IMMIGRATION BENCHBOOK

For Juvenile and Family Court Judges

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IMMIGRATION BENCHBOOK FOR JUVENILE & FAMILY COURTS

CHAPTER 1

INTRODUCTION AND OVERVIEW

SUMMARY

- Section 1.1 discusses why immigration law is relevant to family and juvenile courts.
- Section 1.2 describes the contents of this Benchbook and how to use it.
- Section 1.3 describes different types of immigration status.
- Section 1.4 is a list of immigration law deadlines relevant to family and juvenile court proceedings.

§ 1.1 Why Address Immigration Issues?

State court judges do not have jurisdiction to make decisions about immigration status. Why should bench staff become familiar with any aspect of immigration law?

The answer is that state court decisions can have conclusive impact on immigration issues; a large number of persons appearing before family and juvenile courts are not citizens of the United States and their lives may be profoundly affected by these decisions; and in some cases Congress has requested state courts to participate directly in the immigration process.

The immigrant population in the U.S. has grown significantly in the last decade. According to the National Population Projections released in 2008 by the U.S. Census Bureau, 12 percent of the U.S. population is foreign-born. Recent estimates of the undocumented immigrant population is 11.9 million people.[1] Moreover, approximately 1 in 5 children in the U.S. are either immigrants or the children of immigrants.[2] The foreign-born in the United States have a variety of immigration statuses: they may be naturalized United States citizens, lawful permanent residents ("green card" holders), temporary visa holders, undocumented, or in a number of less common categories. (See description of types of status at § 1.3.)

In most cases, the persons most directly affected by state court orders are the millions of undocumented persons who do not have lawful immigration status, but who might qualify to apply for such status. Children who need to apply for Special Immigrant

[1] A 2008 report of the Pew Hispanic Center, a project of the Pew Research Center.
[2] Ron Haskins, Mark Greenberg & Shawn Fremstad, Executive Summary: Children of Immigrant Families: Analysis, The Future of Children, Vol. 14, No. 2, David and Lucile Packard Foundation (Summer 2004). Available at http://futureofchildren.org/futureofchildren/publications/docs/14_02_ExecSummary.pdf. (Hereinafter "Children of Immigrant Families.")

Juvenile status or to immigrate through an adoptive parent; battered spouses attempting to escape from a batterer who uses the victim's lack of immigration status as a weapon; and victims of crimes who are fearful of coming forward because of immigration issues all appear before family and juvenile courts and all potentially can apply for status based on the events being litigated in court.

Judges need to understand certain aspects of immigration law simply because in the process of conducting normal business they may unknowingly make decisions with far-reaching immigration consequences. In the timing of divorce and adoption decrees, the finding of a violation of a protection order, or certain delinquency findings, the court may foreclose or create immigration options.

> **Example:** A court continues an adoption hearing to a date past the immigrant child's 16th birthday. The child thereby loses all rights to gain lawful status through her adoptive U.S. citizen parents. (See **Chapter 5**, § 5.1).

Further, in some contexts federal law requires state courts to make specific findings directed to immigration authorities, in order for the person to receive status. A dependency, delinquency or probate court will make specific findings to be provided to the Citizenship and Immigration Services (CIS) in order to permit certain children to become permanent residents as "Special Immigrant Juveniles." (See **Chapter 2**.) A court certification that a crime victim will be a helpful witness in the resolution of a criminal case can serve as the basis for a "U" visa. (See **Chapter 4**, § 4.3, Part B.)

In other cases an informed court simply may find it appropriate to direct counsel to investigate certain immigration factors that may have an impact on the case.

> **Example:** In a domestic violence case, the court directs counsel for the undocumented victim to investigate the possibility of relief under the Violence Against Women Act, which would foreclose her husband's ability to have her deported. (See **Chapter 3**.) The court may also provide the defense bar, or all persons who become subject to restraining orders, with a printed warning that violating a protection order may destroy lawful immigration status. See **Appendix I.** In a juvenile case, the court may direct counsel to review immigration options with an undocumented child using a basic questionnaire such as one provided at **Appendix G.**

§ 1.2 Scope of this Benchbook

This benchbook presents a summary of the aspects of immigration law relevant to juvenile and family court. It provides critical basic information, and also should enable bench staff, advocates and others to flag issues. If more in-depth information is required, readers should refer to **Chapter 11,** a listing of specialized books and manuals, technical assistance, websites, and other resources.

This book is organized as follows:

- **Chapter 1** provides a brief overview of immigration law and status, and a summary highlighting important deadlines in immigration law that can affect the timing of state court orders.
- **Chapters 2-4** describe the ways that undocumented persons can obtain lawful status, with an emphasis on Special Immigrant Juvenile Status (**Chapter 2**), relief for abused spouses and children under the Violence Against Women Act (**Chapter 3**), and other forms of relief including U nonimmigrant status and asylum (**Chapter 4**).
- **Chapter 5** discusses several immigration aspects of adoption, including the important rule that an adoption must be finalized by a child's 16th birthday to have immigration effect and ensuring compliance with the Hague Convention where the country from where the child is from is a signatory to that treaty.
- **Chapter 6** discusses immigration aspects of family court rulings, including the impact of divorce, protection orders, and custody decisions.
- **Chapter 7** discusses immigration aspects of delinquency rulings. This includes an analysis of what offenses have negative immigration effect and what forms of immigration status are most likely to be available to children in delinquency. It discusses the effect of referring children to immigration authorities for deportation.
- **Chapter 8** discusses issues pertaining to children in detention and deportation proceedings, including how juvenile courts can apply for jurisdiction over children who are detained by immigration authorities, and the effect of an immigration "hold" or "detainer" on someone detained due to delinquency (or adult criminal) proceedings.
- **Chapter 9** provides a brief overview of a complex area of law, the immigration consequences of adult criminal convictions. It examines the effect of some convictions common to domestic violence and child abuse situations.
- **Chapter 10** goes into more detail about how immigration law works, examining the concept of deportability and inadmissibility, and reviewing specific bases for deportation ("removal").
- **Chapter 11** is a compilation of resources that provide more in-depth information on the above topics.
- **Appendices** consist of material relevant to the discussion of Special Immigrant Juvenile Status and Violence Against Women Act applications, as well as a few guides that can be used by the court or given to counsel or persons appearing. The guides include diagnostic questions to determine an individual's eligibility for lawful status, a chart to determine whether a person born abroad may have inherited U.S. citizenship, and an informational notice to persons who will be subjects of domestic violence protection orders.

What Happened to the Immigration & Naturalization Service (INS)?

On March 1, 2003, the responsibilities of what was formerly known as the Immigration and Naturalization Service (INS) were transferred to the Department of Homeland Security (DHS). The DHS has distributed these duties and responsibilities to three bureaus within DHS: the Citizen and Immigration Service (CIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP). CIS is responsible for immigrant related services and benefits that were previously performed by the INS. ICE carries out the domestic investigative and enforcement responsibilities for enforcement of federal immigration laws. CBP is responsible for border enforcement.

Most issues related to the application and adjudication of forms of immigration relief covered in this benchbook will be handled by the CIS. Their website is found at www.uscis.gov. Most cases of noncitizens currently in removal proceedings are handled by ICE. Their website is now found at ww.ice.gov. Cases of children in immigration detention may be handled by ICE or the Office of Refugee Resettlement (ORR). This is discussed further in **Chapter 8**.

§ 1.3 Overview of Immigration Status

This section provides basic information about different forms of status.

Note that many noncitizens have misconceptions about their own status. For example, they may believe that they are permanent residents when in fact they have only a temporary employment authorization. The best practice for them is to photocopy any documents they have and show them to an experienced immigration practitioner.

A. United States Citizens and Nationals

Any person born in the United States or U.S. territories, such as Puerto Rico, Guam, and U.S. Virgin Islands is a United States citizen. Some persons born abroad inherit U.S. citizenship at birth from a citizen mother or father. Some persons automatically acquire citizenship because, before their 18th birthday, they became a lawful permanent resident and one or both parents became naturalized U.S. citizens. See discussion at § 4.1 and **Appendix H**. A lawful permanent resident who meets certain requirements can apply to become a U.S. citizen in a process called naturalization.

A U.S. citizen cannot be deported ("removed") for any reason, except in some circumstances where the citizenship was acquired by fraud. A U.S. citizen can petition

for a parent, spouse, child or sibling to immigrate, i.e. can apply for them to become permanent residents.

A less commonly encountered status is that of a "noncitizen national" of the United States. Currently, the only people with noncitizen national status are American Samoans and Swain Islanders.[3] Noncitizen nationals have an immigration status that combines elements of citizenship and lawful permanent residency. While U.S. nationals cannot be deported, they do not have all the privileges of citizenship. They can apply to become citizens through naturalization.

B. Lawful Permanent Residents

A lawful permanent resident has the right to live and work permanently in the United States and, with some restrictions, to travel outside the United States for extended periods of time. After five years (or less in some cases), a permanent resident over the age of 18 can apply for naturalization to U.S. citizenship. A permanent resident can apply to immigrate a spouse or unmarried child, i.e. petition for them to become permanent residents.

A permanent resident can lose lawful status and be deported from the United States ("removed") if he or she comes within a "ground of deportability." Common grounds of deportability include conviction of certain offenses in adult criminal court, a civil or criminal finding of a violation of a domestic violence protection order, and commission of certain immigration offenses. In some cases the person can apply for a waiver to have the ground of deportability forgiven. See **Chapter 10** on deportability.

C. Non-Immigrant Visa Holders and Other Temporary Status

A non-immigrant visa gives a noncitizen the right to enter and remain in the United States temporarily for a specific purpose. Common nonimmigrant visas are for visitors for business or pleasure ("B" visas); students or scholars ("F" or "J" visas); professional workers ("H" visas); and fiancées of U.S. citizens ("K" visas).[4]

In some cases the spouse and children under the age of 21 of the principal visa-holder will be permitted to enter on the visa as well. These "derivative beneficiaries" are not necessarily authorized to work or study, even if the principal visa-holder is. Derivative beneficiary spouses will lose their status if the marriage terminates.[5] If the principal visa-holder becomes deportable or otherwise violates the provisions of the visa, he or she as well as the derivative beneficiaries will lose status.

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[3] 8 USC § 1101(a)(22). Not all residents or people with ties to these territories are noncitizen nationals. For further discussion s*ee* Daniel Levy, U.S. Citizenship and Naturalization Handbook (West Group) § 2:15 - § 2:23 (2004).
[4] See the corresponding section in 8 USC § 1101(a)(15), e.g. § 1101(a)(15)(B) for visitors visas.
[5] Sarah B. Ignatius & Elizabeth S. Stickney, Immigration Law and the Family (West Group) § 14:25 (2004).

Some other kinds of temporary status permit persons to be in the United States for time periods ranging from months to years. See, e.g., discussion of Family Unity and Temporary Protected Status in **Chapter 4**. In addition, noncitizens who have filed certain immigration applications are given permission to remain and work legally in the United States while they wait for the authorities to adjudicate the application.

With so many types of status, confusion abounds. Some county social services staff appear to be confused about the immigration category "**Permanently Residing Under Color of Law" or "PRUCOL."** County agencies can contact the CIS, reveal the identity of an individual (say, a child in the juvenile court system), and ask the CIS to designate the child as PRUCOL by stating that it does not have current plans to deport the child. This assists the *agency* in obtaining reimbursement for limited public benefits for the child. It confers no immigration status on the *child.* Some county agency staff wrongly believe that obtaining PRUCOL confers a substantial and sufficient benefit for the child and no more work on immigration status is required.[6]

D. Undocumented Persons

Undocumented persons are those who have no current immigration status. The person may have crossed the border surreptitiously without inspection by an immigration official (known as "entry without inspection" or "EWI"). Or the person may have entered with a temporary visa such as student or tourist, and the visa now has expired. Many children are brought in by adults on borrowed or fake visas.

An undocumented person does not have the right to work lawfully or remain in the United States. The person is subject to removal if detected by the immigration authorities. In some states, laws allow certain undocumented young people residing in the state to attend state schools and pay in-state tuition.

Just because a person is undocumented does not mean that the person faces imminent deportation. Millions of people have lived undetected for many years in undocumented status in the United States, and enormous numbers of American families are "mixed," containing documented and undocumented persons. Each year hundreds of thousands of undocumented persons living in the United States acquire lawful permanent residency or some other lawful status.

§ 1.4 Immigration Deadlines that Affect Timing of State Court Rulings

The timing of juvenile and family court orders can be key to an immigration outcome. Here are important deadlines to keep in mind.

An adoption must be finalized by the child's 16th birthday. For a child to get any immigration benefits from an adoption, the adoption must be legally completed before the child's 16th birthday. There is an exception for adopted sibling groups: if natural siblings are adopted and one sibling's adoption is completed before the child's 16th

[6] *See Social Security Act, Sec. 1614(a)(1)(B)*; 20 CFR § 416.1618

birthday, the adoption of the others can be finalized any time before their 18th birthdays. See § 5.1.

Until further guidance is given by CIS, a child applying for SIJS should remain under the jurisdiction of the juvenile court until the CIS finally approves the entire application. Children under the jurisdiction of dependency, delinquency or probate courts who will not be reunified with their parents due to abuse, neglect or abandonment can apply for permanent residency with "Special Immigrant Juvenile Status" ("SIJS"). The SIJS statute provides that any unmarried person under the age of 21 who properly files an SIJS application with CIS cannot be denied regardless of their age at the time the entire application is decided. Regulations pre-dating the current statute, however, state that the court must retain jurisdiction over the application until the CIS actually grants permanent residency. While this requirement read in tandem with the age-out protection described above appears to eliminate the continuing jurisdiction requirement altogether, until CIS provides clear guidance on this issue jurisdiction over the child should be retained by the court. While CIS must adjudicate the first part of the SIJS application within 180 days, the second part of the application may take longer to adjudicate, potentially months and over a year. This can result in courts retaining jurisdiction longer than they normally would, or having to re-impose jurisdiction. If continuing to retain court jurisdiction in a case is not feasible, where applicable, courts should enter specific language in the juvenile court order terminating jurisdiction of the case that states the case is being closed due to age. See **Chapter 2,** § 2.2, Part F.

A marriage that was bona fide at inception continues to exist for immigration purposes until the moment of divorce, even if the parties are separated and believe the marriage is not viable. A family may wish to defer a divorce if the spouse and child are relying on the marriage to obtain immigration benefits. See **Chapter 4**, § 4.2 (family immigration) and **Chapter 6**, § 6.1 (divorce issues).

Divorce begins a two-year deadline for filing an application for VAWA based on the ex-spouse's abuse. In some cases a noncitizen abused by a U.S. citizen or permanent resident spouse or parent can apply for relief under the Violence Against Women Act ("VAWA") even after divorce, but the application must be filed within two years of the divorce. See **Chapter 3**, § 3.6, Part A.

CHAPTER 2

OBTAINING LAWFUL PERMANENT RESIDENCY: SPECIAL IMMIGRANT JUVENILE STATUS

- Special Immigrant Juvenile Status ("SIJS") provides lawful permanent residency to ***children who are under the jurisdiction of a juvenile court and who cannot be reunified with one or both parents*** due to abuse, neglect or abandonment.

- The following is a ***brief discussion*** of SIJS, providing information on how to identify a potential case.

- A ***comprehensive manual*** on SIJS and other immigrant youth legal issues, entitled *Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth* can be purchased at www.ilrc.org (click "publications"). Other resources are listed in **Chapter 11.**

Deadlines and Special Considerations. The SIJS application is based upon a special order that must be signed by the juvenile court judge. The applicant must be a dependent of the juvenile court or the court must have legally committed the child to, or placed him or her under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court. This broad definition includes children in dependency, guardianship/probate as well as delinquency proceedings. It also includes children who enter into dependency or are committed to the custody of individuals and are later adopted. The SIJS application should be submitted to CIS as soon as possible, because the juvenile court at this time should continue to retain jurisdiction over the noncitizen child until the CIS approves the entire application. (Note: this rule may change pending regulatory guidance from CIS.) The noncitizen child must also be unmarried and under the age of 21 at the time of filing. See **§ 2.2 Part F.** In dependency proceedings the application can be filed before or after reunification efforts are ended. Judges often direct children's attorneys or state agencies to investigate whether a child is SIJS eligible and, if so, to submit the application. Correctly determining eligibility is crucial because a non-eligible child who is denied SIJS could be referred for deportation. Some courts appoint immigration counsel to handle the case.

SUMMARY OF SIJS PROVISIONS

Recent Update in the Law. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) was signed into law by the president on December 23, 2008. This new legislation is designed to bolster federal efforts to combat trafficking and, in the process, to provide critical protections for the tens of thousands of unaccompanied minors who come to the United States each year. The law seeks to create

better screening of unaccompanied minors who may be the victims of trafficking and other vulnerable children, safer repatriation of any youth removed from the United States, more compassionate environments for children in immigration custody, and broader legal protections and access to services for these youth. Importantly, the TVPRA clarified and expanded the definition of Special Immigrant Juvenile and supersedes the previous statutory definition.

Benefits of SIJS application

- Temporary protection from removal (deportation) for pending affirmative SIJS cases
- Provides employment authorization and ability to remain in the United States, and eventual lawful permanent resident status (a "green card") (see § 2.4)
- Provides an easier way to immigrate than through family immigration as an adopted child (see § 2.6)
- Limited eligibility for public benefits

Requirements for Special Immigrant Juvenile Status (see § 2.2)

The basic requirements for SIJS as amended by the Trafficking Victims Protection and Reauthorization Act ("TVPRA") (signed into law on December 23, 2008) are as follows:[7]

- The applicant must be a dependent of the juvenile court or the court must have legally committed the child to, or placed him or her under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court. The definition includes children in dependency, guardianship/probate, delinquency proceedings, as well as children who enter into dependency or are committed to the custody of individuals and are later adopted (see § 2.2 Part A). Delinquency and probate courts may have special considerations (see § 2.2 Part H).

- The juvenile court must find that reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law, as opposed to just get the child lawful immigration status or for some other reason (see § 2.2 Parts B, C).

- A judge or administrative authority must have determined that return to the child's or parent's country of nationality or country of last habitual residence is not in the child's best interest (see § 2.2 Part D).

[7] These are the primary eligibility requirements for SIJS that should be set forth in a court order that will be presented in an SIJS application to CIS. There are additional requirements imposed by regulation for a grant of Special Immigrant Juvenile Status that are discussed here, but which are not essential for the court order.

These enumerated findings should be set out specifically in *an order signed by the juvenile court judge* or other presiding judge.[8] The signed order must be submitted to CIS with the petition for Special Immigrant Juvenile Status.

In addition to these findings for an SIJS order, federal regulations pre-dating the TVPRA provide additional requirements for SIJS applicants. These requirements include:

1) Consent to the grant of SIJS. Approval of an SIJS application by CIS itself is evidence of this consent;

2) Specific consent for a juvenile court determination changing the custody/placement status of a child in federal custody. The applicant must obtain "specific consent" from the Office of Refugee Resettlement (ORR);

3) The applicant be under the age of 21 when he/she files the SIJS petition;

4) Continuing juvenile court jurisdiction until permanent residency is granted. This provision predates changes enacted by the TVPRA, and to date, it is unclear whether this requirement will continue to exist when new regulations are issued. Many people believe that this regulation should no longer be required in order to be consistent with the age-out protections of the new SIJS definition under the TVPRA; and

5) The applicant remains unmarried pending the completion of the process.

Finally, to become a lawful permanent resident under SIJS, the child must not come within certain "grounds of inadmissibility" (see § 2.3).

[8] 8 CFR § 204.11(d)(2).

Cases that 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 delinquency or adult criminal record
- children who have been treated for drug dependency or alcoholism
- children who have been previously deported or removed, and
- children with mental or emotional problems that pose a threat to self or other, such as suicidal tendencies or sexual predator behavior.

§ 2.1 Overview: Obtaining Permanent Residency Through Special Immigrant Juvenile Status (SIJS)

Under the Special Immigrant Juvenile Status ("SIJS") law, an undocumented child who is declared dependent upon a juvenile court or committed to the custody agencies or departments of a state or to court-appointed individuals or entities, whose "reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law" and whose return to their country of nationality or last habitual residence is not in his or her best interest, may be able to obtain Special Immigrant Juvenile Status and, based on that, apply for lawful permanent residency (a green card). To do this, he or she 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 petition, they also must **apply for lawful permanent residency** (a green card). In immigration terminology, applying for permanent residency is called applying for **adjustment of status** to that of a lawful permanent resident. See § 2.3.

The two applications are filed at the same time in an affirmative application. In a defensive application, one in which the child is in removal (deportation) proceedings, the SIJS petition is submitted first and adjustment of status application is submitted later.

