

USCIS Policy Updates for Special Immigrant Juveniles:

A Practice Advisory for State Court Practitioners

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Background

Special Immigrant Juvenile Statute (SIJS): In 1990, Congress established SIJS as a form of immigration relief for immigrant children who have been abused, neglected or abandoned by one or both parents and who are in the United States without status. Since 1990, Congress has modified the requirements for establishing SIJS. Most recently, the Trafficking Victims Protection Reauthorization Act (TVPRA) modified the SIJS statute to its current version.

A child may now obtain SIJS if: (1) he or she has been declared dependent on a juvenile court or has been committed to the custody of a state agency, department, individual or entity; (2) because reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar state law basis; (3) it has been determined that it would not be in the child's best interest to return to her home country; and (4) the Secretary of Homeland Security consents to the grant of SIJ status. INA § 101(j); TVPRA § 235(d).

Only state courts can make determinations based on state law about abuse, neglect or abandonment, family reunification and the best interest of the child. It is the state court that provides a predicate order with the language necessary to apply for SIJS with U.S. Citizenship and Immigration Services (USCIS). This SIJS findings can be included in custody and paternity orders, guardianships, adoptions, divorce decrees, etc. Only USCIS can grant a child immigration status via SIJS.

October 2016 Policy Changes

On October 26, 2016, USCIS, the agency within the Department of Homeland Security (DHS) responsible for adjudicating SIJS petitions, issued an updated Policy Manual on the standards for evaluating SIJS cases.¹ This practice advisory summarizes some of the changes that are particularly important to state court practitioners who obtain predicate orders for SIJS cases.

Jurisdiction

¹ Available at: <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html>

Under 8 C.F.R. 204.11, any court “having jurisdiction under State law to make judicial determinations about the custody and care of juveniles” has authority to make SIJS findings.² The Manual clarifies that “examples of state courts that may meet this definition include: juvenile, family, dependency, orphans, guardianship, probate, and delinquency courts.”³ Any “juvenile court” order must either declare the child dependent on the court, or place the child in custody of an individual or agency. This can include court-appointed guardians, but there must be a final order of guardianship or custody; a temporary guardian or “temporary custodial placement” will not be acceptable for SIJS purposes. For individual custodians, the child must be placed in that person’s physical custody — legal custody will not suffice.⁴

Any order should begin with a recitation that the court has jurisdiction over the parties and subject matter in the case. This will help the immigration attorney establish to USCIS that the juvenile court has appropriate jurisdiction.

The juvenile court that issued the order must have jurisdiction over the child at the time the SIJS petition is filed.⁵ In most states, jurisdiction over a minor terminates when the minor turns 18 (with the exception of certain dependency or delinquency proceedings). This means a state court practitioner should ensure the minor’s immigration attorney receives the predicate order **well before** the child’s 18th birthday, to give them time to file the SIJS petition.

The Manual also notes that the state court order must determine that the court intends that the child will not reunify with at least one parent until the child reaches the age of majority. For example, just because a child’s parent or parents are temporarily unavailable does not mean that family reunification is not viable.

Evidence

Each of the factual findings, including the finding that reunification with one or both parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law, should include some factual basis within the order.⁶ This can be a brief explanatory sentence. For example, “Child’s mother abandoned the family in 2012 and child has had no significant contact with the mother since that time.” The order should not just recite the statutory language. Depending on the facts of the case, there could be a scenario where all three forms of harm (abuse, abandonment, and neglect) are present. If that is the case, be sure to specify that all three forms of harm occurred. You may want to incorporate these factual allegations into the initial petition and draft a detailed affidavit with your client in support of their petition. There is often no court

² See also *Perez-Olano v. Holder*, Case No. CV 05-3604 (C.D. Cal. 2005).

³ USCIS Policy Memo, Volume 6, Part J, Chapter 3.A.1.

⁴ USCIS Policy Memo, Volume 6, Part J, Chapter 2.D.1

⁵ USCIS Policy Memo, Volume 6, Part J, Chapter 2.D.4.

