, page 2, “Juveniles Not in INS Custody.” You might meet an INS officer who wrongly asserts that INS “consent” can be based on anything, such as his not liking the child’s demeanor, the fact that the child is in delinquency not dependency proceedings, or other reason. Or, an officer might

wrongly assert that the Juvenile Court must obtain INS consent even if the child had not been in INS custody before coming to Juvenile Court. If this occurs, get the assistance of an attorney and arrange a meeting with INS to discuss consent and the 1999 Memorandum #2.

Proof of Age; Obtaining Documentation

Proof of Age. The INS regulation requires every applicant for special immigrant juvenile status to submit some documentary proof of age. The evidence can take the form of a “birth certificate, passport, and official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary’s age...”

Immigration practitioners should note that the requirement is for some proof of *age*, a much looser standard than the usual proof of birth. There is no requirement that the person submit a birth certificate. Children have been granted SIJS who did not even know what country they were born in, and did not personally know their year of birth. The statute recognizes that these children come from abusive, chaotic, or interrupted homes, and does not impose the strict requirements of proof of birth that appear in regular family immigration.

Obtaining Documentation to Prove Age. The following practice tips may help you to obtain documents. Because the search for documents can be time consuming (for example, it might take several weeks to hear back from a foreign registry), it is critical to start as soon as the application for SIJS becomes a possibility. For example, if a Social Worker or probation officer identifies that the child is undocumented and is waiting to transfer the matter to another part of the agency for handling, that person could do the child a tremendous service by immediately beginning the search for documents.

Foreign birth certificates, if you can obtain them, are the ideal proof of age.

1. The easiest way to obtain a foreign birth certificate is to contact helpful family or friends in the home country who will travel to the local or national registry to obtain a certified copy. Unfortunately, abused children often lack these connections.
2. Send away for the birth certificate yourself. You will need a letter written in the language of the country and addressed to the registrar in the town where the child was born (or, more importantly, where she believes her birth was registered) or to national registry. You will need an international money order. The letter should state the name, birth date and birthplace of the child and if possible the names of both parents. There are relatively inexpensive "express mail" services to Mexico and Central America in most large cities. The Foreign Affairs Manual (FAM) of the Department of State is an important resource. The FAM provides information on how to obtain foreign birth certificates from various countries. If birth certificates from a particular country appear in a different form, such as family registration

certificates, or if they are generally unavailable and therefore not required, the FAM will state this. To find the FAM, go to a local law library or contact a local immigration agency or attorney. If you are in northern California, you may contact the Immigrant Legal Resource Center, Attorney of the Day at (415) 255-9499, ext. 6263. The Attorney of the Day will send you copies of the pages from the FAM that relate to the country you're dealing with.

3. Contact the local consulate from the child's country and ask for their assistance.

Foreign identity documents: Any foreign identity document, including a military document and perhaps a school identity card, should be accepted as proof of age.

Other substitute documents: If you cannot obtain a birth certificate, the regulation provides that the applicant can submit any "other document which in the discretion of the [INS district director] establishes the person's age." The regulation creates a generous standard because it is well known that some of these children will not have necessary information or will have a hard time obtaining documents.

One good guide for what definitely must be acceptable substitute documents is the INS regulation defining substitute documents for birth certificates in family visa petitions. This is a fairly strict standard for substitute documents that is imposed in regular family immigration cases. Substitute documents may include:

- a. A baptismal certificate with the seal of the church, showing date and place of birth and date of baptism;
- b. Affidavits from people who are personally aware of the birth;
- c. Early school records showing date of admission to the school, the child's date and place of birth, and the name and place of birth of the parent or parents. You must also describe the efforts you made to locate the birth certificate. The best proof is a statement from the registrar explaining that the child's birth certificate cannot be found there.

But that guide is not a requirement for SIJS. The INS District Director can accept *any* document in his or her discretion to prove age in an SIJS case. If you have nothing else, offer a state court order on the child's age. Regular civil courts can make all kinds of findings, including age. For example, under California Welf. & Inst. Code § 362, a Juvenile Court can make any and all reasonable orders for the care of a minor. At least some INS offices have accepted such an order as proof of age. Offer an official doctor and psychologist's evaluation. The INS itself conducts dental exams on youth in its custody to determine if they are under the age of 18, so this is a strong document. (Be aware, however, that the INS then may want to have its own dentist examine the child and you may end up with dueling dental exams.) Always remind the INS that the regulation purposely gave INS wide discretion on what documents will suffice as proof of age.

When submitting foreign documents, **be sure to demonstrate that you diligently searched for original documents and were unable to find them.** This is required. Be prepared to show correspondence with a registrar in the home country, and/or a declaration by the worker of the steps taken to locate documents or information.

Must submit proof of age with initial filing? INS regulation lists proof of age under "Initial documents which must be submitted in support of the petition." While you should be able to file without a birth certificate, it is possible that a local INS will refuse to accept the application without some evidence. If possible, present proof that the birth certificate is not available – such as a letter from a registrar or other in the home country saying it is not available – and/or proof that you are pursuing other means. If nothing else, include a sworn statement by the child or Social Worker and cite the regulation stating that the INS District Director has discretion to accept any document. With that, the INS should accept the papers for filing and leave it to the interview officer to decide whether the document is sufficient, and hopefully by the interview you will have something more.

Additional INS Requirements:

- How Long Must Juvenile Court Jurisdiction Be Maintained?
- What Happens When the Applicant Turns 18 or 21?
- What if the Applicant Marries?

The federal statute sets out requirements a child must meet in order to qualify for special immigrant status. The INS, in its own regulations, adds more requirements. Those INS-imposed requirements will be discussed in this section.

Advocates should make every possible effort to comply with these INS requirements. However, if compliance is impossible, keep in mind that the requirements in the INS regulation might be vulnerable to a lawsuit in federal court, charging that INS overstepped its authority by imposing requirements that weren't stated in the statute.

Jurisdiction Until the Entire Application Is Decided.

The INS regulation states that the person applying for special immigrant status must remain under Juvenile Court jurisdiction throughout the entire application process, i.e. until INS approves the applications for special immigrant juvenile status and adjustment to permanent residency. Thus, if an applicant is under Juvenile Court jurisdiction when he or she files the SIJS and adjustment applications with INS, but leaves court jurisdiction during the several month long wait for the INS interview, the INS will deny the application.

This regulation has caused tremendous problems by requiring Juvenile Courts to retain jurisdiction over older youth longer than the courts normally would. Hopefully a new statute or regulation will change the rule, so that the applicant only needs to be under Juvenile Court jurisdiction at the time she files the application with INS, not all the way

until the INS gets around to deciding the application. But until the rule is changed, you must attempt to comply. Advocates who are running out of time should pursue two strategies simultaneously:

1. **Ask the Juvenile Court judge to retain jurisdiction** over the child and schedule a last hearing a few weeks after the interview date.
 - a. Some courts have taken an affirmative stand on this issue. In Los Angeles, the presiding judge of Juvenile Court, Jaime R. Corral, distributed a memorandum to all Juvenile Court judges requesting that they maintain jurisdiction past the age of 18 for juveniles who may qualify for this relief; this may be of use in informing or convincing other judges.
 - b. Advocates report that in some instances, judges have agreed to retain the children as dependents while stopping other forms of foster care support.
2. **Ask the INS to expedite the application** (give a quicker date for the interview). This is a discretionary decision. In some areas of the country, the INS has agreed to move up the SIJS adjustment interview if the applicant is about to age out of Juvenile Court.
 - a. Find out from local immigration practitioners if the INS has a history of doing this in other time-urgent cases, to use as a precedent (for example, family immigration cases in which a child is about to turn 21 and go into a less advantageous immigration category.)
 - b. If you believe that the INS may not immediately be open to your request, it may be helpful to ask civic organizations such as the local bar association volunteer services program to join in the request and ask for a meeting, ask a respected local immigration lawyer, who may have good contacts in the INS, to take on the case and make the request, or ask the member of the United States Congress that represents the district where your client lives to intervene on your client's behalf with the INS.