§ 2.2 Requirements for Special Immigrant Juvenile Status

The requirements for Special Immigrant Juvenile Status (or "SIJS") are set out in federal statute[9] and regulations.[10] It is important to note that on December 23, 2008, the statutory definition of a Special Immigrant Juvenile was amended by the Trafficking Victims Protection and Reauthorization Act of 2008 ("TVPRA"). To date, regulations implementing the new SIJS statutory language have not been issued. Until such regulations are issued, requirements under these regulations that do not conflict with and are not addressed by the SIJS statute remain in place.

SIJS eligibility is based on findings about the child made by a state juvenile court. The court must make the following findings:

- The court must declare the child to be a court dependent or must legally commit the child, or place him or her under the custody of an agency or department of a state, or an individual or entity appointed by a state or juvenile court.

- The court must issue a finding that *the child's reunification with one or both parents is not viable* due to abuse, neglect or abandonment, or a similar basis under state law, as opposed to just to get the child lawful immigration status or for some other reason.

- The court also must find that it is not in the child's best interest to return to the country of origin.

A. Under the Jurisdiction of a Juvenile Court: Dependency, Guardianship, Delinquency, and Adoption

The child must be declared dependent on a juvenile court located in the United States, or the court must have legally committed the child to or placed the child under the custody of, an agency or department of a State, or an individual or entity appointed by a state or juvenile court to be eligible for SIJS. The term "juvenile court" means a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.[11] In many states, this includes courts that handle dependency cases, guardianship cases, delinquency cases or adoption cases. Whether a court is a "juvenile court" under the federal definition is not determined by the label that the state gives to the court, but rather the function of the court.

The TVPRA has clarified that a state or juvenile court may commit the minor to the custody of an individual or entity, thereby making clear that guardianships are within the meaning of the statute. There is also support in the statute for children in delinquency proceedings to be granted SIJS.

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[9] *Id.*
[10] 8 CFR § 204.11, reprinted in **Appendix A.**
[11] 8 CFR § 204.11(a).

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 care and custody decisions for them—such as delinquency or probate proceedings—also are eligible.)

When a juvenile court accepts jurisdiction to make a decision about the care and custody of a child, for immigration purposes the child is dependent on a juvenile court. Establishing dependency on a juvenile court does not require state intervention or a decision to place the child in any particular form of care. A juvenile is dependent upon the court if she "[h]as been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court."[12] In other words, the

> acceptance of jurisdiction over the custody of a child by a juvenile court, when the child's parents have effectively relinquished control of the child, makes the child dependent upon the juvenile court, whether the child is placed by the court in foster care or, as here, in a guardianship situation.[13]

Guardianship Proceedings. While children placed in formal foster care certainly are dependent on a juvenile court, so are children for whom a court has appointed a guardian. Pre-TVPRA, children placed in guardianship with a non-parental family member through a probate court had been granted Special Immigrant Juvenile Status.[14] This longstanding interpretation of "state dependency" for SIJS purposes was confirmed by the TVPRA. Specifically, the amended statutory language specifies SIJS eligibility for children placed under the custody of "an *individual* … appointed by a state or juvenile court."[15] Specifically, a CIS Memorandum interpreting the changes that the TVPRA made to SIJS provisions states

> Accordingly, petitions that include juvenile court orders legally committing a juvenile to or placing a juvenile under the custody of an individual or entity appointed by a juvenile court are now eligible. For example, a petition filed by an alien on whose behalf a juvenile court appointed a guardian now may be eligible.[16]

A child for whom a guardianship is established may qualify for Special Immigrant Juvenile Status even if she was never formally removed from a parent by the state or placed in foster care.

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[12] 8 CFR § 204.11(c)(6).
[13] *In re Menjivar*, 29 Immig. Rptr. B2-37 (1994).
[14] Public Counsel Law Center, *Guardianship of the Person: Attorney Manual*, 2009. Available at: http://www.publiccounsel.org/publications/Guardianship%20of%20the%20Person%20-%20Attorney%20Manual%202009.pdf.
[15] 8 USC § 1101(a)(27)(J), as amended by the Trafficking Victims Protection Reauthorization Act of 2008, § 235(d), Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d). See Neufeld Memorandum, p. 2 at **Appendix B**.
[16] Neufeld Memorandum, p. 2 at **Appendix B**.

Qualifying guardianships may be established through any court empowered under state law to make decisions regarding the care and custody of children, including probate courts in many jurisdictions.

Delinquency Proceedings. Often SIJS is seen as a form of relief available only for children in dependency proceedings and, increasingly, in guardianship proceedings. As a result, relatively few children in delinquency proceedings apply for SIJS. Because courts that adjudicate delinquency petitions can make decisions about the care and custody of children, a decision issued by such a court adjudicating a child delinquent and making determinations about the custody of the child can serve to establish the requisite dependency on the juvenile court. The key here is that although the particular form or name of the proceeding may vary, a court is taking jurisdiction to make a decision about the care and custody of a child.

The plain language of the statute also provides support for the availability of SIJS to children in juvenile delinquency proceedings. It provides, "[T]he court must have legally committed the child to or placed the child under the custody of, an agency or department of a state.…"[17] State juvenile courts often place children under the custody of probation departments as a result of delinquency, which constitute agencies or departments of a state.

In addition, statutory language providing that the child cannot be reunified with one or both parents "due to abuse, neglect, or abandonment, or *similar basis found under state law*"[18] provides the basis for a delinquency court to enter SIJS findings. Some juvenile delinquency courts have hesitated to enter the requisite SIJS findings because the former statutory language required courts to make findings exclusively regarding abuse, neglect, or abandonment. Some delinquency courts concluded that these findings were in the sole jurisdiction of dependency courts and, therefore, they did not have the authority to make them. The TVPRA, however, through the phrase "a similar basis found under state law," gives delinquency courts broader leeway to enter similar findings within their jurisdiction.

It is important to note that CIS has acknowledged that delinquency proceedings are one type of juvenile court proceeding in which SIJS findings can be made, but has not explicitly addressed the issues of delinquency in detail. Therefore, children in delinquency who apply for SIJS may be at greater risk of being denied by CIS. (Children in delinquency may also be denied for other important reasons such as issues related to inadmissibility and discretion; see discussion below.) 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 viable and permitted under state law. This eliminates any legal question that might arise related to this SIJS requirement. Children in delinquency who are unable to obtain placement in dependency and are

[17] 8 USC § 1101(a)(27)(J)(i).
[18] *Id.*

considering applying for SIJS should be informed of the possible risks of submitting an affirmative application.

Nonetheless, it is not impossible to obtain SIJS for children in delinquency. Many children in delinquency proceedings have been granted SIJS.[19]

Dangers of Delinquency. Note that a few types of delinquency findings are dangerous because they trigger "grounds of inadmissibility" that can make a child ineligible to adjust his or her status to that of a lawful permanent resident. The most dangerous findings are for sale or for 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 automatically cause immigration problems. Any child with a delinquency record should have an expert in this area review the case at least to evaluate eligibility.

Adoption Proceedings. Just as children in guardianship proceedings can qualify for SIJS, so too can some children who are in adoption proceedings and who have been placed under the custody of "an *individual* … appointed by a state or juvenile court."[20]

Many times before a juvenile court finalizes an adoption for a child, the juvenile court judge will place the child formally in the legal and physical custody of the prospective adoptive parents. If this happens, the child may be eligible for SIJS presuming all other requirements are met. The court handling the adoption is clearly a "juvenile court" for SIJS purposes and the custody order clearly places a child in the custody of an individual (or individuals) appointed by the juvenile court.

A child for whom an adoption proceeding is pending may qualify for Special Immigrant Juvenile Status even if she was never formally removed from a parent by the state or placed in foster care.

CIS has long taken the position that children who are going to be, or have been, adopted can qualify for SIJS. The SIJS regulation specifically permits children who have been adopted to apply for SIJS and states that a child can apply if a juvenile court has found that family reunification is not viable and the child proceeds to long-term foster care, guardianship, or adoption.[21] Moreover, the automatic revocation provision in the regulation provides that an approved SIJS application will not be revoked in the case that the child is adopted.[22] Many children have obtained SIJS where he/she was ultimately adopted. See **Chapter 5** for more on adoption.

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[19] As one former INS official remarked, "We took sociology. We know that a lot of kids end up in delinquency for the same reason they could have ended up in dependency: because of abuse in the home."
[20] 8 USC § 1101(a)(27)(J), as amended by the Trafficking Victims Protection Reauthorization Act of 2008, § 235(d), Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d). Neufeld memorandum, p. 2 (acknowledging Special Immigrant Juvenile eligibility for a child "on whose behalf a juvenile court appointed a guardian").
[21] 8 CFR § 204.11(a).
[22] 8 CFR § 205.1(a)(iv).

How Are the Court Findings Presented?

The required SIJS findings must be set out in a simple order prepared especially for the SIJS application and signed by a state court judge. The child's attorney or social worker generally will prepare the order for the court's signature. The findings can be simple: "The court finds that the child cannot be reunified with one or both parents due to [abuse, neglect or abandonment or similar basis under state law], the court has made the child a court dependent [or placed the child in the custody of a state agency], and finds that it is not in the best interest of the child to be returned to the home country." They should also include brief but specific findings of fact to show that the juvenile court made an informed decision. These findings of fact need not be detailed but should include a sentence or two summarizing the evidence. Sample SIJS court orders appear at **Appendix D**.

Some states have created official juvenile court forms to be used for SIJS findings. For example, the California State Judicial Council has issued the JV-224 Order Regarding Eligibility for Special Immigrant Juvenile Status for use in the juvenile courts. Other states that have official SIJS forms include New York and North Carolina. Because some of these forms pre-date changes in the SIJS statutory language, they should be either interlineated or contain an attachment reflecting the new SIJS language. This is important as CIS will not accept orders with the old SIJS language and will require advocates go back into the court to obtain a new order reflecting the current SIJS statutory language.

B. The Juvenile Court Must Find That Reunification with One or Both Parents Is Not Viable

A judge must issue a court finding that *the child's reunification with one or both parents is not viable* due to abuse, neglect or abandonment or a similar basis under state law.[23]

A finding for SIJS purposes that reunification is not viable does not require formal termination of parental rights or a determination that reunification will never be possible. In other words, the possibility of reunification in the future need not deter a finding that reunification presently is not viable for purposes of SIJS.

The "one or both parents" language also signifies that the child need not be separated from both parents to be eligible for SIJS. In other words, the plain language of the statute provides SIJS eligibility on the basis of the non-viability of reunification with

[23] 8 USC § 1101(a)(27)(J)(i).

one parent due to abuse, neglect or abandonment, even while the child remains in the care of the other parent or while the court is actively trying to reunite the child with the other parent. CIS has approved such applications. Courts should be aware, however, that the parent with whom the child remains or with whom he/she eventually reunifies will not be eligible for legal status through the child at any point in the future, even after he or she becomes a U.S. citizen.

It is also important to note that the former SIJS statute required an applicant to have been "deemed eligible for long-term foster care" by the court, which in turn was interpreted to mean that family reunification was no longer a viable option. The TVPRA eliminated this requirement, which had been a source of confusion for both juvenile courts and CIS. In essence, the TVPRA clarified the terminology in the statute and made clear that the child need not be in actual state foster care to be SIJS-eligible.[24]

> **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. Reunification with both parents is not viable and, therefore, she is eligible for SIJS.
>
> **Example:** Esteban's parents are being offered reunification services. He has been living in foster care for months. Since the judge has not yet found that reunification is not viable, he may not be eligible for SIJS.
>
> **Example:** David's father's parental rights were terminated due to abuse. David is in foster care, but reunification efforts are ongoing with his mother. David may be eligible for SIJS.
>
> **Example:** Sara was abused by her father and her mother failed to protect her from his abuse. Sara's situation was reported to local child welfare authorities. Sara's mother left Sara's father. Subsequently, the juvenile court reunified Sara with her mother. For SIJS eligibility, the juvenile court only needs to find that family reunification with one parent—here, Sara's father—is not viable.

C. The Court's Findings and Orders Must Be Based on Abuse, Neglect or Abandonment of the Child, as Opposed to Being a Sham to Get Immigration Status for the Child.

The court's order should make it clear that reunification with one or both parents is not viable *due to abuse, neglect or abandonment of the child or a similar basis under state law*, as opposed to just to get the child lawful immigration status or for some other reason.[25]

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[24] USCIS Memorandum, Donald Neufeld and Pearl Chang, "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions" HQOPS 70, 8.5 (Mar, 24, 2009), page 2. (Hereinafter the "Neufeld Memorandum" found in **Appendix B**).
[25] 8 USC § 1101(a)(27)(J).

Abuse, neglect and abandonment are defined under state law and do not have to take place within the United States for the child to be eligible for SIJS. The relevant question for SIJS eligibility is whether a court, under the applicable law of the state, has found abuse, neglect or abandonment or some other similar finding. While this language prohibits establishing SIJS eligibility via juvenile court jurisdiction for children not otherwise in need, it does not require that formal charges of abuse, neglect or abandonment be levied against parents. For example, a child for whom the court appoints a guardian can qualify without a separate proceeding against the parents alleging abuse, neglect or abandonment.

Under changes by the TVPRA, the SIJS statute now allows for SIJS eligibility based on findings under state law "similar" to abuse, neglect, or abandonment. For example, some states use different legal terms, other than abuse and neglect, to describe the basis for refusing to reunify a child with his or her parents. Other courts, such as delinquency, may not normally enter abuse and neglect findings, but other findings for which they have jurisdiction. The TVPRA broadened the eligibility requirements such that these state law findings based on slightly different vocabulary meet the SIJS statutory requirements. However, the applicant must still establish that such a basis is in fact similar to a finding of abuse, neglect, or abandonment. To avoid this extra step, if the child was declared a dependent under some other legal term it is best for courts to include in the SIJS order (discussed below) one of the designated statutory terms "abuse, neglect or abandonment." The order should contain the term whose plain meaning reflects what actually happened to the child.

The SIJS order should specifically identify whether abuse, neglect or abandonment or a similar basis in law was the foundation for the determination that reunification with one or both parents was not viable. For example, the court order could state, "The minor's reunification with the parent is not viable based on abuse" or "The above orders and findings were made due to abandonment and neglect of the minor." See sample judges' orders in **Appendix D**. According to CIS memorandum, the judge's order, or other documents submitted, also must provide a very basic statement of the facts that supported the order.[26]

D. The Court 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 should include in its SIJS order (discussed below) that it is not in the child's best interest to be returned to his or her country of nationality or last habitual residence. The evidence for this finding may range from a foreign social service agency's home study determining that a grandparent's home is not appropriate to simply interviewing the child to learn that there are no known appropriate family members in the home country. If the juvenile court does not include this language in its SIJS order, the applicant must submit evidence that this finding has been made in another administrative or judicial proceeding.

[26] Neufeld Memorandum, page 2 at **Appendix B**.

E. Applicant Must Be Under 21 and Demonstrate Proof of Age

Any person under the age of 21 who meets the other requirements can apply for SIJS.[27] Historically, this meant that applicants needed to complete the entire immigration adjudication process prior to turning 21. However, under the TVPRA, as long as the applicant is a "child" (defined in immigration law as an unmarried person less than 21 years of age) on the date the SIJS petition is properly filed with CIS, CIS cannot deny SIJS regardless of the applicant's age at the time of petition's adjudication.[28] In other words, so long as the applicant is a child at the time of proper filing, the applicant's age will be locked in time for purposes of the SIJS petition. This new rule applies *only* to petitions pending on or filed on or after December 23, 2008.

Note on Applicants Who Are 18 or Older. State laws generally require that a child be under age 18 at the time he/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/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 dependency to age 21. Similarly, different states have different laws on how old a young person must be to enter or stay under juvenile court jurisdiction in a delinquency case.

Under the regulations, any person under 21 who meets the SIJS requirements can apply for SIJS.[29] Thus as far as CIS is concerned, a 19-year-old could become a juvenile court dependent for the first time at age 19 and could file an SIJS petition and have it approved—so long as he/she meets the other SIJS requirements. In practice, however, most jurisdictions will not declare a youth dependent once they are 18 or older.

Proof of Age. Federal regulation requires every applicant for SIJS to submit some documentary proof of age. The evidence can take the form of a

> "birth certificate, passport, 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 [CIS district] director establishes the beneficiary's age."[30]

The catch-all "other document" category creates a generous standard because it is understood that some of these children will not have necessary information or will have a hard time obtaining documents from the home country. When submitting substitute "other documents," it is important to remember the following:

- A child submitting a substitute document must provide written evidence that a birth certificate was sought and was not available.[31]

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[27] 8 CFR § 204.11(c)(1). See reprint of regulation in **Appendix A**.
[28] Trafficking Victims Protection Reauthorization Act of 2008, § 235(d), Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d)(6).
[29] 8 CFR § 204.11(c)(1). See reprint of regulation in **Appendix A**.
[30] 8 CFR § 204.11(d)(1). Immigration counsel may be able to assist with finding a foreign birth certificate.
[31] This can be correspondence with a foreign registrar showing that no birth certificate can be found, or a statement in the Foreign Affairs Manual (FAM) of the U.S. State Department that credible birth certificates

- A variety of foreign documents as well as affidavits are acceptable proof of age.[32] When no documents at all are available, advocates have submitted a doctor's or a dentist's evaluation, or findings regarding age made by a juvenile court.[33]

F. Until Further Guidance is Provided, the Juvenile Court Should Retain Jurisdiction Until the CIS Finally Grants the Application.

SIJS regulations pre-dating the TVPRA provide that the person applying for Special Immigrant Juvenile Status must remain under juvenile court jurisdiction throughout the entire immigration process—that is, until CIS approves the petition for SIJS *and* the application for adjustment to lawful permanent residency. [34] Because this provision predates changes enacted by the TVPRA and regulations implementing the new SIJS statute have not been issued, it is unclear whether this requirement will continue to exist.

When this requirement is read in tandem with the TVPRA's new age-out protection (described in section E above), however, it appears this continuing jurisdiction requirement is eliminated altogether for children whose juvenile court cases close due to age. If CIS cannot deny SIJS to any person on account of "age," as long as he/she was under the age of 21 when the SIJS petition was filed, CIS cannot then refuse to approve an SIJS petition or revoke an approved SIJS petition simply because the child's juvenile court case has been closed if this closure is because of "age." This issue comes into play, for example, under state law where dependency, delinquency, or other juvenile court jurisdiction ends when a child turns 18 years old. For these reasons, many people believe that this regulation should be changed to reflect the age-out protections of the TVPRA.

As of early October 2009, CIS stated that it will approve SIJ petitions for children whose juvenile court cases have closed prior to adjudication as long as the cases were

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are not available from that country. A copy of the FAM is reprinted in the multi-volume work found in most county law libraries, *Immigration Law and Procedure* by Mailman and Yale-Loeher (Matthew Bender Publishing Co.).

[32] Another list of commonly accepted substitute documents is found at the CIS regulation defining substitute documents for birth certificates in family visa petitions. See 8 CFR §§ 204.1(f) and (g)(2). But the SIJS regulation is broader than this, and documents that are not on this list may be accepted.

[33] In California under Welfare & Inst. Code § 362, a juvenile court can make any and all reasonable orders for the care of a minor. California Health & Safety Code § 103450 provides that a petition may be filed for "an order to judicially establish the fact of, and the time and place of a birth . . . that is not registered or for which a certified copy [of birth certificate] is not obtainable." This provision enables an individual for whom no birth record is available to obtain a "Court Order Delayed Registration of Birth," a public document issued by the California Department of Health Services that may be used as a formal record of birth. CIS will still require showing of due diligence in obtaining original birth certificate, but once that is shown, the Court Order Delayed Registration of Birth should be accepted.

[34] 8 CFR § 204.11(c)(5), reprinted at **Appendix A**.

open when the petitions were filed.[35] CIS has warned that there is no guarantee, however, this policy will continue once new regulations are issued, so courts should proceed cautiously with terminating jurisdiction in such cases prior to the SIJS case conclusion.[36]

If the court is considering termination of jurisdiction, judges should consider keeping the child under juvenile court jurisdiction until the immigration process is complete. If continuing to keep jurisdiction in a case is not feasible, where applicable, courts should ensure that the juvenile court order terminating jurisdiction of the case contains specific language that states the case is being closed due to age.

Continuing existence of this regulation creates a difficult situation and needlessly costs state systems time and energy by requiring children to stay longer in the juvenile court system than they otherwise would. We hope that better rules will appear in the future as a result of the TVPRA's age-out protection.

> **Example:** Julia entered the foster care system when she was 14-years-old. Because social workers had not heard about SIJS earlier and did not know about her immigration situation, Julia did not apply for SIJS until she was 19. The juvenile court retained jurisdiction over Julia until she was 20 and the CIS granted her SIJS application.
>
> **Example:** Mario entered the delinquency system when he was 15-years-old and resided in a foster care group home for years. Mario did not apply for SIJS until he was 18-years-old. The juvenile court terminated jurisdiction on Mario's 19th birthday due to his age and the fact he had completed probation. Mario should remain eligible for SIJS because he was under 21 on the date he applied for SIJS and a denial based on a lack of continuing juvenile court jurisdiction would be "based on age"—something the TVPRA prohibits.

