SIJS "Q & A":
For Children in DCS Foster Care

Four immigration law experts[1] responded to some complex questions regarding Special Immigration Juvenile Status (SIJS) and children in the foster care programs funded by the Office of Refugee Resettlement's Division of Children's Services (hereafter referred to as "DCS.") The information provided here is to help DCS foster care caseworkers better understand the SIJS application process for children in their care; however, specific legal questions about a child's case should be addressed and answered by the child's attorney.

General Questions

1. How would you advise caseworkers about what crosses the line between explaining the process to kids, and giving legal advice to kids?

It is important not to give the children legal advice. Refer the children to their attorneys for any and all questions regarding legal matters. Attorneys who work with SIJS clients should be trained to deal with children and should be able to explain the process and the legal consequences to the children. Unfortunately, there are sometimes not enough attorneys to go around. However, each case and each question is, in fact, so complicated that a layperson's answer is likely to be wrong (as is a brief answer from a lawyer not familiar with the particulars of the case.)

2. Can an SIJS child petition for siblings after becoming a U.S. Citizen? What is the process?

Eventually, but not any time soon. An *adult* United States citizen is allowed to petition for siblings. Thus the petitioner will need to be a U.S. citizen and also be over age 21. A child can apply to naturalize (become a U.S. citizen) five years after becoming a lawful permanent resident (LPR). Typically, there is a very long backlog of brothers and sisters of U.S. citizens.

The process is filing Form I-130, "Petition for an Alien Relative," and waiting.

Although a child granted SIJS could file for a sibling, the child cannot file for a parent. The immigration code explicitly states that "no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act." (INA section 101(a)(27)(J)(iii)(II)).

3. If the child's abusive parent(s) are in the U.S., how can this affect an SIJS case?

If the child's parent is in the U.S. and has abused, abandoned or neglected that child, the

[1] Names and affiliations (at the time this information was provided) were: Professor James Eyster, of Ave Maria School of Law; immigration attorneys Sarah Bronstein of Catholic Legal Immigration Network, Inc. (CLINIC)/San Francisco, Anne Chandler of the University of Houston Law Center, and Deborah Lee of Florida Immigrant Advocacy Center; and Ave Maria law student Amanda Caldwell.

child would still be eligible for SIJS. If there is no history of abuse by one parent and the court places the child under the custody of that parent, but reunification with the other parent is not viable due to abuse, neglect, abandonment, or a similar basis, the child might still be eligible for SIJS, but this might be a more difficult case.

4. What are the differences and advantages of case termination vs. administrative closure?

Case termination is the closure of a removal proceeding – it essentially ends that particular court case. However, even if the immigration judge terminates the case, the government may be able to reinstate proceedings by filing a new "Notice to Appear" with the immigration court.

Administrative closure allows an immigration judge to indefinitely suspend a removal proceeding pending the results of administrative action – it is like putting the case on a shelf. In that situation, the child is still considered to be in removal proceedings. Proceedings can be re-calendared (put back on the court's hearing calendar) at any time by any party.

Generally, termination is better for the child, since it allows the child to submit the SIJS (I-360), LPR (I-485), and work permit (I-765) applications simultaneously. The weakest route is a continuance, where the judge re-calendars the case every six months or annually.

Many judges will not terminate or administratively close the case until the I-360 has been approved, while other judges may be willing to terminate or administratively close the case once the attorney has filed the I-360, or received an I-360 filing receipt, if the child appears SIJS eligible. Judges will also take into account the opinion of the trial attorney, who represents the Department of Homeland Security's (DHS) interests in the court case.

5. At what point in an SIJS case should the immigration attorney ask the immigration judge to terminate or administratively close the case?

Ask early and often may be the best answer. Some judges will be unwilling to terminate a removal proceeding before the child has adjusted status to LPR, since all of the allegations of removability remain and there is no proof that the child will receive SIJS and adjustment. However, whether an immigration judge will terminate or administratively close a case often depends on the position of the government attorney representing DHS. When to approach the government attorney for administrative closure depends on the facts of the case and the trial strategy. For example, the strategy may differ if the child is also seeking asylum as a form of relief.