In some areas, immigration and children's agencies and civic organizations have formed an ongoing local **Task Force on SIJS**. In San Francisco, children's and immigration law staff, county workers, city attorneys, probation officers, the Bar Association and other civic groups formed a Bay Area Task Force to exchange information and discuss problems. This became useful in policy work, as both the INS and the local county systems were responsive to considering concerns raised by the Task Force.

When the applicant goes to the INS adjustment interview, s/he **bring a copy of the minutes from his or her most recent court hearing to establish that s/he remains under Juvenile Court jurisdiction.**

Mandatory injunction and/or writ of mandamus: If the applicant can establish that INS has taken an unreasonable amount of time to process the application, a lawyer acting

on behalf of the client may ask a federal court to order a mandatory injunction and/or writ of mandamus to force INS to act on the case. Whether INS has taken an unreasonable time in processing an application will depend on the facts of the particular case. It will be the court's discretion to decide if the agency delay is unreasonable.

In the case of *Yu v. Brown*, the plaintiff filed an application for SIJS and adjustment to legal permanent resident. INS had taken no action on the application for more than a year. As a result, the plaintiff alleged that the INS had unreasonably delayed the processing of the SIJS application and sought a writ of mandamus/injunction to compel the INS to act on the application. The court in this case found that the delay was unreasonable. Further, the court determined that whether a delay is unreasonable will depend on the facts of the particular case. However, a writ of mandamus/injunction was determined to be an appropriate remedy for the unreasonable delay.

The Age of 18 or 21.

Under the INS regulations, any person under 21 years of age who meets the requirements can apply for SIJS.³⁸ Thus an 18- or 19-year old can file an SIJS application and attend the INS interview as long as s/he remains under Juvenile Court jurisdiction, "eligible for long term foster care," and the subject of a court order that it would not be in his or her best interests to return to the home country.

Note: Some court staff and practitioners wrongly believe that lawful permanent residency status terminates at age 18. Once a person becomes a permanent resident (a "green card" holder), that status continues for the person's entire life unless s/he becomes deportable for some reason, such as serious criminal conviction.

The Applicant Cannot Be Married.

Under INS regulation, if the child marries prior to receiving special immigrant status, the petition will be denied. If the child marries after receiving special immigrant status but before receiving permanent residency, the status automatically will be revoked.

Children over 18 and under 21 who are under Juvenile Court jurisdiction still qualify.

Ask the Juvenile Court to maintain jurisdiction over children 18 years or over if needed. Jurisdiction should be maintained until the application for adjustment of status has been finally approved.

**If an eligible child will be terminated from Juvenile Court jurisdiction before adjusting, ask the INS to move up the adjustment interview date.
Get advice immediately**

How the Applicant Can Lose Special Immigrant Status: Revocation of Approval

The INS can revoke special immigrant juvenile status at any point before the applicant completes final processing for adjustment of status (the green card). Under the regulations, INS will revoke an applicant's special immigrant status if, prior to obtaining permanent residency, the applicant

- becomes 21 years old;
- marries;
- ceases to be under Juvenile Court jurisdiction;
- ceases to be deemed eligible for long-term foster care; or
- is the subject of a determination in an administrative or judicial hearing that it is in the applicant's best interests to return to their or their parents' country of nationality or last habitual residence.

Advocates argue that the INS does not have the authority to revoke special immigrant status when the person marries since that reason exceeds the scope of the statute passed by Congress.

If an applicant is about to leave Juvenile Court jurisdiction because of age, advocates must work hard to persuade the judge to retain Juvenile Court jurisdiction, and/or persuade the INS to move up the interview date.

ELIGIBILITY FOR ADJUSTMENT OF STATUS TO PERMANENCY RESIDENCY

Statutory Requirements for Adjustment of Status

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, called **consular processing**, requires the person to travel to his or her home country and have an interview at the U.S. consulate there). Some people who entered the U.S. illegally and immigrate through family members are not permitted to adjust status in the United States, and instead must go to the home country to do consular processing. This is not a problem for special immigrant juveniles, because the statute provides an exception for special immigrant juveniles so that they can apply for adjustment of status at the INS in the United States despite having entered or worked illegally.

Grounds for Deportation and Inadmissibility: Criminal Record, HIV Positive Status, Public Charge Issues; Waivers of Inadmissibility

Grounds of Deportability and Inadmissibility. People who come within certain categories are penalized under the immigration laws. An alien can be forced to leave the United States (be deported or removed) if he or she comes within a “ground of deportability.” The person can be denied admission to the U.S. or denied adjustment to lawful permanent resident status (a green card) if she comes within a “ground of inadmissibility.” The grounds of inadmissibility and deportability are listed in the federal immigration law.⁴¹ Most apply to persons who have committed or been convicted of certain crimes, have committed certain immigration offenses, have certain diseases, cannot financially support themselves (the “public charge” ground), are judged subversive, or have other problems.

Comparing Immigration Through SIJS to Immigration Through Family Members.

Many grounds for inadmissibility and deportation do not apply to special immigrant juveniles. This is an advantage that special immigrant juvenile applicants have over children who immigrate through their natural or adoptive parents. Children immigrating through their parents are subject to most grounds of inadmissibility, including the **public charge** ground. (To meet the public charge ground, their adoptive family must at a minimum show that they earn 125% of the Poverty Income Guidelines.) Also, unless the petitions were filed on or before April 30, 2001, these children must go through consular processing outside the U.S. instead of adjustment of status in the U.S. if they entered the U.S. illegally. Finally, a person immigrating through SIJS can apply to have certain grounds of inadmissibility waived that a person immigrating through family is not eligible to waive.

Grounds of Inadmissibility That Can Be Waived. Some inadmissibility grounds do apply to special immigrant juveniles, but the applicant can ask for a discretionary "waiver." The applicant will submit a special waiver application asking the INS to "forgive" the ground of inadmissibility. It is probable, but not guaranteed, that INS will approve such waiver applications. The waivable inadmissibility grounds include:

- people who have been prostitutes or procurers ("pimps")
- people who were convicted as adults once of simple possession of 30 grams or less of marijuana
- people who are HIV positive
- people who were deported and did not remain outside the U.S. for five years before returning persons who committed fraud to enter the U.S. or to get a visa
- people who are alcoholics or have a "mental or physical disorder" that poses a risk to people or property (e.g., suicidal behavior, psychopathy, disorder that causes the person to prey sexually on other minors)
- people who are or have been drug addicts or abusers people who helped other aliens to enter the U.S. illegally.

If a child might come within any of these grounds, you will need the help of an immigration expert to file a waiver. As stated above, since it is possible the waiver will not be granted, the application carries some risk. This may be especially true for people with problems related to drugs, since INS takes a severe approach to drug offenses.