One exception to this rule is for children who are adopted or placed in guardianship. A child placed in adoption or guardianship after receiving a dependency order will continue to be considered a juvenile court dependent, despite the fact that a final adoption normally would terminate court jurisdiction.[37] See discussion of the adoption issue in **Chapter 5**, § 5.4.

G. The Applicant Must Be Unmarried

Applicants for SIJS must remain unmarried until the entire immigration process is completed and CIS grants permanent residency. An applicant's being divorced or having his or her own children does not bar SIJS eligibility.

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[35] Irena Lieberman, Associate Counsel, Office of the Chief Counsel, Refugee and Asylum Law Division, U.S. Citizenship and Immigration Services on TVPRA Implementation panel at Unaccompanied Minor Conference, Oct. 2009, Washington D.C.
[36] *Id*.
[37] May 27, 2004, "Memorandum # 3," supra, p. 4, fn. 8, reprinted as **Appendix C**.

§ 2.3 Application for Lawful Permanent Resident Status

Once the child establishes eligibility for SIJS, she next must establish that she is eligible to become a lawful permanent resident. The task here is to show that she does not come within any of the applicable bars, called "grounds of inadmissibility," or if she does, that she qualifies for a waiver of the bar. (Note, however, that children seeking SIJS-based adjustment of status are automatically exempted from many grounds of inadmissibility. Also, special waivers of inadmissibility are available to Special Immigrant Juveniles that do not require a qualifying relative.) A child who does come within the "grounds of inadmissibility" that apply to SIJS will be barred from becoming a permanent resident and might be referred for deportation proceedings, unless a waiver is available and they persuade immigration authorities to grant it.

In general, SIJS applicants *might* be barred from permanent residency if they

- have a record of involvement with drugs or prostitution
- have an adult criminal record
- are classed as mentally ill, suicidal, or a sexual predator
- have engaged in alien smuggling
- were previously deported

To determine whether the child is inadmissible, the CIS will take the child's fingerprints and obtain an **FBI report**, which may reveal any delinquency or adult criminal record. The child will take a special **medical exam and interview** designed to reveal involvement with illegal drugs, whether the child has designated diseases, and whether the child is mentally ill. The child also must truthfully answer **questions on the I-485 form**, Application to Register Permanent Residence or Adjust Status, covering the grounds of inadmissibility.

Children who might be or are inadmissible 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. More detailed information about the grounds of inadmissibility is found in **Chapter 10**.

§ 2.4 The Application Procedure for SIJS and Adjustment of Status

The process of applying for SIJS and adjustment of status depends upon whether the child is applying affirmatively or defensively (while in removal proceedings as a defense to deportation). Some steps are similar and others differ.

Affirmative Cases. The child will file two applications, one for Special Immigrant Juvenile Status and one to adjust status to lawful permanent residency at the

same time. The child or any "responsible adult" can complete the I-360 Petition for Special Immigrant Juvenile status and I-485 Application for Adjustment of Status. The child also must complete other CIS forms, obtain a special medical exam, and provide special CIS photographs and proof of age. Later in the application process children over 14 will be fingerprinted so that the CIS can obtain an FBI file. The application costs a few hundred dollars in fees, but a fee waiver is available.[38] The applicant does not have to travel outside of the United States, but can apply locally. Applicants generally need to have a photo identification to complete their biometrics and for their CIS interviews.

After the applications are filed with CIS, the child can obtain employment authorization. CIS will schedule an appointment for the child to be photographed and fingerprinted, and the FBI will complete a check of any criminal or delinquency record or prior deportation for children 14 and older. CIS must adjudicate SIJS petitions within 180 days of filing, so the child should be scheduled for adjustment of status interview within six months of the filing date. When CIS interviews the child, he/she often can have a social worker, and certainly an attorney, attend if desired. CIS might approve the case at the interview, or might request further information. If CIS denies the case, it might or might not refer the child to a judge for removal (deportation) proceedings. The child can appeal the SIJS petition's denial to a higher unit at CIS, but it cannot appeal the denial of the adjustment of status application. Instead, the adjustment of status application can only be renewed before the immigration court.

Defensive Cases. The child still must file two applications, one for Special Immigrant Juvenile Status and one to adjust status to lawful permanent residency. Unlike in affirmative cases, however, she does not file them together. Instead, the child first files her SIJS petition with CIS—since CIS alone has the power to grant or deny a child's SIJS petition. Besides the forms, the child must submit the SIJS order and some proof of age such as a birth certificate. In addition, the child's immigration attorney must also submit a biometrics packet to CIS so that the child can have her background checks completed. CIS may adjudicate the SIJS petition with or without an interview of the child. Again, this adjudication must happen within 180 days of the SIJS petition's filing. If CIS denies the child's SIJS petition, the child can appeal to a higher unit at CIS. If CIS approves the child's SIJS petition, she proceeds to the next step.

Once CIS has approved the child's SIJS petition, then the child's immigration attorney will file the child's adjustment of status application with the immigration judge—since the immigration judge alone has the power to grant or deny a child's adjustment of status if the child is in removal proceedings.[39] Besides the forms, the child must submit the results of a medical exam conducted by a CIS-approved doctor and filing fees. After these steps are completed, the immigration judge will schedule a merits hearing for the child. At that hearing, the immigration judge will take testimony and will likely issue a decision on the child's case. If the immigration judge approves the case,

[38] 8 CFR § 103.7(c). See discussion of applying for fee waivers in the SIJS manual cited in **Chapter 11**.
[39] The only exception is if the child is charged as an "arriving alien" in her removal proceedings. In that case, CIS has jurisdiction to adjudicate the child's adjustment of status application. 8 CFR §§ 245.2(a)(1), 1245.2(a)(1).

the child becomes a lawful permanent resident. If the case is denied, the child can file appeals with the Board of Immigration Appeals and then the federal courts, depending upon the circumstances.

Note that if the immigration judge is willing to terminate the child's removal proceedings upon the filing or approval of the child's SIJS petition, then the child can proceed affirmatively with her case and seek her adjustment of status before CIS rather than in immigration court.

Expeditious Adjudication. SIJS petitions are now required to be adjudicated expeditiously, within 180 days after the date on which the application is filed.[40] Advocates have been informed that this expeditious requirement only applies to the SIJS petition (I-360) and not the entire application, which includes the adjustment of status application (I-485). In order to comply with this requirement, CIS has the discretion to waive interviews with applicants under the age of 14 or when it is determined that an interview is not otherwise necessary. CIS has also been instructed that interviews should be scheduled as soon as possible.[41] Action in federal court may be possible if CIS does not adjudicate a child's SIJS petition within the 180-day time frame.

Further discussion and a sample application packet appear in the SIJS manual referenced in **Chapter 11**.

§ 2.5 Natural Parents, or Prior Adoptive Parents, and Maybe Siblings, Cannot Benefit through Grant of SIJS to Child

A child who immigrates as a Special Immigrant Juvenile essentially ceases to be the "child" of his or her natural or prior adoptive parents for immigration purposes.[42] 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, even if parental rights were not terminated. 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. These parents generally don't lose any immigration benefit that they otherwise would have had, because without SIJS their undocumented child usually could not have helped his or her parents to immigrate. Even though under the TVPRA a child may qualify for SIJS if only one parent is abusive, neglectful or has abandoned him or her, the other, non-offending parent still faces this same bar. He or she cannot gain any immigration benefit through the child. In some cases where children want to help a non-

[40] TVPRA, P.L. 110-457 at § 235(d)(2).
[41] Neufeld Memorandum, page 4, at **Appendix B**.
[42] 8 USC § 1101(a)(27)(J), INA § 101(a)(27)(J), reprinted in **Appendix A**.

offending parent to also obtain lawful immigration status, U nonimmigrant status may be a better option.

A U.S. citizen who is at least 21-years-old can petition for permanent resident status for a sibling. Unfortunately, it may be that the child who gained lawful permanent residency through SIJS 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 considered the "child" of the natural or prior adoptive parent, CIS may assert that the child no longer has a sibling relationship with brothers and sisters for immigration purposes. Even if the child can apply for siblings, the main drawback is that sibling's petition would be considered "fourth preference." These petitions generally have a long waiting period (of from 10 to 20 years after the petition is filed) before the sibling receives any legal rights.

Although ineligible to benefit from their child's SIJS status, some parents are concerned that other immigration penalties will flow from their child receiving SIJS, or from a court order finding that reunification was not viable. These fears appear to have no basis. Legally, a parent will not become deportable or inadmissible based on an SIJS grant, a court finding that reunification with their child was not viable, or termination of parental rights. In practical terms the SIJS application does not require divulging the parent's exact address or immigration status, and the CIS does not attempt to discover this information in order to move against undocumented abusive parents. A criminal conviction for child abuse, neglect or abandonment is a ground of deportability, however. See **Chapter 10.**

§ 2.6 Immigrating Through SIJS as Compared to "Regular" Family Immigration

Some children may have the choice of immigrating through SIJS or through a new adoptive parent who is a U.S. citizen or permanent resident. In almost every case, it is easier to immigrate through SIJS than through a family visa petition.

Some of the disadvantages of family immigration are: if the parents are permanent residents as opposed to U.S. citizens, the child may have to wait for several years before becoming a permanent resident with no rights in the United States during the waiting period; where applicable, adoption may be complicated by the maze of requirements imposed by the Hague Convention (see Chapter 5); the child may have to travel outside the United States for a few days to complete processing for permanent residency;[43] and more of the grounds for inadmissibility, including the public charge ground, will apply so that a low-income family might not be able to immigrate their adopted child.

[43] Children immigrating through family members must leave the United States to process their papers unless the child's parent is a U.S. citizen and the child entered the United States with inspection (with permission from immigration officials at the border). There is an exception to this rule for children whose visa petitions were filed by a family member by April 30, 2001.

In unusual cases it may be better to immigrate through the adoptive parents than through SIJS. Persons considering this route should consult with an expert immigration attorney before deciding. See discussion in **Chapter 5** at § 5.4.

For an adoption to be recognized by immigration authorities, it must be completed by the child's 16th birthday. The only exception is that in the case of a sibling group. There, if one sibling's adoption is completed by the 16th birthday, the others may be completed before their 18th birthdays. See **Chapter 5**, § 5.1.

§ 2.7 Children in Immigration Custody Who Apply for SIJS

If an unaccompanied immigrant child is already in immigration custody before coming to juvenile court, a juvenile court judge cannot make custody or care decisions about the child without the Office of Refugee Resettlement's (ORR) permission. Specifically, the SIJS statute states that

> "no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction."[44]

Importantly, specific consent is not required for a juvenile court to take jurisdiction over a child's case or to enter SIJS findings. Custody or placement decisions are not always ones that arise in the process of obtaining the SIJS order. Specific consent is only required where a juvenile court will deal with a child's custody or placement status.

Requests for consent for a juvenile court to order a change in custody or placement determination over a child in ORR custody must be made in writing to ORR.[45] As of October 2009, ORR had approved all requests for specific consent. The only requests ORR returned were those for whom specific consent was not required.

[44] INA § 101(a)(27)(J)(iii)(I), 8 USC § 1101(a)(27)(J)(iii)(I), reprinted in **Appendix A**.
[45] Neufeld Memorandum, page 4 at **Appendix B**.

CHAPTER 3

OBTAINING LAWFUL PERMANENT RESIDENCY: VIOLENCE AGAINST WOMEN ACT (VAWA)

- Noncitizens who have been ***abused by a U.S. citizen or permanent resident spouse or parent or a U.S. citizen son or daughter*** may be able to apply for permanent residency under provisions of the Violence Against Women Act ("VAWA"). There is no requirement of specific family or juvenile court findings, although court findings may serve as evidence to support the application.

- The following is a ***brief discussion*** of VAWA, providing information on how to identify a potential case.

- A ***comprehensive manual*** on VAWA that supplies additional information and practice guides entitled, *The VAWA Manual*, is available for purchase from ILRC, 1663 Mission St., Suite 602, San Francisco CA 94103 (go to www.ilrc.org and click on "publications"). See **Chapter 11** for additional resources.

Deadlines and Special Considerations. The timing of a divorce may affect eligibility for VAWA by starting a two-year deadline for applying. Certain criminal convictions relating to domestic violence will render the abuser deportable (see **Chapter 9**), which in turn may establish a deadline for family members' application for VAWA See § 3.6.

SUMMARY OF VAWA PROVISIONS

- **Benefits of self-petitioning under VAWA**
  - Provides immediate employment authorization and ability to remain in the United States
  - Provides eventual lawful permanent resident status (a "green card")

- **Who can apply to self-petition under VAWA**
  - Abused spouses of United States citizens (USCs)
  - Abused spouses of Lawful Permanent Residents (LPRs)
  - Non-abused spouses of USCs or LPRs where a child is abused

- Abused children of USCs or LPRs
- Child of a self-petitioning spouse can derive VAWA benefits even if the child was not abused
- Abused parents of USCs
- Both male and female victims are eligible to apply

Persons in removal proceedings can apply to cancel their removal based on VAWA factors. See discussion in Chapter 4, § 4.7.

- **Requirements to self-petition under VAWA:**

  - The abuser is (or was) a USC or LPR (see § 3.2)
  - The abuse came within a broad definition of battery or extreme cruelty (see § 3.3)
  - The self-petitioner lived with the abuser (see § 3.4);
  - Requirements for a self-petitioning spouse (see § 3.5)
    - The self-petitioner is (or was) legally married to the LPR or USC abuser or is the parent of a child who was abused by the LPR or USC spouse
    - The marriage that forms the basis of the self-petition was a "good faith" marriage
    - The LPR or USC abused the self-petitioner during their marriage
  - Requirements for a self-petitioning child (see § 3.6)
    - The self-petitioner must qualify as a "child" under immigration law, meeting particular requirements for biological children, adopted children, stepchildren and children born out of wedlock
    - Children of the self-petitioner may qualify for derivative status, even if not abused
    - The self-petitioner is a person of good moral character (see § 3.7)

§ 3.1 Overview: Obtaining Permanent Residency Through the Violence Against Women Act

Federal immigration law permits United States citizens (USCs) and lawful permanent residents (LPRs) to *petition* for lawful status for certain family members through a "family visa petition." In some abuse situations, U.S. citizens and lawful permanent residents use immigration status to exert control over their undocumented family members, by threatening to call immigration on them and refusing to file petitions for them. The Violence Against Women Act (VAWA) permits an abused spouse or child of a USC or LPR or an abused parent of a USC to *self-petition* for lawful immigration status without the cooperation of the abuser. Once a self-petition is approved, the self-petitioner will not be deported, will be qualified to work legally in the U.S., will be eligible for certain public benefits, and will be eligible to eventually adjust status (get a green card). This chapter addresses this major provision.

Who Can Self-Petition Under VAWA. VAWA allows the following persons to self-petition for permanent residency in the United States:

- Abused spouses of United States citizens (USCs).[46]
- Abused spouses of Lawful Permanent Residents (LPRs).[47]
- Non-abused spouses of USCs or LPRs where the child is abused, even if the child is not related to the USC or LPR abuser.[48]
- Abused children of USCs or LPRs.[49]
- Abused parents of USC sons or daughters.[50]

Note: VAWA self-petitioners can include their children as derivatives, whether or not the children are abused and whether or not the children are related to the abusive USC or LPR.[51] The children will qualify for any benefits the parent receives.

***Other Provisions of VAWA*:**

- One VAWA provision allows for a **conditional permanent residency waiver** to waive the requirement that abused spouses or children need to jointly petition with the abuser to remove their conditional resident status.
- Another VAWA provision creates special rules to make it easier for an abused spouse or child of a USC or LPR to qualify while in removal proceedings for **VAWA cancellation of removal**. Cancellation of removal is only for people who are in immigration court proceedings and there is a danger that an immigration judge might remove (deport) them from the United States.

§ 3.2 The Abuser Must be (or Have Been) a United States Citizen or Lawful Permanent Resident

Self-petitioners will qualify for VAWA only if the abuser is or was a United States Citizen (USC) or a Lawful Permanent Resident (LPR).

If the abuser loses his lawful permanent resident status or U.S. citizenship *before the self-petition is approved,* the victim still can self-petition as long as (a) the abuser's loss of status was due to an incident of domestic violence and (b) the

[46] 8 USC § 1154(a)(1)(A)(iii).
[47] 8 USC § 1154(a)(1)(B)(ii).
[48] *Id.*
[49] 8 USC § 1154(a)(1)(A)(iv) [children of U.S. citizens]; 8 USC § 1154(a)(1)(B)(iii) [children of lawful permanent residents].
[50] 8 USC § 1154(a)(1)(A)(vii).
[51] 8 USC § 1154(a)(1)(A).

self-petition was *filed within two years* of the date the abuser lost his lawful immigration status.[52] Victims should be warned of this deadline.
If the abuser loses immigration status for any reason *after the self-petition is approved*, that loss of status will not affect the self-petitioner's case for self-petitioning or adjustment of status purposes.[53]

A noncitizen victim is ineligible for VAWA if the abuser was not a USC or LPR. For example, noncitizen spouses of abusers who are undocumented or in the United States on a nonimmigrant visa status are not eligible for VAWA. These victims should investigate other forms of immigration relief that don't require particular immigration status. See, e.g., the "U" nonimmigrant status (commonly known as the "U Visa") for victims of serious crime who are helpful in a criminal investigation or prosecution, where no family relationship or immigration status is required (see **Chapter 4**); Special Immigrant Juvenile Status for children under juvenile court jurisdiction (see **Chapter 2**); and other relief outlined in **Chapter 4**.

Example: Sarit was severely beaten by her husband who is here on a temporary student visa. She is cooperating in a criminal prosecution against him. She is not eligible for VAWA because the abuser was not a USC or LPR. She might be eligible for a "U" visa as a crime victim and witness. See **Chapter 4**, § 4.3 Part B.

§ 3.3 The Abuse Must Constitute Battery or "Extreme Cruelty"

VAWA requires that the self-petitioner show that he or she, or his or her child, "has been battered or has been the subject of extreme cruelty" by the LPR or USC spouse or parent or USC son or daughter.[54] This definition is broadly and flexibly defined in CIS regulations and memoranda, and encompasses physical, sexual, and psychological acts, as well as economic coercion.[55] A person who has suffered no physical abuse may still be eligible to self-petition.[56] The abuse must rise to a certain level of severity, however, to constitute battery or extreme cruelty.[57] Examples of non-physical abuse that may constitute extreme cruelty include social isolation of the victim, accusations of infidelity, incessantly calling, writing or contacting her, interrogating her friends and family members, threats, economic abuse, not allowing the victim to get a job, controlling all money in the family, and degrading the victim.

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[52] 8 USC § 1154(a)(1)(B)(ii)(II)(aa)(CC)(aaa), 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(CC)(bbb).
[53] 8 USC § 1154(a)(1)(A)(vi); 8 USC § 1154(a)(1)(B)(v)(I).
[54] 8 USC § 1154(a)(1)(A)(iii)(I)(bb) [spouses and intended spouses of U.S. citizens]; 8 USC § 1154(a)(1)(A)(iv) [children of U.S. citizens]; 8 USC § 1154(a)(1)(B)(ii)(I)(bb) [spouses and intended spouses of lawful permanent residents]; 8 USC § 1154(a)(1)(B)(iii) [children of lawful permanent residents].
[55] 8 CFR § 204.2(c)(1)(vi) [abused spouses]; 8 CFR § 204.2(e) [abused children].
[56] *Id.*
[57] Aleinkoff, Executive Associate Commissioner, Office of Programs, INS Memo entitled: Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents April 16, 1996, at 9-10 [reprinted as Appendix II, 73 Interpreter Releases 737, May 24, 1996].

Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution would also be considered acts of violence for this purpose.[58] Acts against a third person (including the other parent) may qualify as abuse if deliberately used to perpetuate extreme cruelty against the child. Witnessing domestic violence can also be a form of extreme cruelty.[59]

§ 3.4 The Self-Petitioner Lived with the LPR/USC Abuser

The self-petitioner must have resided at some point with the abuser, either inside or outside the United States.[60] There is no specified amount of time the self-petitioner must have lived with the abuser. The self-petitioner does not need to be residing currently with the abuser in the U.S. at the time the self-petition is filed. Thus, a self-petitioner can qualify even if she or he lived with the abuser for only a short time, or only in another country.

For children, residence with the abusive USC parent includes any period of *visitation* in the United States.[61] Thus a child can qualify even if she or he only lived with the abusive parent for a short time or only was visited by the parent.