Once the I-360 is approved, the judge will need to decide on a motion or preside at a hearing to terminate or administratively close removal proceedings against the child, if the child's attorney decides it is better strategically for the child to apply for adjustment of status before the U.S. Citizenship and Immigration Services (USCIS). It may be just as easy for the judge to adjudicate the I-485 as to close or terminate removal proceedings. Keep in mind that if proceedings are terminated, the I-485 is typically adjudicated by USCIS. If proceedings are administratively closed, the immigration judge typically retains jurisdiction over the I-485

and must adjudicate it after one of the parties has moved to re-calendar the proceedings. (However, there can be a few exceptions to these jurisdictional rules). Which route makes the most sense will vary depending on the child's individual circumstances and where the proceedings are taking place.

In some USCIS Districts, it may be faster to adjust status (that is, adjudicate the I-485) before the immigration judge, while in other Districts it may be faster to adjust status before USCIS. One attorney has noted that she has her SIJS clients adjust before the USCIS when there is a serious inadmissibility issue (a reason that USCIS could deny permanent residency, such as certain crimes); otherwise, she has them adjust before the immigration judge.

6. In places where the immigration judge will only issue continuances, are the number and length of the continuances merely up to the judge's discretion? Could a judge refuse to grant continuances, even though a child has a pending I-360?

The regulation at 8 C.F.R. section 1003.29 provides that an immigration judge may grant a motion for a continuance for good cause shown. In making this determination, the immigration judge considers the arguments raised in the motion and any supporting documentation. Of course, the adjudication of a motion for a continuance is within the discretion of the immigration judge on a case-by-case basis. The judge can deny a continuance and order removal. The child's attorney could then appeal to the Board of Immigration Appeals (BIA) and while the BIA appeal is pending, move to reopen the removal proceedings if the I-360 and I-485 were approved.

7. Are I-360s adjudicated by individual USCIS district offices? What does it mean to file at a "lockbox facility?"

Current USCIS procedure is that all I-360s and concurrent filings of I-360s and I-485s should be sent to the Chicago "lockbox." To file at a lockbox means to file at the address for USCIS. This is a secure post office box. Contract employees of the DHS open the mail, inspect the forms, fees, and evidence and either return the applications or issue receipts and forward the applications to the appropriate DHS local office.

8. After an I-360 is submitted, what acknowledgement is received from USCIS? Is this sent to the child applicant and the attorney, or just the attorney?

The attorney and child each should receive a detailed filing receipt from the USCIS, and then later a copy of the approval; however, this does not always happen. In some jurisdictions attorneys do not regularly receive notices of approval for I-360s for children in proceedings. In other jurisdictions, the I-360 decision will be made immediately following the USCIS interview, and if positive, an approval letter issued the same day.

9. How long does/should an I-360 decision take?

The 2008 Trafficking Victims Protection Reauthorization Act (TVPRA) requires DHS to process these applications within 180 days after the application is filed.

10. If a child submits the I-360 first, and it is approved, what status do they have at that point, before the I-485 is approved?

With only I-360 approval, a child would be considered paroled into the U.S. (under the Immigration and Nationality Act [INA] section 245 (g)), however this is *not* a permanent status.

11. What is the impact on an SIJS case if the child has:

a. An existing removal order?

This is a complex area of law, so there is not a simple answer. Attorneys will typically request that the case be reopened or submit a motion to stay (or suspend) the removal order (though there may be some exceptions to this). The proper course of action will depend on the attorney's case-by-case assessment.

b. A concurrent asylum application or asylum case on appeal?

The TVPRA created important procedural protections for unaccompanied children who are in removal proceedings and seeking asylum. USCIS asylum officers have initial jurisdiction over any asylum application filed by an unaccompanied child, including applications that would have been filed as a defense to removal in immigration court. This means that the child's asylum case is heard first in the non-adversarial setting of the asylum interview, rather than in immigration court.

Also, the one-year filing deadline does not apply in the cases of unaccompanied minors. That is, there is no requirement that unaccompanied minors file their asylum application within one year of their entry into the United States.

If the child's asylum (or withholding of removal) application is denied by USCIS, the government may initiative removal proceedings. The child may renew the applications in removal proceedings. The child cannot be removed until all administrative and judicial remedies, including the appeals to the BIA and U.S. Court of Appeals have been exhausted (provided the attorney files and obtains a stay of removal from the Court of Appeals).

c. If the child has a final order of removal, why is it necessary to reopen removal proceedings in order to apply for SIJS?

A motion to reopen is necessary if the child has an outstanding removal order from the immigration court or the Board of Immigration Appeals, meaning the child could be deported at any time. USCIS cannot adjudicate an application for legal relief (such as SIJS) unless the case is reopened.