Note to Immigration Attorneys: Special SIJS Provisions for Inadmissibility, Deportability, Waivers, and Adjustment. Congress provided a special waiver, available only to SIJS applicants, of many of the grounds of inadmissibility.⁴⁵ Unlike traditional inadmissibility waivers such as INA §§ 212(i) or 212(h), the SIJS waiver does not require the child to have a qualifying relative with lawful status. The Attorney General is authorized to waive the designated grounds for "humanitarian purposes, family unity, or when it is otherwise in the public interest." See INA § 245(h) (2). The legislation proposed by Senator Feinstein in 2001 (S. 121) would add additional waivers. All SIJS applicants are by law deemed to be paroled in and therefore eligible for adjustment of status. See INA § 245(h) (1). They do not need to qualify for adjustment under INA § 245(i) or pay a penalty fee; they are eligible to adjust by virtue of being special immigrant juveniles. Noncitizens who qualify as special immigrant juveniles are exempted from the grounds of deportability that relate to unlawful presence.⁴⁷ Therefore even children who were wrongly admitted or are now out of status cannot be charged under those grounds. This could lead to an interesting argument in an unusual situation: arguably a child who qualifies for SIJS but for some reason cannot adjust status – for example, because the government denied an HIV waiver or had "reason to believe" the child was a drug trafficker and therefore inadmissible -- cannot be deported just for unlawful status.

Grounds That Cannot Be Waived. Other grounds of deportation or inadmissibility are not waivable. A person who comes within one of these grounds should not submit an application, since the application will almost surely be denied and the person can be placed in deportation proceedings. These grounds of inadmissibility include:

- people who INS has "reason to believe" are or have been drug traffickers
- people convicted as adults of a wide range of offenses, or who have made a formal admission of any drug offense or a "crime involving moral turpitude" (such as shop lifting, assault with a deadly weapon, or sex crimes).

If an eligible child might come within any of these categories, *do not file an application until you have consulted with an expert in this area.*

Drug trafficking is especially dangerous. Immigration authorities recognize that a disposition in Juvenile Court is not a "conviction" for any purpose.⁵⁰ However; some actions can be the basis for inadmissibility (disqualification from immigrating) even if there is no conviction. Drug trafficking can be grounds for inadmissibility if the INS has strong evidence that they occurred, such as a Juvenile Court disposition. In some cases, where the INS has become aware that the child has participated in trafficking, either through the child's own admission in the interview or on the application forms or through some other means. Although advocates can argue that a minor cannot form the intent necessary to commit drug trafficking, the INS probably will hold that if an INS officer has good "reason to believe" that the child has ever been a drug trafficker, then s/he is ineligible for special immigrant juvenile status. If the child just possessed or used drugs, this should not be a basis for inadmissibility.

A juvenile delinquency finding of prostitution or of behavior that indicates a "mental or physical disorder" or drug abuse/addiction also can support a finding of inadmissibility. But unlike drug trafficking, these grounds of inadmissibility can be waived (forgiven) in the discretion of the INS. See discussion of "Grounds of Inadmissibility That Can Be Waived," above.

This area is quite complex and this information is only introductory. If you are at all unsure of the implications of a specific criminal disposition, consult with an expert in the area. For more information on criminal grounds of inadmissibility see the ILRC manual, *California Criminal Law and Immigration* or see *Immigration Law and Crimes*.

**Children who were involved with prostitution, drugs, or other crimes,
or who are HIV positive, or who have been deported in the past
may face special problems.
Get assistance before filing the application.**

Who Should Not Apply for Special Immigrant Juvenile Status

A child who is not already in deportation proceedings and who is ineligible either for special immigrant juvenile status or for adjustment of status should not even apply for special immigrant status, since he will be risking deportation for no reason. If a child would be eligible for adjustment if he could obtain a waiver of inadmissibility or deportation. The case should be discussed with an immigration attorney or advocate before filing either application.

However, a child who already is in deportation proceedings and for whom special immigrant status is the only possible road towards a legal immigration status should apply for special immigrant status, even if s/he will not be able to adjust status to lawful permanent resident. Since the INS already know the child, a denial of the petition will not prejudice the child any more. On the other hand, it may draw the INS' attention to the child's specific circumstances, which may lead to some other type of immigration relief that relies on the INS' discretion. Also, it is not clear that a special immigrant juvenile can be removed from the United States even if she is deportable and is not eligible for adjustment of status.

RISKS AND BENEFITS OF APPLYING

Overview

People who obtain "special immigrant juvenile" status (the first step toward becoming a lawful permanent resident) enjoy some **benefits**. They enjoy temporary protection from deportation; they are eligible for limited public benefits (but the counties housing them are eligible for federal foster care matching funds); and, once they have submitted an application for adjustment of status, they are eligible for employment authorization.

Persons who complete the process and become lawful permanent residents enjoy far greater benefits. They can live and work permanently in the United States, can travel outside the country, and are eligible for limited public benefits. In five years, if they wish, they can apply for U.S. citizenship.

The **risk** of submitting an application is that, if either special immigration status or lawful permanent residency is denied and the child has no other way to immigrate, INS could try to deport the child. By applying for special immigrant status, the child is making him or herself known to INS.

After an applicant has submitted the application for SIJS and adjustment of status, but before the INS has decided the application, the applicant gets some important benefits. The person qualifies for employment authorization during the whole period that the application is pending. Even a child who does not plan on working may want to obtain an employment authorization card: it enables the child to get a valid social security number, and has use of a government-issued photo identification card. The person also is protected from deportation while the application is pending. Even if the INS denies the adjustment application, the person is entitled to employment authorization and protection from deportation while the case is before the immigration judge. Also, the county may be able to access benefits such as federal foster care matching funds for the child while the application is pending.

Once the INS approves the application and the child becomes a lawful permanent resident, he or she enjoys far greater benefits. These include:

Permanent Lawful Status. Once a person obtains lawful permanent resident status, s/he can keep that status permanently. The person will lose the status only if s/he does something to come within a ground of deportation (for example, if the person is convicted of a drug offense), or travels while he is inadmissible because of a crime, or abandons U.S. residency by moving to another country or, potentially, by remaining outside of the U.S. for over one year. Once a special immigrant juvenile becomes a permanent resident, s/he will not lose permanent resident status by becoming an adult, marrying, or by being emancipated from Juvenile Court jurisdiction.

Permanent Employment Authorization. Permanent residents automatically are entitled to unlimited employment authorization.

Travel Outside of the United States--But with Caution! Permanent residents may travel in and out of the United States. However, certain grounds of inadmissibility apply to permanent residents every time they enter the U.S., and all grounds apply if the trip is six months or more. INS officers at all entry points to the U.S. may question returning permanent residents to see if they are inadmissible. A court dependent should consult with an immigration expert before leaving the United States.

Public Benefits. Permanent residents are eligible for some public benefits, although this was severely curtailed by the Welfare Reform Act of 1996. If you have questions about public benefits eligibility contact a resource center. The National Immigration Law Center (213) 938-6452 is especially expert in this area, as is the National Center for Youth Law (Lucy Quacinella) at (510) 835-8098.

Ability to Become a U.S. Citizen. A person over the age of 18 can apply for U.S. citizenship if he or she has been a permanent resident for five years (or possibly less time, if the person marries a U.S. citizen or is the U.S. armed forces). Thus a person who became a permanent resident through SIJS at age 14 can apply for naturalization to U.S. citizenship five years later, at age 19.

Note that if the child also was adopted by a U.S. citizen or citizens, she might become a citizen much sooner. A child automatically becomes a U.S. citizen if, while under the age of 18, she

- a. is a permanent resident, through SIJS, family immigration, or any means;
- b. is legally adopted by a U.S. citizen before she reaches the age of 16, and has resided at any time in the legal custody of the citizen for two years; and
- c. is residing in the legal and physical custody of the U.S. citizen parent.