§ 3.5 Actions that Take Place Outside the United States

The abuse need not have taken place in the United States. The self-petitioner need not reside in the United States in order to qualify under VAWA.[62] A self-petitioner who recently moved to the U.S. can qualify. Eligible noncitizens living outside of the United States can self-petition under certain circumstances.[63]

§ 3.6 Special Issues for Self-Petitioning Spouses

A. The Self-Petitioner Has (or Had) a Legal Marriage with the LPR or USC Abuser

[58] *Id.*
[59] *Id.*
[60] 8 USC § 1154(a)(1)(A)(iii)(II)(dd) [spouses and intended spouses of U.S. citizens]; 8 USC § 1154(a)(1)(A)(iv) [children of U.S. citizens]; 8 USC § 1154(a)(1)(B)(ii)(II)(dd) [spouses and intended spouses of lawful permanent residents]; 8 USC § 1154(a)(1)(B)(iii) [children of lawful permanent residents].
[61] 8 USC § 1154(a)(1)(A)(iv) [children of U.S. citizens] Periods of visitation with the abusive LPR parent may count as residence, but are not included in the statute.
[62] Prior to the Battered Immigrant Protection Act of 2000, the law required the self-petitioner to both *presently* reside in the United States AND have resided with the abuser in the United States.
[63] 8 USC § 1154(a)(1)(A)(v) [spouses, intended spouses, and children of U.S. citizens]; 8 USC § 1154(a)(1)(B)(iv) [spouses, intended spouses, and children of lawful permanent residents].

The self-petitioner must have or have had a legal marriage with the abuser (but see definition of "intended marriage" at (4) below). A marriage is considered valid for immigration purposes if it was valid in the place where it was performed or celebrated. The term includes common law marriages from places where they are recognized.

Even if the marriage ends through death or divorce, the noncitizen is not necessarily precluded from self-petitioning under VAWA.[64]

1) If the marriage was terminated *before the self-petition was filed*, the self-petitioner may obtain VAWA benefits as long as she (a) shows a "connection" between the divorce and domestic violence, and (b) files the self-petition within two years of the termination.[65] The divorce decree need not specifically state that the termination of the marriage was due to domestic violence.[66] Instead the self-petitioner must "demonstrate that the battering or extreme cruelty led to or caused the divorce," although "evidence submitted to meet the core eligibility requirements may be sufficient to demonstrate a connection between the divorce and the battering or extreme mental cruelty."[67]

2) If the marriage was terminated for any reason *after the self-petition was filed*, that termination will not affect the self-petition.[68]

3) If the abusive spouse is a USC and dies, the self-petition can be filed within two years of his death.[69] This provision does NOT apply to the spouses of abusive LPRs.

4) If the marriage was not valid because a prior or concurrent marriage of the abuser was not legally terminated, but the self-petitioner believed the marriage was valid, a self-petition may nevertheless be filed. This is referred to as an "intended marriage."[70]

5) If the self-petitioner remarries after the approval of the self-petition, the self-petition will not be revoked.[71]

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[64] 8 USC § 1154(a)(1)(A)(vi) [spouses and intended spouses of U.S. citizens]; 8 USC § 1154(a)(I)(B)(v)(I) [spouses and intended spouses of lawful permanent residents]. Prior to VAWA 2000, the self-petitioner had to be legally married to the abusing spouse at the time the self-petition was filed, although subsequent termination of the marriage did not affect the self-petition.
[65] 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc) [spouses and intended spouses of U.S. citizens]; 8 USC §1154(a)(1)(B)(ii)(II)(aa)(CC)(bbb) [spouses and intended spouses of lawful permanent residents].
[66] Anderson, Executive Associate Commissioner, Office of Policy and Planning, INS Memo entitled: Eligibility to Self-Petition as a Battered Spouse of a U.S. Citizen or Lawful Permanent Resident Within Two Years of Divorce, January 2, 2002.
[67] *Id.*
[68] 8 USC § 1154(a)(1)(A)(vi) [spouses and intended spouses of U.S. citizens]; 8 USC § 1154(a)(1)(B)(v)(I) [spouses and intended spouses of lawful permanent residents].
[69] 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(CC)(aaa).
[70] 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(BB) [spouses and intended spouses of U.S. citizens]; 8 USC § 1154(a)(1)(B)(ii)(II)(aa)(BB) [spouses and intended spouses of lawful permanent residents].
[71] 8 USC § 1154(a)(1)(h).

B. The Marriage Is (or Was) a "Good Faith" Marriage

The self-petitioning spouse must establish that the marriage or intended marriage was entered into in good faith.[72] This means that the self-petitioner must not have entered into the marriage with the USC or LPR spouse solely for the purpose of obtaining immigration status. The most important factor in establishing a good faith marriage is whether the couple intended to establish a life together at the time of the marriage.[73] A self-petition will not be denied just because the spouses are no longer living together and the marriage is no longer viable.[74]

Note: Where the self-petitioner is married to a lawful permanent resident who obtained residence through a previous marriage within the last five years, the self-petitioner will have the additional burden of showing that the abuser's prior marriage was a good faith marriage.[75]

§ 3.7 Children and VAWA

A. Children As Primary Applicants

If a child was **abused by a U.S. citizen or permanent resident parent** who is not willing to file a visa petition on behalf of the child, and the child meets other requirements, the child can "self-petition" through VAWA provisions. Courts, advocates and agencies dealing with abused children should be alert to the possibility of VAWA and advise the child and representatives.

> **Example:** Marc was abused by his U.S. citizen stepfather and came under dependency proceedings. Eventually he was reunited with his mother. Both Marc and his mother may be eligible for VAWA due to the abuse Marc suffered.

Requirements for VAWA Child Self-Petitioners. In order to self-petition under VAWA, a child of an LPR or USC must prove that:

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[72] The general "standard of proof," or degree of evidence, that must be produced to prove good faith marriage is that of a "preponderance of evidence." This is generally interpreted to mean something more than a 50% likelihood that the alleged facts occurred. However, if the marriage took place during the self-petitioner's removal proceeding the self-petitioner must meet a higher standard of proof. 8 USC § 1154(g); 8 USC §1255(e).

[73] *Lutwak v. U.S.*, 344 U.S. 604, 611 (1953); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975); *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980).

[74] 8 CFR § 204.2(c)(1)(ix).

[75] 8 USC § 1154(a)(2)(A)(ii).

He or she meets the immigration definition of "child" that is, that he or she is unmarried, under 21, and has a qualifying parent/child relationship with the abuser (see next section);
The abuser is (or was) an LPR or USC[76] (see § 3.2);
The LPR or USC abused the self-petitioning child[77] (see § 3.3);
The self-petitioning child lives or lived with the LPR or USC parent (includes visits; see § 3.4); and
The self-petitioning child is a person of good moral character (see 3.8).[78]

Note: The self-petitioning child does not have to be the child of a self-petitioning spouse.

Who meets the definition of "child" for immigration purposes? The self-petitioning child must be the "child" of the LPR or USC abuser, as that relationship is defined under immigration law. Qualifying relationships include:

natural children born in wedlock;
step-children, whether born in or out of wedlock, if the marriage creating the step-relationship occurred before the child's 18th birthday;
adopted children, if the adoption was finalized before the child's 16th birthday and the child has been in the adoptive parent's physical and legal custody for two years; and
children born out of wedlock, if legitimated or acknowledged by the father.[79]

The self-petitioning child does not have to be in the abuser's legal custody, nor will changes in parental rights or legal custody affect the status of the child's self-petition.[80] Generally, a self-petitioner must meet the immigration definition of a "child" – under the age of 21 and unmarried – at the time of filing. However, there is a special provision for older children. Self-petitioning "children" may still be eligible for VAWA up to the age of 25 years old if they had been eligible for VAWA self-petitioning before turning 21 years old and the abuse was "one central reason" for the delay in filing.[81]

Children who turn 21: the "Aging-Out" Issue. As long as a child *files* the self-petition with CIS before reaching the age of 21 (at which point he or she ceases to be a "child" for immigration purposes), her application will continue past her 21st birthday. She will be automatically switched into a different visa category, which can lead to a longer delay in becoming a permanent resident.[82] However, she will continue to have

[76] 8 USC § 1154(a)(1)(A)(iv) [children of U.S. citizens]; 8 USC § 1154(a)(1)(B)(iii) [children of lawful permanent residents].
[77] *Id.*
[78] 8 USC § 1154(a)(1)(A)(iv) [children of U.S. citizens]; 8 USC § 1154(a)(1)(B)(iii) [children of lawful permanent residents].
[79] *See* 8 USC § 1101(b), and further discussion in § 4.2 infra. Along with having a "parent/child" relationship, the child must be unmarried and under the age of 21.
[80] 8 CFR § 204.2(e)(1)(ii).
[81] 8 USC § 1154(a)(1)(D)(v).
[82] 8 USC § 1154(a)(1)(D).

employment authorization and protection against deportation during this extended waiting period.[83]

Marriage of Self-Petitioning Children. The marriage of a self-petitioning child *after* approval of the self-petition shall not serve as a basis for revoking an approved self-petition.[84]

B. Children Who Qualify as Derivatives Through a Parent's Self-Petition

Children of the abused spouse who are unmarried and under age 21 qualify for derivative status, as long as they are included on the spouse's self-petition.[85] The derivative child does not have to show that he or she has been abused.

§ 3.8 The Self-Petitioner Must be a Person of "Good Moral Character"

VAWA self-petitioners must establish that they are of good moral character.[86] The immigration statute does not define what good moral character is, but rather lists a number of bars that preclude a person from establishing good moral character. Examples of bars are certain criminal convictions, having worked as a prostitute, being an alcoholic, and if the CIS has "reason to believe" the person has ever sold or helped sell drugs.

Adults and children – especially those with any contact with the criminal justice or juvenile delinquency system – must be carefully screened before applying for VAWA to make sure that they can establish good moral character. If any of the bars above do apply, the self-petitioner will need to show she is eligible for the special exceptions created for VAWA self-petitioners.[87] These exceptions should be explored by an experienced immigration practitioner. See **Chapter 11** for resources.

Children under 14 years of age are presumed to be of good moral character and are not required to submit evidence of good moral character.[88] If the self-petitioning child is 14 years or older, the rules are the same as for a self-petitioning spouse.

§ 3.9 Process for Applying and Benefits Under VAWA

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[83] *Id.*
[84] 8 USC § 1154(a)(1)(h).
[85] 8 USC § 1154(a)(1)(A)(iii) [children of abused spouses and intended spouses of U.S. citizens]; 8 USC § 1154(a)(1)(B)(ii) [children of abused spouses and intended spouses of lawful permanent residents].
[86] 8 USC § 1154(a)(1)(A)(iii)(II)(bb) [spouses and intended spouses of U.S. citizens]; 8 USC § 1154(a)(1)(B)(ii) [spouses and intended spouses of lawful permanent residents]; 8 USC § 1154(a)(1)(B)(iii) [children of lawful permanent residents].
[87] See, e.g., 8 USC §§ 1154(a)(1)(C), 1182(h), 1227(a)(7)(A).
[88] 8 CFR § 204.2(e)(2)(v).

The self-petition is filed with the CIS Vermont Service Center. The application includes CIS Form I-360 (available from **www.uscis.gov**) and documentation to prove that the petitioner meets the requirements. There are some safeguards to protect the self-petitioner's confidentiality and to prevent the abuser from finding out about the self-petition.[89]

If the self-petition is apparently approvable, CIS will send the self-petitioner or her representative a Notice of Prima Facie Eligibility within a few months. The self-petitioner may use this notice as evidence of "qualified alien" status to obtain government aid like Medi-Cal and Cal-WORKS (and with some additional requirements, Food Stamps). If the CIS approves the self-petition, about 6-7 months after it was filed, the CIS will send the self-petitioner a Notice of Deferred Action. With this Notice the self-petitioner can apply for employment authorization.

The self-petitioner may "Adjust Status" to lawful permanent resident status when her immigrant visa becomes available. This may be practically immediately for spouses and children of U.S. citizens, or take some years for spouses and children of lawful permanent residents.

[89] 8 USC § 1367.

CHAPTER 4

U AND T VISAS, ASYLUM AND OTHER WAYS NONCITIZENS CAN OBTAIN LAWFUL STATUS

- The following is a ***brief discussion*** of several ways that a noncitizen can obtain lawful permanent residency, or other temporary resident status. A questionnaire to help immigration advocates determine whether a noncitizen qualifies for any of this relief appears at **Appendix G**.

- ***More comprehensive materials*** are available on all of these forms of relief, ranging from general manuals on immigration law to manuals devoted to specific applications. See **Chapter 11**, Immigration Resources for more information.

- ***Expert immigration counsel*** is necessary to file many of the applications described in this chapter. **Chapter 11**, Immigration Resources provides information on referrals to private **immigration attorneys** or **community agencies**. In some cases juvenile courts have appointed or counties have retained immigration lawyers to process the cases.

Deadlines and Special Considerations. Noncitizens who will apply for **asylum** based on a fear of persecution must do so within one year of arriving in the United States, absent changed or extraordinary circumstances.[90] Some forms of family abuse might be held to constitute such circumstances.[91] See § 4.4. In addition, there is an exception to the one-year filing deadline for noncitizen children under the age of 18 who are deemed "unaccompanied."[92] A state court judge or prosecutor can certify that a victim is a helpful witness in prosecution of a serious crime, so that the victim qualifies for the **U visa** discussed at § 4.3.

SUMMARY OF PROVISIONS

[90] 8 USC § 1158(a)(2)(B); 8 CFR § 208.4.
[91] The regulations provide a non-exhaustive list of "extraordinary circumstances" examples that would cause the failure to meet the 1-year deadline. 8 CFR § 208.4(a).
[92] The term "unaccompanied minor" means one who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody. *See* Homeland Security Act of 2002 § 462(g); 6 USC § 276(g); adopted by TVPRA § 235(g).

- Some persons born outside the United States are U.S. citizens without knowing it. See § 4.1

- U.S. citizens and permanent residents can apply for close family members to become lawful permanent residents through a family visa petition. See § 4.2

- Noncitizens who are the victims of a serious crime and who cooperate with authorities may apply for status under the "U" visa. Victims of a severe form of human trafficking may apply for the "T" visa. See § 4.3.

- Noncitizens who fear persecution if they return to the home country may be eligible to apply for asylum, withholding, or protection under the Convention Against Torture. See § 4.4, 4.5.

- The U.S. provides "temporary protected status" to nationals of certain designated countries that have been devastated by civil war or natural disaster. The applicant does not have to prove an individual fear of persecution. See § 4.6.

- Noncitizens who have lived in the U.S. for ten years or more, and who have a parent, spouse or child who is a U.S. citizen or permanent resident, can apply for "cancellation of removal" as a defense to deportation. See § 4.7.

- Noncitizens who have resided in the U.S. since January 1, 1972 may be eligible for permanent residency under "registry." See § 4.8

- Two million noncitizens applied for permanent residency under the amnesty programs of the late 1980's. Certain relatives of theirs are eligible for "family unity" status. See § 4.9

- Many noncitizens' cases still are pending under laws targeted to specific countries. Special programs have existed for Haitians, Cubans, and Central Americans. See § 4.10

§ 4.1 Citizenship: Acquired or Derived U.S. citizenship

Some people are U.S. citizens without knowing it. Acquisition and derivation of citizenship are ways that an individual can automatically become a United States citizen. Someone who becomes a citizen through either acquisition or derivation of citizenship has all the rights of a U.S. citizen and is not subject to U.S. immigration laws.[93]

[93] A major exception is that a naturalized citizen can lose her citizenship through denaturalization proceedings if she committed fraud on her naturalization or original visa application. Additionally, someone who derived U.S. citizenship cannot become President of the United States. There could be some debate as to whether or not someone who acquired U.S. citizenship at birth could become President of the United States, but the ILRC's position is that someone who acquired citizenship at birth can become President because s/he was born a United States citizen.

Although many people confuse acquisition with derivation because they have some similarities, they are different ways of obtaining citizenship. The easiest way to differentiate between the two is that acquisition of citizenship occurs when a child born outside of the U.S. "acquires" citizenship at birth because of the citizenship status of one or both of her parents. Derivation of citizenship is when a child who is a lawful permanent resident "derives" or becomes a citizen because one or both of her parents is a citizen or becomes a citizen through the naturalization process. In either instance, someone could become a U.S. citizen without knowing it. In order to prove such citizenship, all that one needs to do is prove that the requirements for acquisition or derivation were satisfied and obtain a Certificate of Citizenship from the Citizenship and Immigration Service (CIS) or a U.S. Passport from the U.S. Passport Agency. Acquired and derived citizenship can be very complicated and someone who believes he or she falls in that situation should obtain immigration counsel.

A. Acquisition of Citizenship

Acquisition of citizenship refers to the process by which in some circumstances a U.S. citizen may **transmit** citizenship to her child, even though the child is born outside of the U.S.

Who Can Acquire Citizenship at Birth Outside of the U.S.? Five issues will affect whether a person born outside of the United States is a U.S. citizen. They are:

(1) Whether the person's parents were married when she was born;
(2) The person's date of birth;
(3) Whether one or both of the parents was a U.S. citizen when the person was born;
(4) How long the citizen parent resided in the U.S. prior to the person's birth; and
(5) Whether the person has satisfied requirements for residency in the U.S.

B. Derivation of Citizenship

A second way that many persons are citizens without knowing it is through "derivation of citizenship." A child who is a lawful permanent resident can become a citizen automatically if, under certain circumstances, one or both of her parents naturalizes or, under different circumstances, at least one of her parents is a U.S. citizen through naturalization or by birth. This process is called **derivation of citizenship**.[94] A person who derives citizenship through the citizenship of his or her parents has the same rights as any U.S. citizen except he or she cannot become the President of the United States.

Who Can Derive Citizenship? As with the laws on acquisition of citizenship, the laws governing derivation of citizenship have changed several times. Therefore it is

[94] *See* 8 USC § 1431, as amended by the Child Citizenship Act of 2000. The Child Citizenship Act of 2000 greatly simplified derivative citizenship for most children, and especially for adopted children.

sometimes necessary to refer to the old laws. The law in effect at the time that the last requirement for derivation was met by the individual seeking to determine if he or she derived citizenship is the law that applies in that case. Generally, for a child to derive citizenship the child has to:

- Be a lawful permanent resident;
- Have one, or in some circumstances, both parents who are U.S. citizens;
- Live in the physical and legal custody of the U.S. citizen parent(s);
- Be under eighteen years old (many years ago the law was twenty one); and
- Be unmarried.

Derivation applies to adopted children as well. An adopted child automatically becomes a U.S. citizen if, while under the age of 18, she (1) becomes a permanent resident by 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 U.S. citizen for two years;[95] and (3) is residing in the legal and physical custody of the U.S. citizen parent.[96]

§ 4.2 Family Petitions

United States citizens (USCs) and lawful permanent residents (LPRs) can help certain family members immigrate to the United States by submitting a family visa petition for them. To get the visa approved, the family must prove that the person submitting the visa petition is in fact a USC or LPR, and that the noncitizen who wants to immigrate has the required relationship with that person. If the visa petition is approved, the noncitizen family member may apply to immigrate (obtain permanent residency) based on the visa petition.

How long a person must wait to immigrate generally depends upon what country the person was born in and on the kind of visa petition that was submitted. Persons who may qualify as **immediate relatives**--if they are the spouse, unmarried child, or parent of a U.S. citizen--can immigrate very soon after the visa petition is approved. Others may qualify to immigrate through the **preference categories**--if they are the spouse or child of a lawful permanent resident, unmarried son or daughter of a lawful permanent resident, a married son or daughter of a U.S. citizen, or sibling of a U.S. citizen. The preference categories usually involve some wait to immigrate, sometimes up to ten or twelve years or more depending upon the category in which the person falls.

Immigrating through a spouse. A noncitizen immigrating through a U.S. citizen or permanent resident spouse must show two things: that the marriage is valid (legal) and that the marriage is bona fide (not a fraud).

[95] There are different rules for someone who was adopted as an orphan. *See* 8 USC § 1101(b)(1)(F).
[96] *See* 8 USC § 1431.

- A couple is legally married if the marriage is recognized as valid in the place where the couple was wed, and the couple was free to marry each other. If either spouse was married before, they must present proof that prior marriages were legally terminated before they married again.

- The couple must also meet a specific test to show that their marriage is bona fide. They must demonstrate that at the time that they got married, their goal was to create a real marriage relationship and not to commit immigration fraud.[97]

Immigrating through a parent or child. A permanent resident or U.S. citizen parent who is willing to help the child can submit a family visa petition for the child. 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 of any age. A U.S. citizen of 21 years of age or more may file a petition for a parent; a permanent resident cannot file for a parent. There is no requirement that the parent and child reside together. (If a citizen or permanent resident parent is not willing to help the child and is abusive, the child may be able to file his or her own petition under VAWA, see **Chapter 3**.)