⁶ USCIS Policy Memo, Volume 6, Part J, Chapter 3.A.4

reporter in parentage and probate courts, so it is essential to have detailed pleadings and orders to ensure that your evidence is recorded. If a court relies on hearing testimony that is not in the pleadings, make sure to reference that testimony in your order.

Establishing Paternity

Perhaps the most significant change in the Manual is USCIS's new policy regarding establishment of paternity. It has always been important to establish which parent has abused, abandoned, and/or neglected the child, and to name that parent where possible. USCIS, however, now requires that "if the findings are based on a father not listed on the petitioner's birth certificate, a determination that the claimed father is the father under state law should be established in the juvenile court order."⁷ This means that in cases where the father is unknown, or where a child is the product of rape, USCIS could find a predicate order without a named father insufficient, despite clear abandonment or abuse from which a child needs protection. If you are unable to establish paternity in the order, make as strong a record as possible regarding the abuse, abandonment, or neglect, and work closely with the immigration attorney to allow them to advocate around this issue at USCIS.

The Manual also notes that the term "parent" does not encompass a step-parent unless the step-parent is recognized as the child's legal parent under state law.⁸

Child's Best Interest

USCIS believes that it is not sufficient for a court to determine that it is in a child's best interest to remain with his caretaker here in the United States. There must be a specific determination that it would not be in the child's best interests to return to the home country, and this determination should be supported with a factual basis.⁹ This can be as simple as the fact that there is no appropriate caregiver for the child in the home country. If you intend to provide evidence of dangerous conditions in the home country, be aware of evidentiary rules. Often an older child or the adult petitioner may be able to testify to personal knowledge of the danger to the child (threats from gangs, abuse from caregivers, etc.), avoiding the need to try to admit expert evidence about country conditions. Some practitioners, however, have found experts to be useful when a judge wants to hear more about the dangers in a particular country.

Motives

⁷ USCIS Policy Memo, Volume 6, Part J, Chapter 2.D.2.

⁸ USCIS Policy Memo, Volume 6, Part J, Chapter 2.D.2, fn 11.

⁹ Chapter 2.D.3, *citing* 58 FR 42843-01, 42848 (August 13, 1993).

For USCIS to consent to SIJS, it must determine the request is *bona fide*, which it interprets to mean that the predicate order was sought to obtain relief from abuse, abandonment, neglect, or similar basis under state law, and not primarily or solely to obtain an immigration benefit.¹¹ Since there are always significant benefits attached to having a legal custody or guardianship order, it is important to talk to your client ahead of time about what the most important benefits to their family would be, and include those in the petition and order. For example, in a divorce case that includes a custody order, the primary benefit is to the parent divorcing. An order establishing parentage or legal custody may assist with school enrollment, access to health insurance, or allowing a single parent to obtain a passport for a child. A common scenario is that a parent may leave her child in the care of others in the home country through a “power of attorney” letter. Once that child returns to live with her parent in the United States, a custody order can help to clarify and prevent any potential conflict around who that child’s lawful caretaker is.

Format of the Predicate Order

These predicate order findings may be made in a single court order or in separate court orders. The order(s) should use language establishing that the specific findings (conclusions of law) were made under state law. **The order(s) should not just mirror or cite to immigration law and regulations.** The court order may use different legal terms than those found in the Immigration and Nationality Act as long as the findings have the same meaning as the requirements for SIJS classification.

Remember that the order or supporting evidence should include ALL of the following findings:

- With whom the child is placed [*name the individual custodian or agency*];
- That the child’s reunification with one or both parents [*specify which and name the parent(s)*] is not viable due to abuse, abandonment, neglect, or a similar basis under state law [*specify which ground(s) apply, and briefly state facts in support*]; AND
- That it is not in the child’s best interest to return to her home country [*briefly state reasons why*].

This Practice Advisory is written and intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. If you are in the process of obtaining a predicate order for an SIJS eligible child and are unsure about the specific findings the predicate order should have, we encourage you to request the guidance of an immigration attorney familiar with SIJS.

¹¹ See USCIS Policy Memo, Volume 6, Part J, Chapter 2.D.5. “USCIS recognizes that there may be some immigration motive for seeking the juvenile court order.” *Id.*