Temporary Protection from Deportation

A person who has filed an application for SIJS and/or an application for adjustment of status has temporary protection from deportation, which should last until there is a final denial of the petition for special immigrant status or the application for adjustment of status to permanent residency.

A person granted special immigrant juvenile status is not deportable for illegal entry into the U.S. or for most other acts committed prior to the granting of that status. This is because the law states that many bases for deportation do not apply (are automatically “waived”) if the person is a special immigrant juvenile. Some grounds of deportation relating to crimes are not waivable and applicants with criminal or drug problems might not be protected.

If a person granted special immigrant status is in deportation proceedings based on a ground of deportation that is automatically waived, the person should ask the judge to terminate proceedings. A person who has submitted an application for special immigrant status can ask the judge to terminate or conditionally terminate proceedings, or at least continue proceedings pending a decision on the application.

Denials and Appeals. If INS denies the child's application for either special immigrant status or adjustment for status to permanent residency, the child loses protection against deportation and can be brought before a judge for deportation ("removal") proceedings. At the hearing the child may be able to apply again, and appeal any denials.

The child has the right to appeal. If an appeal is necessary, the county should immediately retain or assign an attorney, preferably one with immigration experience, if this has not been done already. *INS decisions often are reversed on appeal* and it would be a violation of the county's duty to the child to not fully investigate appeal possibilities.

Employment Authorization

A person who files an application for adjustment of status is eligible for employment authorization during the time it takes INS to decide the applications.⁵⁵ Often the person files the application for employment authorization (form I-765) at the time of submitting the adjustment application, and the application is approved immediately or within a few weeks.

Even children too young to work might benefit from obtaining employment authorization. For one thing, it provides an official picture identification card for them, months before they will receive their green card. They can also obtain a social security number.

Limited Eligibility for Public Benefits

People who have applied for or been granted SIJS but who are not yet permanent residents no longer qualify for federal public benefits as aliens who are "permanently residing under color of law" (PRUCOL). Welfare and immigration legislation enacted in 1996 has at least cut back on the federal PRUCOL category. However, some states might make benefits available to these children. If you have questions about public benefits eligibility contact a resource center. The National Immigration Law Center (213) 938-6452 is especially expert in this area.

RISKS OF APPLYING - DEPORTATION BASED ON DENIAL OR REVOCATION OF STATUS

Denial of the Application and Deportation. A person who applies for special immigrant status is identifying him or herself to INS. If the person is undocumented, INS can bring deportation (“removal”) proceedings if it denies the application for special immigrant status or adjustment of status. For this reason, an application should only be submitted if you believe that it will be granted.

On the other hand, some INS offices have agreed not to initiate deportation proceedings against children who are county dependents, even if the INS denies SIJS or adjustment.

Deportation after Special Immigrant Status is Revoked. INS regulations require that a child be under 21, single, under the jurisdiction of a Juvenile Court, and eligible for long term foster care up until the application for adjustment of status is decided. Otherwise, it may revoke special immigrant status and place the child under deportation proceedings. This poses a special risk to older applicants especially if the application will not be decided for a long period of time either because of bureaucratic delay or the creation of a waiting list for adjustment of status.

Special immigrant status also can be revoked if the Secretary of State terminates the person’s registration for a visa for failure to file for permanent residency within one year of being eligible for the immigrant visa. This would happen only if your office lost track of the case and forgot to apply for adjustment of status within one year of the person becoming eligible to do so.

People Who Obtain Permanent Residents from SIJS Cannot Petition for *Original* Parents to Immigrate; They Can Petition for New, Adoptive Parents. Generally a U.S. citizen who is over twenty-one years old can file a petition to immigrate a mother or father. A child who becomes a permanent resident as a special immigrant juvenile loses the right to file a visa petition to immigrate his or her natural parent or original adoptive parent (i.e., the parent with whom the judge found the child could not be reunified). While this is not “risk” of applying, applicants should understand this. In general the applicant’s parent does not lose anything, because without SIJS s/he would not have become a permanent resident or a U.S. citizen in any event.

Because undocumented people are permitted to adopt children in many parts of the U.S., the question may arise whether the SIJS recipient can file a petition to immigrate her new, adoptive parents (i.e., parents who adopted her after the court found she could not be reunified with her original parents). The answer is yes, as long as family meets various requirements. First, a “parent/child” relationship for immigration purposes must be established, which means that the adoption must have occurred before the child’s 16th birthday, and the child has resided in the adoptive parent or parents’ lawful custody for two years (unless the child was an orphan when adopted⁵⁶). Once the parent/child relationship is established, the regular rules of family immigration apply: the child must be a U.S. citizen and be 21 years of age in order to immigrate a parent.

COMPLETING AND SUBMITTING THE APPLICATIONS: PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS AND APPLICATION FOR ADJUSTMENT OF STATUS

This chapter first will discuss the basic procedure for completing and submitting the applications and having the case decided. In brief, this involves submitting the application packet; attending an interview at INS; and receiving a decision. If the case is denied, the applicant can file an appeal.

Some children's welfare workers might not complete any part of these applications. They might be able to find volunteer attorneys, or the county may agree to retain attorneys or paralegals to handle this section. Still, they should at least read Part One so that they can understand the application process and explain it to the child. Other welfare workers may handle the entire case; in several cities, welfare workers have become experts in SIJS and have large successful caseloads with INS.

NOTE to Social Workers, Probation Officers: Even if you do not complete the forms, you can provide a tremendous service by helping to collect some of the documents the applicant will have to produce which include: birth certificate and translation; results of a medical exam that must be performed by an INS-approved doctor; three "green card" photos made to certain specifications; application fees; and the order signed by the Juvenile Court judge.

OVERVIEW OF THE APPLICATION PROCESS

Submit the Two Applications to Local INS District Office; Obtaining Employment Authorization

Currently, in almost all cases the petition for special immigrant juvenile status and supporting documentation (Form I-360 packet) and the adjustment of status application and supporting documentation (Form I-485 packet) should be submitted to INS together as one packet. (There are some exceptions to this for persons already in removal proceedings.) In the future, the INS may change its procedure and have the two applications filed at different offices. The following is a discussion of the current procedure for filing the two applications at the same time, at the local INS office.

Getting the Application to the INS Office: the Option of Mailing. You must submit the applications to the local INS District Office or Sub-Office with jurisdiction over the place where the applicant lives.

In some locations it may be possible to submit the applications to local INS by mail. Depending on the INS office, this might be a tremendously convenient option, since otherwise the person might have to come to the INS building very early in the morning to stand in line for several hours to file it in person.

It takes some networking to be able to mail the application in: you must either join with a local immigration bar, or make your own arrangement with INS. In many cities the local immigration bar has worked out a mailing arrangement with INS. Contact the local chapter of the American Immigration Lawyers Association (AILA); to get contact information, call the national AILA office in Washington D.C. at 202/216-2400. As long as you're on the phone with a local immigration attorney, see if the person might be interested in advising you. Some attorneys are willing to do this for no money. In other cases, counties have decided to retain immigration attorneys to entirely take over the case.