For immigration purposes, the parent-child relationship includes: natural children born in wedlock; stepchildren (if the marriage creating the step relationship occurred before the child was 18[98]); adopted children (if the adoption was complete by age 16 for at least one adopted sibling[99]); and children born out of wedlock.[100]

Immigrating through a sibling. A U.S. citizen over 21 years of age can file a petition for a brother or sister, but these petitions generally have a waiting period of over ten years.

§ 4.3 Visas Available for Victims of Certain Crimes

Victims of certain serious crimes who have gathered the courage to come forward, report the crime and assist in its investigation or prosecution may be eligible for

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[97] See *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980).

[98] The marriage which creates the stepchild relationship must occur before the child is 18. It does not matter whether the child is adopted or natural born. *See* 8 USC § 1101(b)(1)(B).

[99] Eligibility for immigration can be established through adoption if the adoption was completed by the child's 16th birthday, and the child has been in the legal custody of and has resided with the adoptive parent for at least two years. If a sibling group is adopted, only the youngest sibling's adoption must be completed before age 16; older siblings may be adopted at age 18. *See* 8 USC § 1101(b)(1)(E); 8 CFR 204.2(c)(7). For further discussion of adoption see **Chapter 5**.

[100] The child will be held the "child" of the mother for immigration purposes. To be the "child" of the father, the father must have or have had a "bona fide parent-child relationship" with the child, established while the child was still unmarried and under 21 years of age. *See* 8 USC § 1101(b)(1)(D). This relationship can be shown just by the fact that the father "evinces or has evinced an active concern for the child's support, instruction, and general welfare." *See* 8 CFR § 204.2(d)(2).

one of two visas designed to protect victims and provide them with temporary or permanent lawful status.[101]

The "T" visa is available to victims of severe forms of trafficking in persons.[102] The "U" visa is available to noncitizens who suffer substantial physical or mental abuse resulting from a wide range of criminal activity including domestic abuse.[103]

A. Trafficking Visa ("T" Visa)

The T visa is a temporary "nonimmigrant" visa, but a person awarded a T nonimmigrant visa may apply three years later to become a lawful permanent resident. There are some important deadlines to consider for a T visa. See box below.

To be eligible for a T visa, the applicant must have been a victim of a "severe form of trafficking in persons."[104] That term is defined as:

> (a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform the act is under 18 years of age, or
>
> (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

In addition to showing that the applicant is or was a victim of a severe form of trafficking in persons, the applicant must demonstrate that he or she:

- Is physically present in the United States, or at a port of entry, or certain territories on account of the trafficking;
- Has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, unless he or she is under 18 years of age, in which case compliance is not a requirement;
- Would suffer extreme hardship involving unusual and severe harm if he or she were removed from the United States;
- Has not committed a severe form of trafficking in persons;[105]
- Is not inadmissible (see **Chapter 10**). Note, there are extensive possible waivers of inadmissibility grounds for T visa applicants, including potential waiver of any criminal conviction.

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[101] The Victims of Trafficking and Violence Prevention Act. Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000) [VTVPA].
[102] 8 USC §§ 1101(a)(15)(T), 1184(o), 1255(l).
[103] 8 USC §§ 1101(a)(15)(U), 1184(p), 1255(m).
[104] 8 USC § 1101(a)(15)(T)(i)(I).
[105] 8 USC §§ 1184(o)(1), 1184(o)(1).

Important Deadlines for T Visa Filing

The regulations impose a filing deadline on T-visa applications. Under the regulations, applicants whose victimization occurred before October 28, 2000 were required to file by January 31, 2003.[106] Those who were trafficked as children must have filed by January 31, 2003 or within a year after their 21st birthday, whichever occurs later.[107] Additionally, "for purposes of determining the filing deadline, an act of severe form of trafficking in persons will be deemed to have occurred on the last day in which an act constituting an element of a severe form of trafficking in persons…occurred."[108] Therefore, if the victimization occurred before October 28, 2000 and lasted beyond (e.g. did not end) October 28, 2000, the victim does not face this filing deadline. There is also an exception available for applicants who can demonstrate that exceptional circumstances prevented them from filing by the deadline.[109] Exceptional circumstances may include severe trauma, either psychological or physical.[110] Importantly, there is no filing deadline for cases in which victimization occurred after October 28, 2000.

After the application for the T visa is submitted, the person will receive work authorization. Removal proceedings cannot be begun pending a final decision, and a bona fide application automatically stays execution of any final order of removal.[111]

A T visa applicant may apply for admission of his or her spouse and children or, if the applicant is a child, for admission of his or her parent or unmarried sibling under 18 years of age if issuance of those visas is necessary to avoid extreme hardship.[112] Furthermore, under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457)(TVPRA), the government may grant T nonimmigrant status to a parent or unmarried sibling under the age of 18 of an adult trafficking victim if the relative is in danger of a trafficker's retaliation as a result of the victim's cooperation with law enforcement.[113]

There is an annual limit of 5000 T visas which can be granted annually.[114] However, there is no limit on the number of visas available for qualifying spouses,

[106] *See* 8 CFR §214.11(d)(4).
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] 8 CFR § 214.11(k)(4)).
[112] 8 USC § 1101(a)(T)(ii). The regulations have not yet been updated to reflect that persons under 21 years of age may also apply for unmarried siblings who are under 18 years old.
[113] TVPRA 2008 § 201(a).
[114] 8 USC § 1184(o)(2).

children or parents of T-visa applicants. If the annual cap is reached, a wait list will be created and the applicants' T-status will be granted once a visa becomes available.[115]

B. "U" Visas for Victims of Serious Crimes Who Are Cooperating with Law Enforcement

When Congress created the U nonimmigrant status in 2000, their intention was to protect victims of certain crimes who have gathered the courage to come forward, report the crime, and assist in its investigation and prosecution. The purpose is two-fold. First, it enhances law enforcement's ability to investigate and prosecute crimes. Second, it furthers humanitarian interests by protecting victims of serious crimes.[116]

Like the "T" visa, the "U" visa begins as a nonimmigrant or temporary visa, but after the three years the visa-holder can apply for lawful permanent residency. [117]

The U nonimmigrant visa protects victims of certain crimes. The following requirements must be met.

- The applicant has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity;

- The applicant (or, if the applicant is under age 16, his or her parent, guardian or next friend) possesses information concerning the criminal activity and has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution;

- The criminal activity is serious. The statute provides multiple offense examples including rape, incest, domestic violence, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, abduction, unlawful criminal restraint, false imprisonment, felonious assault, witness tampering, or attempt, conspiracy, or solicitation to commit these or similar offenses in violation of federal, state or local criminal law;

- The criminal activity violated the laws of the United States or occurred in the United States or its territories or possessions; and

- The visa petition contains a certification from a federal, state, or local law enforcement official, prosecutor, judge, or other authority investigating criminal activity, or from a DHS official, stating that the applicant "has been helpful, is

[115] 8 CFR § 214.11(m)(2).
[116] *See* "USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specified Criminal Activity," USCIS News Release (Dec. 8, 2008).
[117] 8 USC § 1255(m) (*sic*).

being helpful, or is likely to be helpful" in the investigation or prosecution of the criminal activity.[118]

- U visa petitioners must be admissible to the U.S., but broad and forgiving inadmissibility waivers are available. (Note that the U Visa is one of the most forgiving forms of immigration relief.)

Note, unlike VAWA described in Chapter 3, there is no requirement of family relationship or immigration status of the perpetrator, nor are U visas limited to victims of domestic abuse. For example, a U visa applicant could be the victim of a felonious assault perpetrated by an undocumented stranger.

The CIS may issue U visas to the spouse, child, or, for a child, parent of the U nonimmigrant, if necessary to avoid extreme hardship to the spouse, child, or parent. The applicant must present a certificate from a judge, prosecutor or other referenced official that an investigation or prosecution would be harmed without the assistance of the applicant's spouse, child, or parent.[119]

Principal Applicants and Derivative Beneficiaries. Noncitizens may benefit from U nonimmigrant status in one of four different ways:

(1) A noncitizen who has been the **direct victim** of a crime may qualify as a principal applicant.
(2) A noncitizen who has been the **indirect victim** of a crime may qualify as a principal applicant.
(3) A noncitizen who has a family member that has been the immigrant victim of a crime may qualify as a **derivative beneficiary** of that family member's application.
(4) A noncitizen who has a family member with U nonimmigrant status may be petitioned for immigration status as a **qualifying family member**.

Note that the third and fourth methods require certain relationships with the principal, discussed below.

Helpful, Has Been Helpful, or Is Likely to Be Helpful in the Criminal Investigation or Prosecution. In order to qualify for U nonimmigrant status, the nonimmigrant crime victim must provide proof from a government official that he/she is being helpful, has been helpful, or is likely to be helpful in the criminal investigation or prosecution.[120] Such proof in the form of a law enforcement certification is essential to the U nonimmigrant status application and required by statute.[121] This certification can come from a federal, state or local prosecutor, *a federal or state judge*, a police investigator, a victim witness advocate within the District Attorney's office or other local

[118] *See* 8 USC § 1101(a)(15)(U)(i) - (iii). *See also* 8 USC § 1184(p) (*sic).*
[119] 8 USC § 1101(a)(15)(U)(ii).
[120] 8 USC § 1101(a)(15)(U)(i)(III).
[121] 8 USC § 1184 (p)(1).

authority charged with investigating ***or*** prosecuting criminal activity. Child Protective Services, the Equal Employment Opportunity Commission (EEOC), the Department of Labor, and others may also qualify as a certifying agency if they have criminal investigative jurisdiction in their respective area of expertise.[122] This certification must be submitted on a specific immigration form called Form I-918, Supplement B and must be signed by the law enforcement official within the past six months. In addition, the certifying official must be the head of the certifying agency or a designated supervisor.[123]

Importantly, the statute does not require that the criminal investigation have led to a *prosecution* of the case.[124] Being helpful with the criminal investigation alone may be sufficient. The statute does not require anything specific such as the victim serving as a witness at trial or providing testimony. However, the case must have led to an investigation or prosecution in which the victim was helpful.

There is an important exception to the helpfulness requirement for victims who are under 16 years of age. These young victims can satisfy the helpfulness requirements if their parent, guardian or next friend provides the required assistance.[125] A similar exception exists for victims who are incapacitated or incompetent. In those cases, a parent, guardian or next friend may fulfill the helpfulness requirement.[126]

Compared to Special Immigrant Juvenile Status (SIJS) (discussed in Chapter 2). Unless the parents were the perpetrators of the qualifying crime, unlike SIJS, U nonimmigrant status may provide the parents of victims of crime with a form of legal status where SIJS does not.

§ 4.4 Asylum and Withholding of Removal Based on Fear of Persecution

People who fear returning to their home country can apply for **asylum or withholding of removal**.[127] A person who is granted asylum can submit an application for permanent residency one year later, but may not receive permanent residency until some years on a waiting list. A person who does not qualify for asylum still may apply for withholding of removal, which results in employment authorization and at least temporary permission to remain in the United States, but does not confer permanent residency. Conviction of certain crimes bars eligibility for asylum and withholding of removal. Applicants *must* obtain expert representation before applying for asylum.

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[122] 8 CFR § 214.14(a)(2). Sometimes these agencies conduct criminal investigations, and sometimes they do not. For example, some state or county child protective services agencies conduct *criminal* investigations while others do not.
[123] 8 CFR § 214.14(a)(3).
[124] The Yates Memorandum, page 4.
[125] The regulations define "next friend" as "a person who appears in a lawsuit to act for the benefit of an alien under the age of 16 or incapacitated or incompetent, who has suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity. The next friend is not a party to the legal proceeding and is not appointed as legal guardian." 8 CFR § 214.14(a)(7).
[126] 8 CFR § 214.14(b)(3).
[127] 8 USC §§ 1158, 1231(b).

To be eligible for asylum, a person must have a well founded fear of persecution on account of one or more of five grounds: race, religion, nationality, political opinion,[128] and/or membership in a particular social group.[129] The well-founded fear of persecution standard may be based on past persecution (which creates a rebuttable presumption of a well-founded fear of persecution) or a well-founded fear of future persecution which has been defined as a "reasonable possibility" of persecution (a one in ten chance).[130] In addition to establishing a well-founded fear of persecution, asylum seekers must show that the persecution is on account of (the nexus requirement) one of the five grounds in refugee law and U.S. asylum law listed above.

The persecutor may be a government actor or a non-state actor, provided in the case of the latter that the government is unable or unwilling to protect the asylum seeker from the persecution by the non-state actor (this is known as the "failure of state protection" requirement).

Beyond meeting these requirements, asylum applicants must also not be precluded from applying for asylum based on certain enumerated bars. These bars include more serious grounds such as: persecution of others, conviction for a particularly serious crime in the United States[131], serious reasons to believe that the person committed a serious nonpolitical crime outside of the United States, danger to the U.S. security, and one who is described in the terrorism grounds of inadmissibility. Other bars that arise in asylum cases include: ability to be removed to a safe third country, firm resettlement, filing of a previous asylum application, and filing for asylum more than one year after the last arrival (known as the "one-year bar").

Importantly, the one year-bar and the firm resettlement bar do not apply to unaccompanied minors,[132] under the Trafficking Victims Protections and Reauthorization Act of 2008.[133] Furthermore, there are exceptions in the regulations for the one-year bar for all applicants if there are extraordinary or changed circumstances.[134] Presumably situations involving domestic violence could justify tolling this requirement.

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[128] The political opinion ground takes two forms: *actual political opinion*, which is the political opinion that an individual actually holds, and *imputed political opinion*, which is the political opinion that the persecutor imputes to the individual. *Elias v. Zacarias*, 502 U.S. 478 (1992).

[129] Membership in a particular social group is a ground that has been the subject of the most innovation and controversy in asylum law. It does not require formal membership in an official group organization, such as a political party, labor union, church or the like. Families and clans can constitute particular social groups. Sexual orientation, gender, and HIV+ status can make up elements of a particular social group. In some cases asylum has been granted based on severe domestic violence, even if the persecution and abuse was committed just by family members. In other cases, individuals have been granted asylum based on gang-related persecution in their home countries, though these claims are very difficult to win.

[130] *INS v. Cardoza-Fonseca*, 480 U.S. 421,448 (1987).

[131] Note that juvenile delinquency adjudications are not convictions for immigration purposes.

[132] The term "unaccompanied" is defined as a child who has no lawful status in the U.S, under the age of 18, and has no parent or guardian in the U.S. or no parent or legal guardian in the U.S. who is available to provide care and physical custody. 6 USC § 279(g)(2), as amended by the Homeland Security Act.

[133] P.L. 110-457 (2008).

[134] 8 CFR § 208.4(a)(5); 8 CFR § 208.4(a)(4)(i)(C).

In addition to the bars to asylum, the decision to grant asylum is discretionary. In other words, beyond meeting the requirements enumerated above, the applicant must demonstrate that asylum should be granted in the exercise of discretion.

The TVPRA and government guidelines provide special procedural protections to children applying for asylum.[135] Again, asylum law is extraordinarily complex, and asylum seekers need to seek out strong immigration counsel.

Withholding of Removal. Because of the bars and discretionary nature of asylum, it is important to be aware of another asylum-related protection- withholding of removal (technically called "restriction on removal"). Withholding of removal provides protection for individuals who fear a threat to life or freedom on account of one of the five grounds in the refugee definition (race, religion, national origin, membership in a particular social group or political opinion). Unlike asylum, withholding of removal is not discretionary, although, there are still bars to obtaining it. The Convention Against Torture (CAT) also provides protection to individuals fearing return to their home countries and is discussed in the next section.

§ 4.5 The Convention Against Torture (CAT)

Article 3 of the **Convention Against Torture (CAT)** prohibits countries from expelling a person to a country where he or she would be tortured.[136] This is an important form of immigration relief for immigrants fleeing persecution who do not qualify for asylum because of criminal convictions, or because they cannot establish that the persecution was based on race, religion, ethnic group, political opinion, or membership in a social group.[137] The applicant must show that it is "more likely than not" that he would be tortured in the proposed country of removal by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[138]

CAT is slightly different from asylum in that it protects individual who fear torture, not persecution (there are overlapping harms) and is the only form of asylum-related protection that does not require that the persecution (again, specifically, torture) be on account of one of the five refugee grounds. CAT, like withholding of removal, is non-discretionary.

§ 4.6 Temporary Protected Status (TPS)

[135] A copy of the entire CIS Guidelines for Children's Asylum Claims can be found on the web at http://www.uscis.gov/graphics/lawsregs/handbook/10a_ChldrnGdlns.pdf. *See also* 76 Interpreter Releases 1 (January 4, 1999) for a summary and additional information.
[136] United States Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984).
[137] 8 CFR § 208.17.
[138] 8 CFR § 208.16(c)(2), 208.18(a).

People from certain countries fleeing civil war, famine or natural disaster may be able to obtain **Temporary Protected Status (TPS)**,[139] which provides temporary permission to be in the United States and temporary work authorization. For example, most recently, the United States designated Haiti as a country that benefits from TPS due to the January 2010 earthquake. Other presently designated TPS countries include El Salvador, Honduras, Nicaragua, Somalia, and Sudan.

TPS was established by Congress as a form of protection for those persons who are unable to return to their home countries safely, or where their governments are unable to handle their return adequately, but who do not fall under the definition of a refugee, e.g., proving that he or she will be singled out for persecution. TPS is designed to protect those who cannot safely return to their homes, not necessarily because of persecution, but rather because of ongoing armed conflict, environmental disaster (earthquake, hurricane, flood), or other extraordinary conditions.

There are important limitations to TPS. **TPS is only available for people from certain designated countries who can establish continuous residence and physical presence in the United States by the dates assigned to each country.** Thus, someone arriving in the United States from a non-TPS designated country or from a TPS designated country after the required date is ineligible (see eligibility discussion below). TPS, as the name implies, is only temporary and confers no permanent path to legal status. However, while granted TPS, an individual should not be detained by the Department of Homeland Security, is not removable from the United States, and may obtain employment authorization to lawfully work in the United States. An individual granted TPS may also apply for travel authorization. Another critical limitation to TPS is there are no derivative beneficiaries, so family members must each qualify for TPS in their own right. Although TPS provides no path to permanent legal status, an individual granted TPS may immigrate permanently through another provision of immigration law (i.e., family based, etc.) if otherwise eligible.

TPS Eligibility Requirements. An individual is eligible for TPS if he or she meets the following requirements:

- Is a national of a country designated for TPS, or a person without nationality who last habitually resided in the designated country**;**
- Files during the open registration or re-registration period, or meets the requirements for late initial registration regardless of whether there is currently an open registration or re-registration period;
- Has been continuously physically present in the United States since the most recent designation date of the country;
- Has been a continuous resident in the United States since the date specified for the country;
- Has not been convicted of any felony or two or more misdemeanors in the United States;

[139] 8 USC § 1254a.

- Is not a persecutor, or otherwise subject to one of the bars to asylum;
- Is not subject to one of the criminal or security related grounds of inadmissibility for which a waiver is not available; and
- Has met all the requirements for TPS registration or re-registration as specified for the country.

For updated information about what countries currently are designated TPS and what requirements nationals of those countries must meet to qualify, go to www.uscis.gov and follow directions to get to information about Temporary Protected Status.

§ 4.7 Cancellation of Removal for Persons Who Are Not Permanent Residents

Undocumented noncitizens who have lived in the United States 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 a parent spouse or child who is a U.S. citizen or permanent resident and who would suffer exceptional and extremely unusual hardship if the person were deported.[140]

> **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 exceptional and extremely unusual hardship if they went back to Marta's home country.

Eligibility Requirements. A person qualifies for non-LPR cancellation of removal if she is in removal proceedings because she is inadmissible or deportable and:

1) she has been physically present in the U.S. continuously for at least ten years (the clock may stop for calculating the ten years when the person is placed into removal proceedings or commits certain offenses that trigger removal under immigration laws);
2) she has had good moral character for that time;
3) she has not been *convicted* of certain offenses [crimes listed in 8 USC §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3)]; and
4) to deport her would cause exceptional and extremely unusual hardship to her lawful permanent resident (LPR) or U.S. citizen spouse, child, or parent.

The judge has the **discretion** to grant or deny the case. The judge may deny the case even if the applicant meets all the other eligibility requirements. Cancellation is a highly discretionary relief, and consultation with an expert immigration practitioner is required.

[140] 8 USC § 1229b(b).

Special Cancellation for Victims of Abuse under VAWA. The Violence Against Women Act (VAWA) described in **Chapter 3** created a special cancellation of removal for a noncitizen who has been abused by a U.S. citizen or permanent resident spouse or parent. A grant of cancellation of removal "cancels" the removal of an applicant who would otherwise be removable and grants the applicant lawful permanent residence. The application must be made in removal proceedings before an Immigration Judge, as a form of relief from removal.[141]

The eligibility requirements for VAWA cancellation are as follows:

1. The applicant must be the abused spouse or child, or non-abused parent of an abused child, of a USC or LPR;
2. Must have been physically present in the United States for at least three years;
3. Must have been of good moral character during that time;
4. The applicant or his or her child or parent would suffer extreme hardship if the applicant had to leave the United States; and
5. The case must warrant a favorable exercise of the Attorney General's discretion.

§ 4.8 Registry

People who have lived continuously in the United States since January 1, 1972 may apply for lawful permanent residency under **registry**.[142] To qualify, they must be admissible and must be able to establish good moral character.

§ 4.9 Amnesty: Legalization and Special Agricultural Worker Programs, and Family Unity for Their Family Members

In 1986, Congress passed a law that provided for three amnesty programs for undocumented people in the United States. The **legalization program** was for people who have lived in the U.S. since January 1, 1982. The application for that program has closed, except for certain groups. The **Special Agricultural Worker (SAW) program** was for people who did agricultural work in the U.S. during at least one year, from 1985 to 1986. Application for that program has closed. The **Cuban-Haitian program** was for certain people from Cuba and Haiti.

Spouses and unmarried children of persons who obtained temporary or permanent resident status through the amnesty programs of the late 1980's may be granted a stay of removal and employment authorization under the **Family Unity** program.[143] To be

[141] 8 CFR §§ 1240.20(b), 1240.11(a)(1).
[142] 8 USC § 1259.
[143] Immigration Act of 1990 § 301, as amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Public Law 102-232. The implementing regulations are found at 8 CFR § 236.10-236.18.

eligible, the applicant spouse or child of a legalized alien must have entered and resided in the U.S. before applicable dates in 1988.

§ 4.10 Relief Targeted to Specific Countries

Other laws have benefited individuals from specific countries. While the deadlines for filing new applications have passed, many immigrants still have pending applications under these programs.

NACARA for Nicaraguans, Cubans and Former Soviet Bloc Nationals. The Nicaraguan Adjustment and Central American Relief Act of 1997 provides permanent residency to nationals of Nicaragua or Cuba who have been physically present in the U.S. since December 1, 1995, are admissible, and filed the application for adjustment before April 1, 2000.[144]

Relief for Haitians. Haitian nationals who were present in the U.S. since 1995 and filed applications before 2000 were eligible for permanent residency under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA).[145] Note also that Temporary Protected Status is now available to Haitians present in the U.S. since January 12, 2010 or earlier (see § 4.6).

[144] 8 USC § 1152.
[145] Division A, Title IX, Sec. 902 of Pub.L.No. 105-277, 112 Stat. 2681-538; 8 CFR § 245.15.

CHAPTER 5

SPECIAL ISSUES RELATED TO ADOPTION AND IMMIGRATION

SUMMARY

- For a child to get immigration benefits through a family immigration petition based on an adoption, ***the adoption must be legally completed before the child's 16th birthday***. There is an exception for adopted sibling groups. See § 5.1.

- Where the child is from a country that is a signatory to the Hague Convention, an international treaty that establishes international standards for intercountry adoptions, there are additional requirements that must be met for the adoption to be recognized. See § 5.1(C).

- The 16th birthday deadline for completing the adoption also applies to certain children's ability to receive automatic U.S. citizenship by being adopted by a U.S. citizen. See § 5.2.

- Undocumented parents are permitted to adopt. Even here, the 16th birthday deadline is important. See § 5.3.

- Children who are in adoption proceedings and who have been placed under the custody of "an *individual* … appointed by a state or juvenile court" may qualify for Special Immigrant Juvenile Status as a way to obtain lawful immigration status. See § 5.4.

§ 5.1 How Adoption Creates a Parent/Child Relationship for Immigration Purposes: the 16th Birthday and Two-Year Custody Requirements

A. The Requirements of a Completed Adoption Before the Child's 16th Birthday and Two Years in the Parent's Lawful Custody

"Parent" and "child" are terms of art under the immigration laws. Adopted children must meet certain requirements in order to be considered the "child" of the new parent and thereby receive or give any immigration benefits through the relationship. Once an adopted child is the "child" of a permanent resident or U.S. citizen, the adoptive parent can file papers for the child to become a permanent resident (see discussion of family immigration at § 4.2). Even if the parent is not yet a permanent resident, as long as the parent/child relationship is timely created, the child will be able to take advantage of any future immigration status that the parent obtains, and vice versa. See § 5.2.

The required parent/child relationship can be established through adoption in certain cases if:

> *(1) the child is adopted under the law of the child's residence or domicile while under the age of 16, and*
>
> *(2) the child has been in the legal custody of and has resided with the adoptive parent for at least two years while under the age of 21.*[146]

Judicial and state authorities must understand the crucial nature of the 16th birthday deadline. Many adoptive parents and attorneys are not aware of this requirement. If the adoption does not occur timely, the child will lose all immigration benefits she could have gained through the family relationship.

> **Example:** Luis became Marta's guardian when she was 14. Luis is a U.S. citizen and Marta is undocumented. Luis legally adopted Marta shortly after her 16th birthday. Because the adoption did not occur before her 16th birthday, Marta is not Luis' child for immigration purposes and Luis cannot file a family visa petition or otherwise help her to get lawful status.

Two-year custody requirement. The requirement that the child reside and be in the legal custody of the adoptive parent for two years before reaching the age of 21 is not nearly as pressing an issue for courts and agencies. The two-year custody requirement can be fulfilled either before or after the completion of the adoption. For example, a child could be adopted at age 15, reside with the adoptive parent for two years, and then apply to immigrate through the parent at age 17. If the child is legally placed with the parents before adoption under foster care, guardianship, or some other legal arrangement, the two-year period begins sooner.[147] The practical burden of the two-year requirement is that it delays when the family visa petition first can be filed so that the immigration process can begin. Thus, the sooner the child is in some legal custody of the prospective adoptive parent to start the two-year clock, the better for immigration purposes.

WARNING! The Requirements of the Hague Convention. The rules of adoption and immigration are significantly complicated where the child is from a country that is a signatory to the Hague Convention, an international treaty that establishes international standards for intercountry adoptions. In these cases, there are additional requirements that must be met for a child to immigrate through adoption. See discussion in Part C below.

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[146] 8 USC § 1101(b)(1)(E)(i).

[147] Whether legal or physical custody has occurred is sometimes a matter of dispute. While this clearly includes placement by foster care or guardianship, and does not include an informal family arrangement, arrangements that fall in between should be researched individually to see if they constitute legal and physical custody

B. Exceptions: Sibling Adoption and Overseas Orphan Adoption

There are exceptions to these requirements, one of which involves **siblings**. If natural siblings are adopted, only one sibling's adoption must be completed before the age of 16. The other sibling or siblings' adoption may be completed any time up to their 18th birthdays. The two-year lawful custody requirement still applies.[148] The siblings do not have to be adopted at the same time, and the younger sibling does not have to have met the two-year requirement before the older sibling is adopted.[149]

> **Example:** A family adopts siblings Fran and Stephan. Fran's adoption is completed when she is 13 and Stephan's adoption is completed when he is 16. Once the two-year lawful custody requirement is met, both Fran and Stephan will be the children of the adoptive parents for immigration purposes despite the fact that Stephan's adoption was not completed before his 16th birthday.

Another exception concerns adopted children who are classed as "**orphans**" under the Immigration & Nationality Act (INA). "Orphan" under the INA has a different meaning from common usage. In order for a child to meet the definition of "orphan," the child must be residing outside the United States when the petition is filed. This means that the only children who come within this category are those who, with the help of prospective adoptive parents, *entered the U.S. on a special orphan visa.* Thus a typical noncitizen child in foster care waiting to be adopted does not qualify as an "orphan" for this purpose even if both parents are deceased: the test is entry on an orphan visa. In addition, the adopting parent must obtain a valid home study before adopting and must meet many other requirements, including those of the Hague Convention (discussed in Part C below) if applicable.[150] Orphans are not subject to the two-year lawful custody requirement, although they do need to be adopted by age 16.[151]

Again, those who are working with children from Hague Convention signatory countries should proceed with caution and ensure that all the legal adoption requirements are met.

C. The Hague Convention

The Hague Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption establishes international standards for intercountry adoptions to prevent the abduction, sale, or trafficking of children. The United States became a signatory to this Convention on April 1, 2008. Therefore, as of April 1, 2008, the rules

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[148] 8 USC § 1101(b)(1)(E)(ii).
[149] *See* article in *Interpreter Releases*, Feb. 5, 2001 entitled "INS Updates Guidance on Minor Adopted Siblings Legislation," discussing Memorandum from Michael Pearson, Exec. Assoc. Comm'r, INS, HQADN 70/8.3. *Interpreter Releases* is a very useful immigration newsletter that can be found at most county law libraries.
[150] 8 CFR § 204.3.
[151] 8 USC § 1101(b)(1)(F).

for adoption under the INA depend upon whether or not the adoptee child is from a country that is also a signatory to the Hague Convention.[152]

The Hague Convention emphasizes the best interests of children and provides increased protections to children, birth families, and adoptive families. It also recognizes intercountry adoption as a valid means of finding homes for children who cannot return to their country of origin. Under the Convention, both children abroad and those already in the U.S. can be adopted by persons located within and outside of the U.S. A child who is already in the U.S. as a parolee, nonimmigrant, or even in unlawful status may be able to be adopted under the Convention.

While the Convention provides more protections for children, it does significantly alter and complicate the rules of adoption and immigration for noncitizen youth in the United States and abroad. It is now more difficult for a child who is present in the United States and from a Hague Convention country to immigrate through adoption, and, consequently, SIJS is a preferable route to immigrate, if it is available. See § 5.3 and Chapter 2.

Because the rules under the Hague Convention are extremely complex, a detailed discussion of them is beyond the scope of this summary.

There are now two different sets of rules for immigration by adoption.

The Old Rules Apply Where:

- The children subject to adoption are from non-Convention countries (countries who have not signed onto the Hague Convention); or
- The children are from Convention countries where the central authority of that country has determined that the child is a habitual resident of the United States; or
- The adoption process began before April 1, 2008 (the date the U.S. became a signatory to the Hague Convention).

In any of these situations, immigration through adoption for non-orphans is possible if the following requirements are met:

- The child is under 16 years old when the adoption is completed;
- The child lived in the legal custody of the adoptive parents for two years before the papers are filed; [153] and
- The child is not otherwise inadmissible.

[152] For a list of countries who have signed onto the Hague Convention go to: http://www.travel.state.gov/family/adoption/convention/convention_4197.html.
[153] Please note that if a child is adopted as an orphan because of parental death or abandonment, then the child does not meet the two-year legal custody and residence with the parents requirements. There are, however, other requirements for orphans. *See* 8 USC § 1101(b)(1)(F).

WARNING! The two year legal custody and residence requirements under the old adoption rules do not apply in cases where the Hague Convention applies. Fed. Reg. Vol. 72, No. 192. at 56834, 56850.

The Hague Convention Rules Apply Where:

- The children come from Convention countries (countries that are signatories to the Hague Convention); [154] and
- The children are deemed habitual residents of those countries; and
- The adoption process is initiated on or after April 1, 2008.

The requirements for the Hague Convention can be found at 8 USC § 1101(b)(1)(G) and 8 CFR § 204.301-.313. The basic requirements for an adoption under the Hague Convention are:

- The child must be under 16 when the visa petition is filed
- The child is a habitual resident of a Convention country (defined as the adoptee's country of citizenship unless the country of origin determines that the child is now habitually resident in the United States);[155]
- The child has no parents or both parents are unable to provide proper care, or sole or surviving parent or guardian is unable to provide care; and
- All parents or guardians give written irrevocable consent to termination of legal relationship to the child, and emigration and adoption.

When the adoption process through the Hague Convention is initiated, CIS must first determine that the adoptive parents are suitable before authorities in other countries allow or place the child with the parents for adoption. The other country must also agree that the adoption is in the best interests of the child. These are preliminary requirements (including a home study) that need to be met before the adoption is completed. The U.S. must then decide, before the adoption takes place, that the Convention and the U.S. immigration requirements are met. While children who are unlawfully present in the U.S. can be adopted under the Convention, they must return to the country of origin to obtain a visa after the visa petition (I-800) is approved. Without the visa, they cannot adjust their status.

[154] There are some Hague Convention countries that the United States is no longer processing adoptions from, such as Cambodia and Guatemala. While these are Hague Convention countries, because they were not following the adoptions procedures correctly, the U.S. is not performing adoptions for kids from those countries at all. *See* http://adoption.state.gov/hague/overview/countries.html.

[155] Intercountry Adoption Act (IAA) of 2000, PL 106-279. A child who has already been brought to the U.S. will generally be considered to be habitually resident in the Convention country. 8 CFR § 204.2(d)(2)(vii). If the child is deemed to be habitually resident of the U.S., the Convention rules do not apply. 8 CFR § 204.2(d)(2)(vii)(F).

The forms that are applicable for Hague Convention adoptions are the I-800 (visa petition) and I-800A (application for determination of suitability to adopt). The I-800A must be approved before approval of the I-800. The I-800 is approved provisionally until the foreign state determines that the child will be authorized to immigrate. Once the I-800 is approved, the child will be issued a visa by the consulate to enter the U.S. The child will be classified as an immediate relative and enter as a lawful permanent resident.[156]

Because of the complexity of the Hague Convention, any person working with a child who may be affected by the Convention should consult an attorney with expertise in Convention adoptions. Other resources on the Convention include:

- "A Guide for Judges in Outgoing Cases Under the Hague Adoption Convention," William J. Bistransky, Division Chief for Intercountry Adoption, Office of Children's Issues, Bureau of Consular Affairs, US Department of State. Available at: http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5720885/k.4071/Hague_Convention_Requirements.htm;
- Online at adoption.state.gov; and
- Hague Adoption Convention Questions can be emailed to AdoptionUSCA@state.gov or directed to 1-888-407-4747 (for U.S. and Canada) and 202-501-4444 (outside the U.S. or Canada).

§ 5.2 The Child Citizenship Act: Adoption by a U.S. Citizen Before Age 16 May Confer Automatic U.S. Citizenship on a Child

Even children who already are permanent residents may need their adoption to be completed before their 16th birthday, so that they will qualify for automatic U.S. citizenship. United States citizenship confers many benefits beyond permanent residency. For example, a U.S. citizen is eligible for the full range of public benefits, can never be deported, and can vote when he or she comes of age.

A child automatically becomes a U.S. citizen if, while under the age of 18, the following three events occur in any order: (1) the child becomes a permanent resident (whether through SIJS, family immigration, or any other means); (2) the child 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;[157] and (3) the child currently resides in the legal and physical custody of the U.S. citizen parent.[158] Where the Hague Convention rules of adoption apply, compliance is essential to meet the second prong requiring a legal adoption. See § 5.1(C).

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[156] 8 CFR § 204.306.
[157] There are different rules for someone who was adopted as an overseas orphan. *See* 8 USC § 1101(b)(1)(F) and § 5.1 Part B above.
[158] *See* 8 USC § 1431 and the ILRC's manual entitled *Naturalization and U.S. Citizenship: The Essential Legal Guide*.

Example: Edward became a permanent resident at age 12 under an SIJS application. He began living with a foster family that year. Shortly after his 15th birthday his foster parents, one of whom was a U.S. citizen, adopted him. On the day his adoption was completed Edward met all three requirements for automatic citizenship: he was a permanent resident, legally adopted before the age of 16 who had resided for two years and continues to reside in the lawful and physical custody of at least one citizen parent. Without submitting any immigration application, he automatically became a U.S. citizen on that day.

Example: Elena is undocumented. A U.S. citizen adopted her when she was 14. Her citizen parent filed a family visa petition for her, and Elena became a permanent resident when she was 17. At the same moment that she became a permanent resident she also automatically became a U.S. citizen: on that day she was a permanent resident, adopted before the age of 16, who had resided for two years and continued to reside in the lawful custody of the U.S. citizen.

Once the child is a citizen, he or she should apply for a U.S. passport (much faster than applying for a "certificate of citizenship" from the CIS) to use as proof of American citizenship.

§ 5.3 Adoption Should Not be Denied Based on the Adoptive Parents' Undocumented Status

There is no known federal law that prohibits adoption based on a prospective parents' citizenship or immigration status. Moreover, many states do not have provisions that preclude adoption based on immigration status. In California, for example, undocumented parents may adopt children despite the parents' lack of lawful immigration status.[159] Nonetheless, there are different kinds of rules imposed by states that may make such an adoption difficult or impossible. One obstacle for undocumented individuals is the legal clearances or background checks necessary for adoption. This may be difficult where they have no form of identification, including a social security number. Another and significant obstacle is that many child welfare agencies may not make the necessary recommendations in support of the adoption due to the issue of permanency for the child in the event of the adoptive parents' apprehension and deportation. The governing standard in these types of cases, however, should not be the parents' immigration status, but rather the "best interests of the child." In these cases child welfare should look at many factors including: the relationship between the child and the parents, how strong the placement is emotionally, whether the prospective parents have a backup plan if deported, and whether support and resources are available in the home country if they were to be deported. These decisions should be made in a team

[159] *See Rodriguez-Mendez v. Anderson*, CN 948348 (San Francisco Superior Court, February 9, 1993), All County Letter 93-16 (March 2, 1993). For more information contact the National Immigration Law Center in Los Angeles, which brought successful legal action against California on this matter (213-639-3900).

decision-making setting where the social worker and family assess the pros and cons of adoption.

Note that even where the parents have no lawful status, it is important where possible to complete the adoption before the 16th birthday so that a "parent/child relationship" is created for immigration purposes. See discussion in § 5.1, supra. That way the parent or the child may be able to help each other in the future. The parents might find a future way to obtain lawful status and be able to automatically include the child. Likewise a child who has or gains lawful status ultimately can petition for her undocumented parent. This is because a child who is a U.S. citizen and at least 21 years of age can file a family visa petition on behalf of her parents. See § 4.2 for more information on immigrating through family relationships in general.

> **Example:** Li Chin is undocumented and adopts an undocumented child before the child's 16th birthday. Three years later Li Chin is able to immigrate through her sister, and her adopted child automatically immigrates as well.
>
> **Example:** Esteban is a native-born U.S. citizen. When he was ten, he was placed in foster care with his undocumented aunt, who adopted him before his 16th birthday. Upon his 21st birthday, as a U.S. citizen Esteban can file a visa petition for his adoptive mother to obtain permanent residency.
>
> If in this example Esteban were undocumented, he still could help his adoptive mother. He would apply for permanent residency under SIJS once he came to a permanent plan (see **Chapter 2**) and also complete the adoption before his 16th birthday, to establish the parent/child relationship. Upon his 18th birthday he could apply for U.S. citizenship. Once he is a U.S. citizen of at least 21 years he can petition for his adoptive mother. But see discussion of the timing of SIJS and adoption in § 5.4, following.

§ 5.4 SIJS and Adoption

Children who are in adoption proceedings and who have been placed under the custody of "an *individual* … appointed by a state or juvenile court,"[160] can qualify for SIJS. See **Chapter 2** for a general discussion of SIJS.

Many times before a juvenile court finalizes an adoption for a child, the juvenile court judge will place the child formally in the legal and physical custody of the prospective adoptive parents. If this happens, the child may be eligible for SIJS presuming all other requirements are met. The court handling the adoption is clearly a "juvenile court" for SIJS purposes and the custody order clearly places a child in the custody of an individual (or individuals) appointed by the juvenile court.

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[160] 8 USC § 1101 (a)(27)(J), as amended by the Trafficking Victims Protection Reauthorization Act of 2008, § 235(d), Pub. L. No. 110-457, 122 Stat. 5044 (2008), § 235(d). Neufeld memorandum, p. 2 (acknowledging Special Immigrant Juvenile eligibility for a child "on whose behalf a juvenile court appointed a guardian").

A child for whom an adoption proceeding is pending may qualify for Special Immigrant Juvenile Status even if she was never formally removed from a parent by the state or placed in foster care.

It should be noted that CIS has long taken the position that children who are going to be, or have been, adopted can qualify for SIJS. The SIJS regulation specifically permits children who have been adopted to apply for SIJS and states that a child can apply if a juvenile court has found that family reunification is not viable and the child proceeds to long-term foster care, guardianship, or adoption.[161] Moreover, the automatic revocation provision in the regulation provides that an approved SIJS application will not be revoked in the case that the child is adopted.[162] Many advocates throughout the country have obtained SIJS where the child was ultimately adopted.