If you can't mail the application with local AILA chapter, you might be able to work out your own arrangement with INS. We suggest you get the support of your county and some other group, such as a local children's law group or bar association. If you can't file by mail, you may have to go extremely early in the morning (this could range from 4 a.m. to 7 a.m., depending on the INS office) to get in line to file. Each INS office may have different rules -- you need to find out the local office arrangement, which is best done by talking with a local immigration attorney or trustworthy INS contact. Going in person does have some advantages: generally the child can obtain employment authorization that same day, and you can also make sure that the INS accepts the application. But bring something to read, and bring the child.

After INS receives the application packet it will set a date for the interview. It may notify you by mail of this date. Depending on the backlog at the local INS office, the interview

date may be from six to thirty-six months, or even longer, from the date you filed. If the child files a request for work authorization (Form I-765) with the application packet, INS may give this the same day if you have gone in person. If you have mailed in the application, the child still will receive the work authorization card quickly, within a few weeks.

We recommend filing for employment authorization even if the child does not necessarily plan to work. It gives the child a government picture identification and a means to get a social security number.

Adjustment Interview

When the interview finally arrives, the child will meet at the INS office with the INS officer. An attorney can be present, and it is almost never a problem for the Social Worker or “next friend” to be present as well. If the officer attempts to bar a non-attorney from accompanying the interview with the child, ask to see a supervisor.

During the interview the INS officer will ask routine questions about the adjustment application. He may go through each question on the I-360 and I-485 forms. Practice all of these questions with the child in a role-play beforehand. Some of the questions are quite strange (“Are you a Communist? A drug dealer?”) and the child should be prepared. The INS officer already will have received the report from the FBI describing any criminal or juvenile delinquency record the person may have. The officer also will have the medical exam, which will tell if the person is HIV positive or has venereal disease or tuberculosis, or had illegal drugs in her system.

Hopefully the interview will be short and courteous, and just cover basic information on the form. In some cases, however, over-zealous INS officers have tried to ask about the details of abuse or abandonment, or other family issues such as when the father last visited. While we hope that this does not occur, you should be prepared just in case, in order to avoid possibly retraumatizing the child at the INS interview. Our position is that such questioning is not appropriate, and isn’t legally relevant. First, the INS does not need the details, but only needs to know that the Juvenile Court made certain findings. Second, even if it did need details, it should not get them from interviewing the child. If you do decide to provide the INS with more details about the child’s difficult situation, tell the INS officer that you will provide these in writing or with your own statements, so that the officer does not question the child. This is the INS’ own policy, and in its “Memorandum #2” it sets out a procedure for how a Social Worker or other agency employee should give written information. The child should not be present for these discussions.

Again, bad interviews are relatively rare, and most INS officers understand the need not to interrogate the child. To prevent bad INS interviews, your office may wish to establish a relationship with the local INS office and discuss what the interview will be like. Most

importantly, make sure that a lawyer or other advocate attends the interview with the child. If the interviewer insists on asking the child about sensitive subjects, insist on speaking with a supervisor and if needed, end the interview (especially if you are not in a very bad time crunch). It can be rescheduled. If needed, you can request a meeting with a higher-level INS officer to work out a system for these interviews. If you do this, it is a good idea to get children's and/or immigrants' rights organizations, the bar association, local officials, member of congress, etc. on your side to meet with INS.

Notice of Decision: Approvals, Denials and Appeals

The INS officer may tell you right at the interview that the applications for special immigrant status and adjustment of status have been granted. Otherwise, INS will mail out the decision. The INS decides both the special immigrant juvenile status and permanent residency applications.

Approval. If the applications are granted, the child may receive a written document stating this. The child will be a permanent resident as of the date on the notice. With some convincing, you should be able to use the form to obtain lawful permanent resident benefits, such as in-state tuition or student loans only available to permanent residents. The "green card" (which have been different colors including pink and blue) will arrive in the mail two to six months, or even longer, after the interview.

If possible, obtain a passport for the child from the child's home country and bring it to the interview. When INS approves the case, the child can receive a lawful permanent resident stamp in her passport that is easily accepted as proof of residency and "green card" status. (But don't delay the interview to get the passport – a passport is not a requirement, just something that may help you.)

Denial. If the petition for special immigrant status is denied, the decision must state the reasons for the denial. The INS must notify the applicant of the right to appeal the decision to the Associate Commissioner, Examinations. The INS also may ask the applicant to leave the country. Instead of leaving, the applicant should consider appeals and other forms of relief. The INS might issue a "Notice to Appear" to immigration court for deportation proceedings (which are officially called "removal" proceedings). Depending on the posture of the case, as discussed below, the applicant may be able to apply for relief from the judge. (It may well be possible to work out an agreement with local INS that applicants currently under Juvenile Court protection should not be put in deportation proceedings.)

It is important to remember that *many INS decisions are incorrect and are overturned on appeal.* The county has a duty to retain or assign counsel to investigate appeal possibilities and, if the appeal is warranted, to handle an appeal. For a lengthy appeal, volunteer counsel may be available through Bar Association, Legal Aid, or other sources.

Appeal Procedure. The following information is directed at attorneys handling appeals under this program. The INS and immigration judge have jurisdiction over different parts

of the case. Under the regulations, the INS and not the immigration judge can decide the *petition for special immigrant status*. The petition must be submitted to INS, and if denied, appealed to the INS Associate Commissioner, Examinations. 8 CFR § 106(b) (2) (e). See generally 8 CFR § 103.3.

If, on the other hand, INS approves the petition for immigrant status but denies the application for adjustment of status (for example, based on an inadmissibility ground) and the applicant is placed in deportation/removal proceedings, the immigration judge has the authority to rule on the application for adjustment of status and any application for a waiver of inadmissibility involved in the application.⁵⁸ If the judge denies the application for adjustment of status, an appeal can be taken to the Board of Immigration Appeals in Virginia.

Rules governing federal court appeals of these decisions have changed greatly since 1996, and many questions are unresolved. If you are considering a federal appeal, contact an expert immigration attorney or a resource center such as the ACLU Immigrant Rights Projects in New York or San Francisco.

HANDLING THE CASE—COMPLETING THE APPLICATION FORMS, PREPARING DOCUMENTS

General Guidelines for INS Applications: How to Get Forms; Original Documents; Translating Foreign Documents; Answering Each Question

The INS has several general rules about preparing applications.

How to Get INS Forms

Luckily, it is not difficult to get INS forms, and INS accepts photocopies of its original forms. If you have access to a computer, go to www.ins.gov and go to the “Forms, Fees and Fingerprints” area. You can download all the forms needed for SIJS, and you can obtain up-to date information about which dated versions of the forms are acceptable and about fees. You can also order forms from INS by calling 800/870-3676.

This manual includes blank copies of forms, but it is best to make sure that you are using the most recent version. The INS updates versions of its forms from time to time, and may only accept certain, recent versions for filing. *As of June 2001*, the I-360 dated September 11, 2000 is the most recent version of the form, but INS also is accepting the March 7, 1996 version. You must submit the February 7, 2000 version of the I-485 form. The October 2, 2000 version of the I-765 is the most updated, but you can also submit the April 28, 2000 version. The medical exam, form I-693, should be the September 1, 1987 version. If an attorney or BIA-accredited representative is representing the child before the INS, he or she should submit a form G-28. The G-325A form (for applicants 14 years of age and older) can be the version dated September 11, 2000, May 1, 2000, or October 1, 1982. It is best to check the website or order new forms from the 800 line if you are unsure of the date.

Submit a Photocopy of Birth Certificates and Other Original Documents

This section discusses dealing with “original” and photocopies of documents. A copy certified by a government office in the applicant's country of birth is considered an original (i.e., a photocopy with an original government stamp on it is acceptable as an “original”).

It is wise to submit a photocopy of the original document with an application and keep the original yourself. The INS doesn't require the original document, and generally it will not return it to you if you submit it. You don't need to certify that the photocopy you're submitting is an accurate copy. INS views the signing of the application form as certification that the copy is accurate. When INS decides it wants to inspect the original, the person has 12 weeks to produce it. 8 CFR § 103.2(b) (4). But you should plan to bring the original to the interview so that an INS official can examine it.

Translate Documents into English

Any document not in English must be accompanied by a certified translation in English. The INS no longer accepts abbreviated translations. The entire document must be translated. Anyone who is competent to translate (for example, the child's social services worker, paralegal, or volunteer) can certify the translation by signing and dating the following statement: "I certify that I am competent to translate from (the foreign language) to English and that the above is a true and correct translation."

Answer All Questions

Be sure to answer all questions on the form, using a black pen or typewriter. If an item is not applicable, write "N/A". If an answer is none, write "none." If extra space is needed to answer any item, attach a sheet of paper with the applicant's name and INS alien registration number (if any) and indicate the item number that you are answering.

The Form I-360/Petition for Special Immigrant Juvenile Status

The petition for special immigrant juvenile is requested on Form I-360, *Petition for Amerasian, Widow or Special Immigrant*. The INS will accept either the September 11, 2000 or the March 7, 1996 version (the date is found on the bottom left corner of the form).

A photocopy of a blank Form I-360 appears in **Appendix N**. The form is not difficult to complete. A sample completed I-360 appears at **Appendix B**. Special immigrant juvenile applicants must complete Parts 1-4, and Parts 6, 8 and 9. It must be signed by the juvenile applicant or "any person acting on the alien juvenile's behalf." This would include a children's welfare worker. The person filing the petition does not have to be a citizen or permanent resident.⁵⁹ See § 4.4 for more information about obtaining and completing INS forms.

The fee for filing the I-360 is \$110.00. See § 4.11 for more information about fees.

Form I-360 and Supporting Documents (Court Order and Form G-28)

The I-360 petition must be filed with evidence of the child's eligibility for special immigrant juvenile status. This includes a court order, signed by the Juvenile Court judge, that specifically sets out all of the requirements for special immigrant juvenile status. In other words, the judge should sign one order, which you will prepare, identifying the child and stating that s/he is under the jurisdiction of a Juvenile Court, eligible for long term foster care, and it is in his or her best interest not to be returned to the country of origin, due to abuse, neglect or abandonment. See **Appendix C** for a sample order, and Chapter 2 for a more thorough discussion of supporting evidence.

A Form G-28 "Notice of Appearance" of attorney should also be attached to the I-360 if an attorney is representing the child in the immigration process. There is no fee for this

form. If neither an attorney nor a BIA-accredited representative (paralegal who has been certified by the government to handle immigration matters) is representing the child – for example, if a Social Worker is handling the application -- do not file the form G-28.

The Application for Adjustment of Status to Lawful Permanent Resident: The I-485 Packet

Usually the adjustment of status application will be filed with the special immigrant petition. The application contains several forms and requires documentation. You can obtain from INS or an immigration community agency an adjustment of status "packet" containing all of the forms required.

An application for adjustment of status must contain the following completed forms and documents. Note that multiple copies are required in some cases; follow the instructions on the form.

- Form I-485/Application for Permanent Residence (adjustment of status application);
- Form G-325A/Biographical Information (in quadruplicate), if the applicant is 14 years or older;
- 3 "green card" size photographs that meet specified requirements;
- I-485 Filing fees (\$220, or \$160 for children under 14) or request for waiver of fees;
- \$25 fingerprinting fee (only children 14 years old or older need to be fingerprinted);
- Birth certificate or other proof of age (translation into English is required)
- Form I-693 medical exam completed by INS-approved doctor (while the I-485 instruction sheet directs applicants to wait until after filing the I-485 form before getting a medical exam, apparently some INS offices want the medical exam at the time of the I-485 filing);
- Form I-765/Request for Work Authorization, if desired (\$100 fee)
- A passport, Form I-94, or I-186 card showing lawful entry into the U.S., if any exist (in many cases, children will have entered the U.S. without papers, won't have these documents, and don't need to show them);
- "Audit" sheet -- Some INS offices have an administrative sheet they ask applicants to complete. Talk with local practitioners to see if your office has such a form. The form may describe the exact order in which documents should be placed.
- The I-360 application packet, described above.

CAUTION: You are completing several forms that ask for much of the same information. Make sure that the information on all the forms is consistent, e.g., list of addressees, birth date, and etc.

NOTE: You do not need to submit a fingerprint card to the local INS office with your I-

485 packet. INS will give you instructions on submitting that at a later date.

Fingerprint Card and Medical Exam

After the applicant files the adjustment and SIJS application, the INS will direct the applicant to an appointment to have fingerprints taken. The applicant may be directed to take an INS-approved medical exam *either before or after* filing, depending on local procedure.

Every applicant over the age of 14 must be fingerprinted so that the FBI can inform the INS of any criminal record (often including juvenile delinquency record) or record of prior deportation or removal. At some point after the applicant files the adjustment of status and SIJS application with INS, INS will direct the person to a special center that takes prints for immigration applications. The fee for fingerprints is \$25, which is due at the time of submitting the I-485.

Every applicant must take a medical exam from a specially approved INS-doctor. The medical exam often costs upwards of \$100. The doctor will complete INS Form I-693, which can be downloaded from the website as described in § 4.4, above. At the medical exam the doctor will take tests and ask questions to see if the applicant has certain conditions. These include, among other things, chronic alcoholism, mental retardation, insanity, drug addiction, venereal disease, Hansen's disease, HIV and tuberculosis. (See form I-693.) The doctor will also check to see if several required immunizations have been provided. The doctor will recommend follow-up steps if needed, such as getting further evaluation or treatment for TB, obtaining a psychological or psychiatric evaluation for a suspected medical condition, or obtaining needed vaccinations.

Note that to determine whether a person is a drug abuser or addict, the doctor may simply ask whether the applicant has taken any illegal drugs within the last few years. Outside the U.S., consular officials regard any use of drugs more than one-time experimentation within the previous three years to be "abuse." Inside the U.S. the standards appear more reasonable, but may vary. If the doctor feels there is abuse, the child must obtain a psychologist's evaluation. At this point, advocates should obtain expert advice about INS standards and what is required.

Application for Employment Authorization

The INS is authorized to grant work authorization to applicants for adjustment of status. The request is made on Form I-765. The form is available from INS. The filing fee is \$100.00. Applicants mark (C) (c) (9) as the grounds of eligibility at Number 16 on the form.

Even children who cannot or do not want to work (for example, are too young) may benefit from applying for employment authorization, since it will provide them with a government picture identification card and the ability to obtain a social security number.

Change of Address

The INS must be informed of an applicant's change of address on Form I-697A. At this time the form is not available by computer. If you do not have access to the form, send a letter with the person's alien registration number (nine or ten digit number beginning with "A") to INS informing them of the change of address. Send the letter certified mail, return receipt requested.

Filing Fees and Fee Waivers

Fees

Fees may be paid by check or money order, drawn from a bank in the United States. The fee for filing the I-360 Special Immigrant Petition is \$110.00. The fee for filing the Application for Adjustment of Status is \$220.00, or \$160.00 for children under 14 years. An application for employment authorization (optional) has a fee of \$100.00. Children who are 14 years old or older must be fingerprinted. The fingerprinting fee is \$25.00. *Be sure to keep the INS receipts for the filing fee.* This is your proof of filing.