SIJS v. Family Immigration Petition. A child can obtain permanent resident status through either SIJS or a petition filed by an adoptive parent (if the adoptive parent is a citizen or permanent resident, and the requirements described at **§ 5.1** are met). More likely than not it is easier for a child to immigrate through SIJS than through regular family immigration, including adoptive family, and thus this often is the best choice for the child. The disadvantages of family immigration, as compared to SIJS, is that family immigration may involve a long waiting period if the parent is a permanent resident rather than citizen; where applicable, adoption is complicated by the maze of the Hague Convention and may require the child to return to the home country for at least a few days to obtain the immigrant visa; and will subject the child to more grounds of inadmissibility, including the "public charge" ground in which the parent must prove that he or she has a certain income. For these reasons, most children adopted after juvenile court custody choose to immigrate through SIJS rather than through their new parents, if possible. If SIJS or other forms of immigration relief are not options, however, immigrating through an adoptive parent may be the best choice, especially if the Hague Convention does not come into play.

The juvenile court need not retain jurisdiction after adoption for the CIS to grant the SIJS application. As noted in Chapter 2, the SIJS regulations pre-dating the TVPRA provide that a child applying for SIJS must remain under juvenile court jurisdiction throughout the entire immigration process—that is, until CIS approves the petition for SIJS *and* the application for adjustment to lawful permanent residency.[163] (Note: many people believe this regulation should be eliminated due to recent changes in the SIJS statute). Regardless of the continuing validity of this regulatory provision, because it did not previously apply to adopted children prior to statutory change, it should also not apply now. This means that children who are in dependency proceedings and are eventually adopted need not remain under the juvenile court's jurisdiction after adoption to qualify for Special Immigrant Juvenile Status (SIJS). In Memorandum #3 issued by the CIS (**Appendix C**), it states that those who are adopted, "necessarily remain

[161] 8 CFR § 204.11(a).
[162] 8 CFR 205.1(a)(iv).
[163] 8 CFR § 204.11(c)(5), reprinted at **Appendix A**.

considered a juvenile court dependent based on the prior dependency order."[164] The regulations at 8 CFR 204.11(a) further provide that if an adoption or being placed in guardianship brings on the change in status for an SIJS applicant, they are not disqualified from obtaining their permanent residency through SIJS.[165]

[164] May 27, 2004 "Memorandum #3" issued by William R. Yates, Associate Director for Operations, entitled: "Field Guidance on Special Immigrant Juvenile Status Petitions" p. 4 reprinted in **Appendix C.**
[165] 8 CFR 205.1 (a)(iv).

CHAPTER 6

FAMILY COURT RULINGS: DIVORCE, PROTECTION ORDERS AND CUSTODY DECISIONS

SUMMARY

- Divorce can cause a noncitizen whose status is dependent on the ex-spouse to lose or be blocked from obtaining status. See § 6.1.

- A permanent resident becomes deportable if a judge finds that the person has violated a protection order. See § 6.2.

- Custody decisions can impact immigration status in unusual situations. See § 6.3.

§ 6.1 Immigration Consequences of Divorce

If the state recognizes a divorce, the CIS also will consider it valid unless to do so would violate public policy.[166] The impact of a finalized divorce varies depending on the noncitizen's immigration status at the time of the divorce.

A. Impact of Divorce on Lawful Permanent Residents

Generally, if a lawful permanent resident obtains a valid divorce, it will have no effect on the permanent resident's immigration status. However, a person who gains lawful permanent status through marriage and later divorces the petitioning spouse cannot file a petition for a new spouse for five years, unless he or she can prove by "clear and convincing evidence" that the first marriage was bona fide, including reasons for that marriage's demise.[167]

B. Impact of Divorce on Conditional Permanent Residents

Conditional permanent residents are noncitizens who immigrate through a U.S. citizen spouse within two years of the date that they married the spouse. They become conditional permanent residents for two years and receive most the benefits of lawful permanent residency. Children of conditional residents are also conditional residents.

At the end of the two-year period, the married couple must jointly petition to remove the conditional status and make the spouse a lawful permanent resident. If this is

[166] This issue mainly has arisen in evaluating foreign divorces. *See, e.g.*, *Matter of San Juan*, 17 I&N Dec. 66 (BIA 1979).
[167] IMFA § 2(c)(2), Pub. L. No. 99-639, 100 Stat. 3537 (Act of Nov. 29, 1986); 8 USCA § 1154(a)(2)(A)(ii); 8 CFR §§ 204.2(a)(1)(i)(A)(1) and (C).

not possible – for example, if the marriage has ended in divorce, or the couple has not divorced but the petitioning spouse is not willing to jointly file -- the conditional resident can apply for a waiver of the joint petition requirement.

There are three possible waivers. To qualify for the **"good faith" waiver**, the conditional resident simply must show that she intended to have a bona fide marriage when she got married, that the marriage ended other than through the death of the spouse, and that it was not her fault that she could not file the joint petition. For the **extreme hardship waiver**, the conditional resident must show that, if removed, she would suffer hardship above and beyond that which a person who is forced to leave the United States normally suffers. For the **battery or extreme cruelty waiver**, the conditional resident must show that she was married in good faith and that her spouse battered her or treated her with extreme cruelty.[168]

A conditional resident who will apply for a waiver must be sure to do so in a timely fashion, and should seek expert immigration counsel.

C. Impact of Divorce on VAWA Self-Petitioners

The requirements to self-petition for immigration status under VAWA as the abused spouse of a U.S. citizen or lawful permanent resident are discussed at length in **Chapter 3**.

If the marriage was terminated *before the self-petition was filed,*[169] the self-petitioner may obtain VAWA benefits as long as she (a) shows a "connection" between the divorce and domestic violence, and (b) files the self-petition within two years of the termination.[170] The divorce decree need not specifically state that the termination of the marriage was due to domestic violence.[171] Instead the self-petitioner must "demonstrate that the battering or extreme cruelty led to or caused the divorce" and "evidence submitted to meet the core eligibility requirements may be sufficient to demonstrate a connection between the divorce and the battering or extreme mental cruelty."[172]

If the marriage was terminated for any reason *after the self-petition was filed*, that termination will not affect the self-petition.[173]

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[168] 8 USC § 1186a(c)(4).
[169] The CIS will issue a Notice of Receipt upon proper filing of a self-petition. However, approval of the self-petition may not occur for many months after the filing of the self-petition.
[170] 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc) [spouses and intended spouses of U.S. citizens]; 8 USC § 1154(a)(1)(B)(ii)(II)(aa)(CC)(bbb) [spouses and intended spouses of lawful permanent residents].
[171] Anderson, Executive Associate Commissioner, Office of Policy and Planning, INS Memo entitled: Eligibility to Self-Petition as a Battered Spouse of a U.S. Citizen or Lawful Permanent Resident Within Two Years of Divorce. January 2, 2002.
[172] *Id*.
[173] 8 USC § 1154(a)(1)(A)(vi) [spouses and intended spouses of U.S. citizens]; 8 USC § 1154(a)(1)(B)(v)(I) [spouses and intended spouses of lawful permanent residents].

D. Impact of Divorce on Nonimmigrant Visa Holders

Spouses and unmarried children of most nonimmigrants may obtain derivative nonimmigrant visa status. For example, the spouses and children of "H-1B" specialty occupation employee nonimmigrant visa holders receive "H-4" visas. The derivative family member's status is dependent on the qualifying relationship to the principal nonimmigrant visa holder and the principal nonimmigrant visa holder's continuing valid status. Therefore, if an "H-4" visa holder divorces her "H-1B" visa holder husband, her nonimmigrant visa status in the United States ends unless she has qualified for and actually obtained another visa independent of her husband.[174]

E. Impact of Divorce on Stepchildren Eligibility

Divorce may also affect a stepchild's eligibility for immigration benefits. Since stepchildren are a creation of the marriage between a natural biological parent and a stepparent before the child's eighteenth birthday, the legal step relationship may terminate with divorce.[175] However, if an emotional step relationship continues despite the divorce, the child remains a stepchild.[176]

§ 6.2 Deportation Based on a Judicial Finding of Violation of a Protection Order

Noncitizens who are found in civil or criminal court to have violated certain kinds of protection orders are deportable. No criminal conviction is required. Once a permanent resident becomes deportable, an immigration judge can revoke the person's status and expel him or her from the United States. See discussion at § 10.3.

The type of court finding that causes deportability is described in the "domestic violence deportation ground" in the federal immigration statute, which provides:

> Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons

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[174] For example, the spouse, former spouse or child of an H-1B nonimmigrant visa holder has the option of seeking a B-2 visitor's nonimmigrant visa instead of an H-4 visa which is dependent on the status of and relationship to the H-1B visa holder. *See* 9 FAM § 41.31 n.11.4.

[175] *Matter of Mourillon*, 18 I&N Dec. 122 (BIA 1981), *quoting Brotherhood of Locomotive Firemen and Enginemen v. Hogan*, 5 F.Supp. 598, 605 (D. Minn. 1934)("The relationship of a stepchild and stepparent is predicated on marriage, as are all other relationships of affinity…the entire structure of relationship by affinity is based on a subsisting marriage, not a dissolved one."). *But see Palmer v. Reddy*, 622 F.2d 463, 54 ALR Fed. 179 (9th Cir. 1980) (The INS and BIA may not add requirements not stated in the statute; 8 USC § 1101(b)(1)(B) requires only that the marriage occurred prior to the child reaching the age of eighteen).

[176] The appropriate inquiry is whether a family relationship has continued to exist as a matter of fact between the stepparent and stepchild. *Matter of Mowrer*, 17 I&N Dec. 613, 615 (BIA 1981).

> for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purposes of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding. [177]

Effective date. The violation that is the subject of the court finding must have occurred after September 30, 1996 for the person to be deportable.[178]

What type of violation triggers deportability? The court must determine that the noncitizen has violated a court ordered protective order designed to protect someone against threats of violence, repeated harassment, or bodily injury in order for him to be deportable.

To be a qualifying protection order, the violated order must have been "issued for the purpose of preventing violent or threatening *acts of domestic violence*."[179] The term "crime of domestic violence" is defined specifically in another section of the domestic violence deportation ground. If the same broad definition applies here, that involves a crime of violence, as defined under 18 USC § 16, directed against a current or former spouse, co-parent of a child, person co-habiting as a spouse, or any other person protected under state domestic violence laws. See discussion of crimes of domestic violence in **Chapter 9**.

It is arguable that the court must determine that the noncitizen has violated "*the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury* to the person or persons for whom the protection order was issued." If the court instead finds that different portions of the order not related to the designated acts were violated, the noncitizen arguably is not deportable. In a recent Ninth Circuit court case, however, the Court held where a protection order can be issued only upon a showing of reasonable proof of a past act of abuse, any violation of such protection order will trigger removal, even if the act that violates the protection order is not itself a domestic violence offense.[180]

Can a juvenile court finding cause deportability under this ground? It appears so. The statute provides that a civil court finding is sufficient, and does not require that a "crime" must have been committed. It seems likely, therefore, that a juvenile court's finding of violation of a protection order will be held to establish deportability under this ground. (In most other contexts juvenile dispositions do not cause immigration

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[177] 8 USC § 1227(a)(2)(E)(ii).
[178] The ground is effective for "convictions, or violations of court orders, occurring after" September 30, 1996, the date of enactment of the IIRIRA legislation. IIRIRA § 350.
[179] 8 USC § 1227(a)(2)(E)(ii).
[180] *Alanis-Alvarado v. Mukasey*, 541 F.3d 966 (9th Cir. 2008).

consequences because the proceedings are civil, not criminal in nature, and juveniles are held not to have committed a crime; see **Chapter 7**).

Providing notice to subjects of protection orders. **Appendix I** is a notice warning that a noncitizen who is found to have violated a protection order may become deportable. Some judges may wish to provide a copy to all persons subject to protection orders, or to the family court bar.

§ 6.3 Child Custody Decisions

A. Custody Where a Noncitizen Parent is in Deportation Proceedings and/or is Going to be Deported ("Removed")

It is an increasing occurrence that a noncitizen parent involved in a custody fight will be in deportation ("removal") proceedings facing deportation from the United States. This is due to increased immigration enforcement where, for example, a parent who is apprehended and detained by immigration authorities may have his or her children taken by Child Protective Services because no other person has been legally designated to take care of them.

In these cases, it is important for courts not to assume that the lack of participation of a parent in the child custody proceedings is due to the fact that she has already been deported or that there is a lack of interest in pursuing custody of the child(ren). In reality, many parents have not yet been deported, but are merely in the process of deportation. Deportation proceedings can take years to resolve (often conflicting with the strict timelines of child custody proceedings) and the parent might have viable defenses against deportation. In fact, many parents fight their deportation in order to stay with and care for their children in the U.S.

During deportation proceedings, many parents are held in immigration detention centers far from their home and therefore, have no way of meaningfully participating in the child custody case. Because their whereabouts are often unknown by the court and they are detained, parents may not receive notices about the child custody proceedings, may not have phone access, or know how to contact the social worker or their legal representative. Even where a parent might have knowledge about a pending child custody case, immigration authorities may hinder their participation in the case. Due to these obstacles facing detained parents, local courts should ensure that they receive all notices, are in communication with their attorneys, and that court orders are issued and served upon immigration authorities to ensure that they participate in court hearings in person, or at the least, telephonically. The location of detained noncitizen parents can be tracked at: https://locator.ice.gov/odls/homePage.do. (A person can be tracked by name and date of birth or by their immigration identification number (A#). The country of birth is required for either search.)

It is also important to note that even though the person has a U.S. citizen child, it *does not automatically stop the deportation*, although in some cases the existence of a

citizen or permanent resident child may be a positive equity if the parent is eligible to apply for some waiver of the deportation. If a noncitizen parent really is about to be removed, hopefully the family will be able to make the difficult decision as to where the children, whether U.S. citizen or not, will grow up: with the removed parent in another country or with the parent who remains in the United States.

Undocumented Parents Who are Not in Removal Proceedings. Just because a person is undocumented does not mean that he or she faces imminent deportation from the United States or even is very likely ever to be deported. Millions of undocumented persons have lived for decades in the United States, often acquiring lawful immigration status later in life.

When a U.S. citizen child reaches the age of 21, he or she may be able to petition for the parent to become a permanent resident, whether the parent is living in the United States or abroad. See discussion of family immigration in **Chapter 4, § 4.2**.

B. Custody and "Acquired Citizenship" for Permanent Resident Children with one U.S. Citizen Parent

This fairly complex analysis is applicable in a relatively small number of cases, where a court's custody decision may determine whether a permanent resident child of a U.S. citizen is able to preserve her right to gain U.S. citizenship automatically before her 18th birthday.

The rule is that a noncitizen child automatically will become a U.S. citizen if the following two events occur in any order before the child's 18th birthday: (a) the child becomes a lawful permanent resident, and (b) one of the child's natural or adoptive parents (not step-parent) *who has custody of the child* is a U.S. citizen through birth or naturalization. If the U.S. citizen parent has no custody rights over the child at the crucial legal moment, it appears that the child will lose the right to automatic citizenship. The only penalty for this is that rather than gaining citizenship automatically at a young age, the child will remain a permanent resident. At some point after the child's 18th birthday he or she can naturalize to U.S. citizenship, assuming the child meets all requirements.

The issue comes up for children mainly in two scenarios: where an adopted child of a U.S. citizen is about to receive a green card, or where a lawful permanent resident parent of a permanent resident child is about to naturalize to U.S. citizenship.

> **Example 1**: Mark is the U.S. citizen parent of an adopted undocumented daughter Martha. She is going to become a permanent resident in a few months and before her 18th birthday. If on the date that Martha becomes a permanent resident Mark still has some form of joint or sole custody of her, Martha will become a U.S. citizen on the same date she becomes a permanent resident (provided that she was adopted while under the age of 16, and she has been in the legal custody of and has resided with Mark for at least two years). But if Mark

loses custody and Martha's other parent is not a U.S. citizen, she will become a permanent resident but not gain automatic citizenship.

Example 2: Sara and her son Sam both are lawful permanent residents. Sam is under the age of 18. Sara will be sworn in as a naturalized U.S. citizen next week. If on that date Sara retains some form of joint or sole custody over Sam, he automatically will gain U.S. citizenship when Sara does.

The automatic citizenship occurs under the naturalization laws as amended by the Child Citizenship Act in 2000.[181] See further discussion in **Chapter 5** on adoption, § 5.4.

C. A Noncitizen is Inadmissible if He or She Removes a U.S. Citizen Child from the United States in Violation of a Custody Decree by a U.S. Court

If a court located in the United States has granted custody of a U.S. citizen child to some person, then any noncitizen who detains or withholds custody of the child outside the United States is "inadmissible" until the time that the child is surrendered to the person having been granted custody.[182]

Also inadmissible are any persons who assisted or supported the noncitizen in this endeavor, as well as the noncitizen's spouse (other than the spouse who is parent of the child) and other children.[183]

[181] *See* 8 USC § 1431 and the ILRC's manual entitled *Naturalization: A Guide for Legal Practitioners and Other Community Advocates*.
[182] 8 USC § 1182(a)(10)(C)(i). To be inadmissible means to be barred from physical entry into the United States, as well as barred from acquiring lawful status. See **Chapter 10**.
[183] 8 USC § 1182(a)(10)(C)(ii).

CHAPTER 7

JUVENILE DELINQUENCY PROCEEDINGS

Judicial actions in delinquency court can affect the immigration status of a child in at least two ways.

- First, certain delinquency findings create bars to the child obtaining immigration status, while many others do not.

- Second, many children in delinquency are eligible for lawful immigration status but do not know it. A judge may direct child's counsel to complete a simple screening form provided in this book at **Appendix G**, or appoint immigration counsel. Lawful immigration status for a child caught up in delinquency may be key to the child's rehabilitation and successful transition to adulthood. Among other things it may provide the means of escape from abusive family, criminal contemporaries, and/or a lifetime of work in the underground economy.

Deadlines and Special Considerations. If an immigrant child in juvenile proceedings is applying for Special Immigrant Juvenile Status, until further guidance is given, juvenile court jurisdiction should not be terminated until the application is adjudicated. If this is not possible and jurisdiction must be terminated, where applicable, the court should insert language in the order stating that the termination is due to age.

If an immigrant child is to benefit from adoption, the adoption must be completed before the child's 16th birthday except in the case of certain sibling groups. Where the child is from a country that is a signatory to the Hague Convention, the adoption rules are complicated. See Chapter 5 and § 7.3.

SUMMARY OF CHAPTER

- Because a delinquency disposition is not a criminal conviction for immigration purposes, many such dispositions have no automatic bad immigration effects. Dispositions relating to prostitution, severe sexual crimes, and controlled substances may harm immigration status, however, and all delinquency dispositions adversely affect discretionary decisions regarding applications for immigration relief. See §§ 7.1, 7.2.

- Immigrant children in delinquency may be eligible for lawful immigration status. Summaries of the most relevant immigration applications appear in § 7.3, and a screening checklist is provided at **Appendix G.**

- Referring children to immigration authorities for deportation is bad public policy and in some cases illegal. Children often are unrepresented and the focus of immigration authorities is on deporting them, not on analyzing eligibility for relief, for which many of them are eligible. Such referrals are not required, and may be prohibited. See § 7.4.

§ 7.1 Overview of Immigration Consequences of Delinquency Findings

Juvenile delinquency may have many immigration consequences for noncitizen youth. It can lead to identification and arrest by immigration authorities for deportation, secure detention without possibility of release pending the outcome of their removal proceedings, bars from obtaining legal status in the U.S., statutory ineligibility and/or denial of immigration relief as a matter of discretion, and deportation.

The immigration consequences of delinquency, however, are not nearly as dire as the immigration consequences of an adult criminal conviction. See Chapter 9 for discussion on immigrations of some adult convictions. An adjudication in juvenile proceedings is not considered a "conviction" for any immigration purpose, regardless of the nature of the offense.[184] This means that in many cases a finding of juvenile delinquency will not automatically hurt immigration status. There are important exceptions, however. Some immigration penalties do not depend upon a conviction: certain forms of bad conduct or medical conditions such as being a drug addict can trigger the penalty. The penalties for these actions or conditions can include being "inadmissible" (ineligible to get many kinds of immigration status) and/or "deportable" (vulnerable to losing current immigration status, such as permanent residency). Specific conduct-based grounds are discussed in § 7.2. For a more detailed discussion of deportability and inadmissibility, see **Chapter 10.**

It is also important to note that many forms of relief from deportation are discretionary. As such, even though they may not trigger a statutory ground of inadmissibility or deportability, they will be considered by immigration judges or U.S. Citizenship and Immigration Services (CIS) examiners as significant negative discretionary factors in any application for lawful status or other immigration benefit. Furthermore, although an applicant may not have ever been charged or adjudicated delinquent, virtually all immigration applications require disclosure of any criminal activity. Finally, delinquency can lead to detention in a secure facility for youth while they are in deportation proceedings since it is a significant factor in immigration's risk assessment instrument. This can significantly interfere with a youth's access to due process and immigration relief.