Fee waivers.

Under INS regulations, immigrants who are indigent and submit certain applications -- including the application for special immigrant juvenile status -- can ask the INS to waive application fees.

In California, some INS offices used to deny these applications for fee waivers on the ground that the children were wards of the county and therefore had access to county funds. Through the work of the Bay Area Task Force on Immigrant Children, the INS in Northern California reversed its position and has granted at least one fee waiver.

Fee waivers can be granted for the I-360 petition for special immigrant juvenile status, the I-485 application for adjustment of status, and the I-765 application for employment authorization. To apply for a fee waiver, submit a cover letter and affidavit by the child stating that s/he is indigent at the same time you submit the application whose fee you want waived.

The INS may not be used to dealing with fee waivers for special immigrant juveniles and might deny the waiver or delay in making a decision. For this reason, workers may choose to bring a check for the fee with them when they file, in case the waiver is denied and they want the application to be filed immediately. It is clear, however, that children in foster care are indigent and should qualify for a fee waiver, unless they have access to some independent funds through a trust fund or bank account in their name.

OTHER WAYS THAT CHILDREN CAN OBTAIN LAWFUL IMMIGRATION STATUS

What can be done for children who do not qualify for special immigrant juvenile status (SIJS)? For example, children who have aged out of Juvenile Court, who never came into Juvenile Court, or who were taken in but then reunified with a parent do not qualify for SIJS. What can they do? Several other options are available.

Family Visa Petition Through Natural, Step or Adoptive Relatives

Some children who could immigrate through SIJS also have the option of immigrating through a relative who has legal status. As is discussed below, in almost every case it is better and easier to choose the SIJS option instead of family immigration. Other children do not qualify for SIJS, and family immigration is their best or only option.

Who Can Immigrate Through Family

If a member of the child's family is a permanent resident or U.S. citizen and is willing to help the child, he or she might be able to submit a **family visa petition** (I-130 form) for the child, even though they do not live together. A parent who is a lawful permanent resident (green card holder) can petition for an unmarried son or daughter of any age; a U.S. citizen parent can petition for a married or unmarried son or daughter. For immigration purposes, the parent-child relationship includes **stepchildren** (if the marriage creating the step relationship occurred before the child was 1860), **adopted children** (if the adoption was complete by age 1661), and **children born out of wedlock**. A U.S. citizen brother or sister over 21 years of age can file a petition, as can a permanent resident or U.S. citizen spouse.

Example: Thanh's stepfather is a U.S. citizen. Although Thanh is angry with his father and lives only with his mother, the father can immigrate Thanh if he's willing to submit a visa petition. (Thanh doesn't qualify for SIJS because he is with his mother.) Thanh's father will have to really want to do his stepson a favor, however. Like anyone petitioning a family member, Thanh's father has to be willing to submit an "affidavit of support" that makes him liable to pay back any public benefits that Thanh uses until a certain time.

Example: Starr's parents decided to give her up in a private adoption. The adoption was completed on her sixth birthday. Her adoptive parents are "parents" for immigration purposes and can petition for her. (Starr does not qualify for SIJS because she was never in the Juvenile Court system.)

Difficulties in Immigrating Through Family as Compared to Through SIJS

There are serious disadvantages to immigrating as described above, through a family visa rather than special immigrant juvenile status. Depending on the type of petition and the child's country of origin, the child might wait from several months to several years before becoming a permanent resident. During that waiting period the child does not have a legal right to be in the United States or to receive work authorization, and could be subject to deportation proceedings if discovered by INS. In many cases the child eventually must travel outside the U.S. for a few days to complete processing for permanent residency. Also, all of the grounds for inadmissibility, including the public charge ground, will apply so that a child supported by public benefits probably would not qualify. If the family relationship is at all shaky (for example, with a parent from whom the child is somewhat estranged) the parent may not want to submit the binding "affidavit of support" that makes him or her liable if the child accepts any public benefits. If the child has spent any time in undocumented status in the U.S. after reaching the age of 18, it may be difficult to immigrate because of "unlawful presence bars."

Children whose parents became permanent residents through an amnesty or legalization program of the 1980's have a somewhat easier time. Besides being eligible to immigrate through a family visa petition, the children also may be eligible for temporary **family unity** status. To qualify for family unity status, the child need not reside with the parents but must have resided in the United States since May 5, 1988, must not be inadmissible, and must meet other requirements.⁶⁶ Family Unity status gives them permission to remain in the U.S. and to have work authorization during all or part of the time they are waiting to immigrate through the visa petition.

A child who was born outside the U.S. to a parent who already was a permanent resident may be a permanent resident or be able to immigrate quickly through the parent.

The bottom line is: Family immigration has become complex and various bars apply. Consult an expert immigration practitioner before choosing this option. And in almost every case, it is better to immigrate through SIJS (instead of, for example, the new adoptive family) or the Violence Against Women Act, if that is an option. The exception, of course, is if the INS is aggressively contesting the SIJS status and family immigration contains no legal blocks.

Violence Against Women Act Petition (VAWA)

If the child was **abused by a U.S. citizen or permanent resident parent** (including stepparent) who is not willing to file a visa petition on behalf of the child, and the child meets some other requirements, the child can "self-petition" through VAWA provisions. (This relief also is available to abused spouses.) Many children passing through Juvenile Courts are eligible for VAWA but are not identified. For example, the citizen stepfather might abuse the child, but the child later is reunited with her mother. In that case, both child and mother probably are eligible for VAWA. Persons working with Juvenile Courts should understand VAWA, and should spread the word to their colleagues. People working with adult victims of domestic violence also need to understand VAWA.

In order to qualify for VAWA the child must establish that:

- The child has been battered by or been the subject of extreme mental cruelty
- committed by a parent who is a U.S. citizen or lawful permanent resident of the U.S.;
- The child has resided with the citizen or permanent resident parent (“resided” can include any period of visitation)
- The child has good moral character and
- The child currently resides in the U.S., with some exceptions

Even if the child herself was not abused, if her parent was abused and qualifies for this relief, the child may qualify as a “derivative” VAWA beneficiary.

Example: When Kim was 16 her mother married Steve, a U.S. citizen. Kim and her mother are undocumented immigrants (have no lawful immigration status). Steve refused to petition to get his new wife and stepdaughter their immigration papers. When Steve began to sexually abuse Kim, the county removed Kim from the home. Kim’s mother left Steve, and eventually the county gave Kim back into her mother’s care.

Kim does not qualify for SIJS, because she was reunified with a parent (her mother). However, Kim qualifies for a green card under VAWA. She can “self-petition” through her U.S. citizen stepfather Steve even without his cooperation because she meets the VAWA requirements: he’s a citizen or permanent resident, he abused her, she resided with him, she’s currently in the U.S., and she has good moral character.

In this example, Kim’s mother also could apply for VAWA even if Steve did not abuse her. Kim’s mother could qualify for VAWA as the mother of an abused child. Likewise, if Steve had abused her mother but not Kim, Kim would have been able to qualify as a derivative of her mother’s VAWA self-petition.

Note that VAWA only works if the abuser was a U.S. citizen or permanent resident. If Steve had been undocumented or had any other immigration status less than a green card, Kim and her mother would not be eligible for VAWA relief.

The definition of “parent” as it pertains to stepparents, adoptive parents, and children born out of wedlock is the same as described in the section above in family immigration, with one exception. A spouse for VAWA purposes includes an intended spouse, that is someone who thought she was legally married to the abuser, but who really wasn’t because he was secretly married to someone else at the time. A women also can qualify for VAWA if her child is abused, even if the mother is not married to the abuser.

Cancellation of Removal

General Cancellation.

Persons who have lived in the United States illegally for ten years or more and who are put into deportation (“removal”) proceedings can apply to the immigration judge for **cancellation of removal**, if they have close relatives who are U.S. citizens or permanent residents and who would suffer hardship if the person was deported.

Example: Marta is 17 years old and has a U.S. citizen baby with serious medical problems. She has lived undocumented in the U.S. since she was five years old. If she were placed in removal proceedings, Marta could apply for cancellation of removal by showing that her baby would suffer if they went back to Marta’s home country. Marta would not have to show that she had been abused or been under the jurisdiction of a Juvenile Court judge.

Cancellation for Victims of Abuse.

The Violence Against Women Act (VAWA) described above created a special cancellation of removal for a spouse or child who has been abused by a U.S. citizen or permanent resident parent. The person only has to have resided in the U.S. for three years, but she must show that deportation would cause extreme hardship to her, her children, or her parents.

Example: Esteban is a 19 years old and undocumented. He has lived in the U.S. for four years. Esteban’s mother, who is a permanent resident, has physically abused him for some time. Esteban is in removal proceedings. He can apply for cancellation of removal under VAWA.

Sara is 14 years old and has lived in the U.S. for three years. Her permanent resident father never married her undocumented mother. Her father abused Sara, and she was placed in her mother’s custody. Sara is eligible for VAWA cancellation of removal.

If the judge as a matter of discretion decides to cancel the removal (stop the deportation), then the applicant will become a permanent resident. Cancellation is a highly discretionary relief, and consultation with an expert immigration practitioner is required.

Asylum and Temporary Protected Status

People who fear returning to their home country can apply for **asylum or withholding of removal**. In some cases the courts have granted asylum based on severe domestic violence or issues involving gender, even if the persecution and abuse was committed just by family members. Applicants *must* obtain expert representation before applying for asylum. The test for asylum is complex: the person must fear persecution from the

government or a group that it is unwilling or unable to control, based on the person's race, religion, political opinion, nationality, or social group.

In addition, people from certain countries of natural disaster or civil strife may be able to obtain **Temporary Protected Status (TPS)**, which provides temporary permission to be in the United States and temporary work authorization. Recently countries such as Angola, Bosnia- Herzegovina, Burundi, El Salvador, Guinea-Bissau, Honduras, Kosovo, Liberia, Montserrat, Nicaragua, Sierra Leone, Sudan, and Somalia have been designated for TPS or similar relief. For example, any person from El Salvador who can prove that he or she was in the United States as of February 2001 can apply for TPS. For up-to-date TPS information, go to www.ins.usdoj.gov/graphics/services/tps_inter.htm.

“U” Visa for a Victim of, and Witness Against, a Serious Crime

Persons who are the victim of a serious crime, and who have been or will be helpful in the investigation or prosecution of the crime, may be able to obtain a “U” visa. This may be crucial relief for people who do not qualify for VAWA or SIJS because they are not in the Juvenile Court system, or because the abuser was not a citizen or permanent resident.

Example: Marsha and her parents are undocumented. Marsha's father sexually abused her. Marsha and her mother left the father. Marsha is not eligible for SIJS because she is with a parent and not in the Juvenile Court system. She is not eligible for VAWA because her abusive parent was not a citizen or permanent resident. But if she or her mother cooperate in a criminal investigation against her father, they may be eligible for a “U” visa. The temporary “U” visa status would give them employment authorization and protection against deportation, and might lead to a green card.

There is no requirement of any family relationship between the victim and criminal.

Example: Sonya is an undocumented woman. A doctor in her rural area sexually abused many undocumented women patients. Sonya is participating in an investigation and prosecution of the doctor for sexual assault. Sonya may be eligible for a U visa, even though she is not related to the doctor.

Tara was mugged on the street outside her home. She picked the mugger out of a line-up and is cooperating with the prosecution in other ways. She may be eligible for the U visa.

To qualify for a U visa the applicant must establish the following:

- The applicant suffered substantial physical or mental abuse as a result of being a victim of serious criminal activity that occurred in the U.S. or its territories. Serious criminal activity includes crimes such as domestic violence, rape, incest, abusive sexual contact, prostitution, kidnapping, abduction, extortion, serious assault, etc.;
- The applicant (or if the applicant is a child under age 16, the parent, guardian or next friend of the applicant) possesses information concerning this criminal activity;
- The applicant (or if the applicant is a child under age 16, the parent, guardian, or next friend) has or will be helpful in investigation or prosecution of criminal activity; and judge, prosecutor or other official must certify that this is true.

Ten thousand “U” visas will be awarded each year. They are temporary, but they can lead to lawful permanent residency. Because this visa was just created in the fall of 2001, there is not yet detailed information on how to apply. Contact an immigration specialist for up-to-date information.

“T” Visa – Assistance for Victims of Alien Trafficking

A person who is or has been a victim of a “severe form of trafficking in persons” may be able to apply for a “T” Trafficking Crime Visa. This includes victims of sex trafficking, which is defined as the recruitment, harboring, or transportation of a person for the purpose of a commercial sex act such as prostitution. Also, it can include the recruitment, harboring or transportation of a person for labor services, involuntary servitude, slavery or debt bondage through the use of force, fraud or coercion. An applicant must establish the following to qualify for a T visa:

- The applicant is or has been a victim of a severe form of trafficking in persons.
- The applicant is physically present in the United States on account of such trafficking
- The applicant has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or has not attained 15 years of age, and
- The applicant would suffer extreme hardship involving unusual and severe harm if removed from the U.S.

Example: Chan was brought into New York by a violent gang of Chinese smugglers. He is 14. He understood that he must work in a sweatshop basement for years to pay them back for his passage. He believes that they will kill him if he is sent back to China. They said that they would find him and torture him if he tried to escape. His older sister was smuggled in to work as a prostitute. She is cooperating in a criminal case against the smugglers, and has even greater fear of them. Chan and his sister should be eligible for the T visa.

Five thousand “T” visas will be awarded each year. They are temporary but lead to lawful permanent residency. Because this visa was just created in the fall of 2001, there is not yet detailed information on how to apply. Contact an immigration specialist for up-to-date information.

Inherited or Derived U.S. Citizenship

Some people who were born outside the United States **inherited U.S. citizenship** from their parents without knowing it. If a child has a parent or grandparent who was a U.S. citizen, you should obtain help from expert immigration counsel to analyze the complicated laws governing “acquisition of citizenship.”

Also, a child may automatically become a U.S. citizen if, before he reaches the age of 18, he becomes a permanent resident, at least one of his parents is a U.S. citizen, and he lives in the U.S. in that parent’s legal and physical custody.

This automatic “derivation of citizenship” rule applies to adopted children. A child automatically becomes a U.S. citizen if, while under the age of 18, she

1. is a permanent resident, through SIJS, family immigration, or any means;
2. is legally adopted by a U.S. citizen before she reaches the age of 16, and has resided at any time in the legal custody of the citizen for two years; and
3. is residing in the legal and physical custody of the U.S. citizen parent.

For more information on immigration relief, contact an **immigration attorney** or **community agency**. You may be able to obtain free assistance. Or, in some cases counties have retained immigration lawyers to process the cases.