[184] *Matter of Devison*, Int. Dec. 3435 (BIA 2000*), Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

NOTE: If there is a **juvenile delinquency finding**, it may provide the CIS with evidence that a person is inadmissible under the conduct-based grounds. In some cases delinquency records come up in the FBI or state fingerprint report that the CIS runs for each applicant for status age 14 and older.

§ 7.2 The Immigration Impact of Specific Delinquency Findings

Overview. Juvenile court findings, while not convictions, can constitute evidence that a child is inadmissible or deportable under the "conduct-based" grounds, which include "engaging in" prostitution, being a drug addict or abuser, making a false claim to U.S. citizenship, using false documents, smuggling aliens, and, significantly, providing the CIS with "reason to believe" the person ever has assisted or been a drug trafficker.

On the other hand, juvenile court dispositions involving theft or violence generally have no automatic immigration consequences (with the exception of "Family Unity" discussed at Part C below). While a juvenile court disposition involving possession for sale of marijuana can cause a permanent bar to lawful status, a juvenile disposition involving burglary, robbery, or even gang-related activities are not absolute bars to status – although they will be considered as negative factors in discretionary decisions.

Duty of Juvenile Defense Counsel in Representing Noncitizen Children. In *Padilla v. Kentucky*, the United States Supreme Court held that criminal defense counsel has a duty under the Sixth Amendment to provide affirmative, competent advice of the immigration consequences of a guilty plea.[185] Importantly, in so holding, the Court found that deportation is a "penalty", not a "collateral consequence," of a criminal proceeding.[186] Under *Padilla,* non-advice (silence) about the immigration consequences of a plea is insufficient (ineffective). Moreover, defense counsel's duty extends not only to investigating and advising of the immigration consequences, but to defending against such consequences, including preserving the possibility of discretionary relief from deportation.[187] Therefore, in any case involving a noncitizen juvenile, defense counsel must investigate and analyze the immigration consequences of the case, advise of such potential immigration consequences, elicit the child's wishes, and defend the case accordingly. Failure to do so constitutes ineffective assistance of counsel under the Sixth Amendment.

[185] *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).
[186] *Id*. at 1481.
[187] *Id*. at 1483.

A. Offenses that Have Harmful Immigration Consequences

Prostitution. If a court finds that a juvenile has provided sex for money in any ongoing manner within the last ten years, the juvenile is in danger of being found inadmissible, but not deportable for "engaging in" prostitution.[188] While no conviction is required for this finding, one or more delinquency adjudications for prostitution will serve as evidence. This provision will apply even if the person engaged in prostitution in a country where it is legal.[189]

Prostitution is defined as engaging in a pattern or practice of sexual intercourse for financial or other material gain.[190] A single act of prostitution does not amount to engaging in prostitution under this provision,[191] and engaging in prostitution does not encompass sexual conduct that falls short of intercourse.[192] There are waivers for the prostitution ground of inadmissibility for SIJS,[193] U nonimmigrant status,[194] and T nonimmigrant status applicants.[195]

Drug Trafficking. If the CIS has "reason to believe" that a noncitizen ever has assisted or been a drug trafficker, the person is inadmissible (but not deportable).[196] Drug trafficking has been defined as "some sort of commercial dealing" [197] and "the unlawful trading or dealing of any controlled substance."[198] Immigration authorities must have "reasonable, probative and substantial" evidence that the noncitizen was a knowing and conscious participant or conduit in the drug trafficking.[199] Evidence such as a police report or other documentation of the drug trafficking, testimony from police, detectives, or other officers, or admissions from the person himself, delinquency adjudications and

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[188] 8 USC § 1182(a)(2)(D).
[189] 22 CFR § 40.24(c).
[190] *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008). *See also* State Department regulations at 22 CFR § 40.24(b) which defines prostitution as "engaging in promiscuous sexual intercourse for hire … that must be based on elements of continuity and regularity, indicating a pattern of behavior of deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts."
[191] *Id*.; *Matter of T-*, 6 I&N Dec. 474 (BIA 1955).
[192] *Matter of Gonzalez-Zoquiapan*, *supra*. *See also Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006)(holding that prostitution for immigration purposes only encompasses offering sexual intercourse for a fee, as opposed to other sexual conduct).
[193] 8 USC § 1255(h)(2)(B).
[194] 8 USC § 1182(d)(14).
[195] 8 USC § 118 (d)(13).
[196] 8 USC § 1182(a)(2)(C).
[197] *Lopez v. Gonzales*, 549 U.S. 47 (2006).
[198] *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992).
[199] *See, e.g.*, *Matter of R.H.,* 7 I&N 675 (BIA 1958)(admitted giving drugs away for free*); Matter of Martinez-Gomez*, 14 I&N 104 (BIA 1972) (maintaining place where drugs are dispersed); *Matter of Rico*, 16 I&N Dec. 181, 185-86 (BIA 1977); *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000); *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (government's knowledge or reasonable belief that an individual has trafficked in drugs must be based on "credible evidence"); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979).

adult convictions or other evidence of sale, possession for sale, and the like have been held to supply "reason to believe."[200]

This ground also applies to the spouse, son, or daughter of a drug trafficker if they received any "financial or other benefit" from the drug trafficking within the previous five years.[201] Under the immigration law, the definition of a child is a person under the age of 21, whereas a son or daughter is someone over the age of 21.[202] As such, the "reason to believe" family ground should only apply to persons who received the benefit after reaching the age of 21 and not unduly punish children and youth who may have received some "benefit" from drug trafficking while still a child.

While many of the "conduct-based" grounds can be waived in the discretion of immigration authorities, the drug trafficking ground usually cannot be waived and is an absolute bar to obtaining status.[203] An exception is that a person inadmissible under this ground can apply for a "U" or "T" visa based on being a victim/witness of a serious crime or of severe human trafficking. For information on the U and T visas see **Chapter 4**, § 4.3 and discussion at § 7.3 below.

Drug Addict or Abuser. A person is inadmissible who is a "current" drug addict or abuser, and deportable if he or she has been one at any time since being admitted to the United States.[204] The definition of abuser is not settled, and in some areas the CIS finds current abuse based on any more than one-time experimentation with a controlled substance within the last three years. This means that drug abuse may be defined as nearly synonymous with drug use. Drug addiction is the non-medical use of a controlled substance "which has resulted in physical or psychological dependence."[205] Multiple delinquency findings of drug possession or under the influence cases might or might not trigger a government charge that the juvenile is an abuser or addict. (Note, however, that

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[200] *Igwebuike v. Caterisano*, 230 Fed. Appx. 278 (4th Cir. 2007)(unpublished)(holding that the drug sale charges for which the petitioner was acquitted were alone insufficient to constitute "reason to believe," and that "reason to believe" charge triggering inadmissibility must be based on facts underlying an arrest and those facts must be cited in support of the charge); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1211 (9th Cir. 2004) (finding sufficient reason to believe the alien had committed illegal acts underlying previous drug trafficking arrest because the government submitted documents describing the police surveillance of the person and the person's subsequent attempt to escape with 147 pounds of marijuana); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003)(in addition to a previous arrest for drug trafficking, two undercover detectives testified that they had personally arranged drug deals with the petitioner); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979)(applicant admitted to participating in an attempt to smuggle a kilogram of marijuana into the United States); *Matter of Rico*, *supra* (BIA did not rest on evidence of arrest for drug trafficking, but testimony of the Border Patrol Agent and the Customs Inspector that he frequently drove the car in which 162 pounds of marijuana was found as well as testimony of special agents of the Drug Enforcement Administration in the investigation of the incident).

[201] 8 USC § 1182(a)(2)(C)(ii).

[202] *See* 8 USC § 1101(b)(1).

[203] For example, there is no waiver provided for applicants for special immigrant juvenile status or VAWA relief. A person can be granted asylum or withholding based on fear of persecution despite being inadmissible under the ground, but will not be permitted to become a permanent resident.

[204] 8 USC §§ 1182(a)(1)(A)(iii) (inadmissibility), 1227(a)(2)(B)(ii) (deportability). See **Chapter 10** for discussion of "admission" and inadmissibility and deportability.

[205] 42 CFR § 34.2(g).

a mere user is not an addict.) These are medical determinations; the person may submit doctor's reports stating that the abuse or addiction is not current. Some waivers are available.[206]

Finding of Violation of a Protection Order. A person is deportable if a civil or criminal court finds that he or she has violated a protection order designed to protect against credible threats of violence, repeated harassment, or bodily injury.[207] It is unsettled whether a noncitizen found to have violated a different portion of the protection order is deportable or not. In a recent Ninth Circuit court case, the court held that where a protection order can be issued only upon a showing of reasonable proof of a past act of abuse, any violation of such protection order will trigger removal, even if the act that violates the protection order is not itself a domestic violence offense.[208]

Juveniles should understand that their age may not protect them from a violation of a protection order finding. This ground of deportability does not require a conviction. The government, however, has to prove by clear and convincing evidence that the protective order was a domestic violence protective order and secondly that it was violated. For more discussion on protection orders see **Chapter 6** § 6.2.

False Documents. Many states have offenses concerning use of false documents and immigration status. A disposition in juvenile proceedings might provide evidence for a finding in a special civil court that in turn would trigger inadmissibility or deportability under the false documents grounds.[209]

Offenses that demonstrate that the person is a sexual predator. A person who has a mental condition that poses a current threat to self or others can be found inadmissible under a separate medical category.[210] Juvenile court dispositions that involve sexual predator behavior or other behavior suggesting a mental pathology might cause the government to charge inadmissibility under that ground. While juveniles who only have a single adjudication for a sexual offense (especially against a minor) will not be found inadmissible under this ground, they will have difficulties as a matter of discretion to obtain immigration relief such as SIJS.

Note: Most of the conduct grounds of removal affect undocumented youth rather than youth with lawful status. Such conduct grounds may cause undocumented youth to be statutorily ineligible for lawful status or for other forms of relief against deportation. On the other hand, in many cases, a youth with lawful status (in particular lawful permanent residents) will not be affected by juvenile delinquency since fewer conduct removal grounds trigger the loss of lawful status.

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[206] *See, e.g.*, specific waivers for SIJS and VAWA.
[207] 8 USC § 1227(a)(2)(E)(ii). See further discussion of the consequences of this finding in **Chapter 6**, § 6.2.
[208] *Alanis-Alvarado v. Mukasey*, 541 F.3d 966 (9th Cir. 2008).
[209] 8 USC §§ 1182(a)(6)(F), 1227(a)(3)(C).
[210] 8 USC § 1182(a)(1)(A)(iii).

B. Offenses that Generally Do Not Bar the Non-Immigrant from Applying for Relief

The following grounds of inadmissibility and deportability are not triggered by a delinquency finding. Such findings can be considered as a negative factor in a discretionary decision, however.

"Admission" of a crime involving moral turpitude or drug offense. A noncitizen can be found inadmissible if he or she has formally admitted all of the elements of a crime involving moral turpitude or controlled substances, even if there has been no conviction.[211] An admission occurs when: (1) the conduct in question involves a crime, (2) the government provides a plain language description of the crime, and (3) the admission is voluntary. An admission of guilt by a juvenile or adult about conduct that was treated or would have been treated in delinquency proceedings is not an admission for this purpose, because the person is merely admitting to an act of juvenile delinquency, not a controlled substance or moral turpitude "crime."[212] (However, if the child admits repeated usage, the government might charge inadmissibility as a drug abuser or addict. See discussion in section A above.)

Juvenile disposition of a violent or theft crime, including one or more crimes classed in immigration law as an aggravated felony, crime involving moral turpitude, firearm, or domestic violence offense. A delinquency disposition is not a conviction for immigration purposes, so deportability and inadmissibility grounds such as these that require a conviction are not triggered by delinquency findings.[213] Thus a finding regarding burglary, robbery, theft, felony assault, battery, or sexual assault does not carry automatic immigration penalties. The one exception is if the noncitizen will apply for Family Unity; see Part C, below. Such findings, however, may be considered serious negative factors in any discretionary decision, which can be insurmountable for a child to overcome. This is particularly true for sex offenses or violent offenses including serious assault or gang-related activity. (Note that allegations of gang-related activity and membership are of particular concern since targeting non-citizen gangs is a high priority to immigration authorities.)

As stated above, a person who has a mental condition that poses a threat to self or others can be found inadmissible under a separate medical category.[214] Juvenile court dispositions that involve sexual predator behavior or other behavior suggesting a mental pathology might show inadmissibility under that ground.

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[211] 8 USC § 1182(a)(2)(A)(i).
[212] This follows from the reasoning in cases such as *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981); *see also Matter of Devison*, 22 I&N Dec. 1632 (BIA 2000), citing *Matter of C. M.*, 5 I&N Dec. 27 (BIA 1953); *Matter of MU*, 2 I&N Dec. 92 (BIA 1944) (admission by adult of activity while a minor is not an admission of committing a crime involving moral turpitude triggering inadmissibility); *but see United States v. Gutierrez-Alba*, 128 F.3d 1324 (9th Cir. 1997) (without discussion of issue of juvenile delinquency, juvenile's guilty plea in adult criminal proceedings constitutes admission, regardless of whether adult criminal court prosecution was ineffective due to defendant's minority status).
[213] *See* discussion in § 7.1 and cases such as *Matter of Devison*, and *Matter of Ramirez-Rivero, supra.*
[214] 8 USC § 1182(a)(1)(A)(iii).

C. A Delinquency Finding of a Violent Felony Blocks Eligibility for "Family Unity"

A finding in juvenile proceedings of a felony involving violence or threat of force against another person will bar eligibility for "Family Unity."[215] This is one of the only provisions in the Immigration and Nationality Act that specifically imposes a penalty based on a delinquency finding.

To qualify for Family Unity, the person must be the spouse or child of someone who became a permanent resident under one of the immigration amnesty programs of the late 1980's. A child who entered the United States from 1989 on is not eligible. For that reason, this benefit currently affects few people.

D. Certain Juvenile Dispositions Can Bar a U.S. Citizen or LPR from Petitioning for a Family Member

Under the Adam Walsh Child Protection and Safety Act of 2006, both U.S. citizens and lawful permanent residents convicted of certain crimes against minors cannot file family based petitions, unless they qualify for a narrow exception.[216] Certain serious juvenile delinquency dispositions will be considered "convictions" for this purpose. These offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct.

Whereas under the Immigration and Nationality Act, juvenile adjudications do not count as convictions for immigration purposes, § 111(a) of Adam Walsh includes juvenile delinquency adjudications as convictions if two criteria are met: (1) the offender is 14 years or older at the time of the offense; and (2) the offense was the same as or more severe than aggravated sexual abuse described in 18 USC § 2241 or was an attempt or conspiracy to commit such an offense. 18 USC § 2241 criminalizes someone who crosses a state border to engage in a sexual act with someone under the age of 12 or someone who knowingly engages in sexual conduct with someone who is between the ages of 12 and 15 by using force or threatening the person with serious bodily harm.

The only exception to this entire provision is if the Secretary of Homeland Security decides in his "sole and unreviewable" discretion that the citizen or permanent resident petitioner poses no risk to the relative.

§ 7.3 Applying for Lawful Immigration Status from Delinquency Proceedings

Immigrant children in delinquency proceedings are not barred from applying for lawful immigration status. Often the underlying causes of the delinquent behavior –

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[215] IIRIRA § 383 bars from Family Unity a person who "(3) has committed an act of juvenile delinquency which if committed by an adult would be classified as – (A) a felony crime of violence that has as an element the use or attempted use of physical force against another individual, or (B) a felony offense that by its nature involves a substantial risk that physical force against another individual may be used in the course of committing the offense." This is similar to the definition of "crime of violence at 18 USC § 16. For further information see ILRC manual on Family Unity cited in **Chapter 11.**

[216] Pl 109-248, title IV; 120 Stat. 587, 622-23 (July 27, 2006).

trauma within the family, victimization by criminals or smugglers, or past traumatic experience in the home country–form part of the basis for the immigration application.

As discussed in § 7.2 above, many delinquency dispositions do not pose a bar to becoming a lawful permanent resident. Some do, however, so it is advised that any child with a delinquency record who is considering applying for immigration status obtain **advice from an expert immigration practitioner** to see if the record triggers a bar and if so, if a waiver is available.

Applications for immigration status are discussed in **Chapters 2-4.** The following applications may be most commonly applicable to children in delinquency proceedings.

A. Special Immigrant Juvenile Status ("SIJS") for Children Under Juvenile Court Jurisdiction Where Reunification with One or Both Parents is not Viable Due to Abuse, Neglect or Abandonment, or a Similar Basis Found under State Law

Federal law provides that an immigrant child who is under juvenile court jurisdiction and cannot be reunified with one or both of her parents due to abuse, neglect or abandonment or a similar basis under state law may be eligible for lawful permanent residency (a "green card") as a "Special Immigrant Juvenile." [217] The definition of SIJS includes children in delinquency proceedings. SIJS is discussed in **Chapter 2**, and special considerations applicable to children in delinquency proceedings are discussed at § 2.2 Part H.

> **SIJS Example:** Samuel is brought to delinquency proceedings and the court finds that he has committed theft and aggravated assault. Because Samuel has been severely neglected by his parents, when it is time for Samuel's release from custody the court finds that parental reunification is not viable and instead places Samuel in a group home. The court is considering releasing Samuel to his uncle as guardian. Either way, Samuel should be found eligible for SIJS.

Note that, until further guidance is given, it is recommended that the court maintain juvenile court jurisdiction until the entire SIJS application is adjudicated. See § 2.2, Part F. If this is not possible and jurisdiction must be terminated, where applicable, the court should insert language in the order stating that the termination is due to age. In some counties judges direct attorneys, social workers or probation officers to investigate whether SIJS is appropriate relief, or appoint immigration counsel.

B. Violence Against Women Act ("VAWA") Relief for Immigrants Abused by a U.S. Citizen or Lawful Permanent Resident Parent or Spouse

A child who has been subjected to "battery or extreme cruelty" by a citizen or permanent resident parent can apply for permanent residency under VAWA. "Extreme

[217] *See* 8 USC § 1101(a)(27)(J), 8 CFR § 204.11, and discussion in **Chapter 2**, *supra.*

cruelty" is broadly defined and encompasses threats, emotional abuse, and other acts not amounting to violence. Further, if the child's parent was subject to battery or extreme cruelty by a citizen or resident spouse, the child may obtain VAWA benefits as a derivative even if the child was not abused. If the couple has divorced, the abused spouse and/or child still may be able to apply. The VAWA applicant should have lived with the abuser at some time and must be a person of good moral character. See **Chapter 3**.

> **VAWA Example:** Celia is in delinquency proceedings. She and her mother are undocumented. Her U.S. citizen stepfather has been physically abusive toward her mother and perhaps toward Celia. The couple recently divorced. Celia and her mother should be evaluated for VAWA. If eligible, they will have to apply within two years of the divorce. There is no requirement that Celia be under juvenile court jurisdiction, but an immigration practitioner should carefully review her delinquency record, or hopefully advise her before findings are made, to make sure the record does not bar her from VAWA.

C. "U" Visa for Victims of Crimes, "T" Visa for Victims of Severe Human Trafficking

An immigrant child or adult who is the victim of a serious crime and who is potentially helpful to the investigation or prosecution of that crime may qualify for a "U" visa. A child or adult victim of alien traffickers (persons and criminal organizations who bring noncitizens illegally into the United States) may qualify for a "T" visa if (a) the person was brought in to do sex work or (b) the person was coerced to do other kind of labor by the traffickers, (c) would suffer extreme hardship if deported, and (d) has complied with reasonable requests for assistance in the investigation or prosecution of trafficking, unless he or she is under 18. If the victim was a child, the parent also may qualify for status, and vice versa.

The U and T visas initially are temporary, non-immigrant visas, but visa-holders can apply for lawful permanent residency within a few years. See **Chapter 4**, § 4.3. Any delinquency finding or adult conviction potentially can be waived.

> **U Visa Example:** Luis is a 12-year-old accused of assisting older children in drug sales. He has been the victim of gang violence. If a judge, prosecutor or other official certifies that Luis's cooperation may be helpful in investigation of his attackers, Luis as well as his parents may be eligible for a U visa. This is one of the few visas where Luis may qualify for status despite the fact that he has been involved in drug trafficking.

D. Immigration through Family; Adoption Issues

A child can become a permanent resident through a family visa petition submitted by a natural, step or adoptive parent, if the parent is a U.S. citizen or permanent resident. The child can only immigrate through an adoptive parent if the *adoption is completed before the child's 16th birthday*. There is an exception for adopted sibling groups: if

natural siblings are adopted and one sibling's adoption is completed before the child's 16th birthday, the adoption of the others can be finalized any time before their 18th birthdays. Note, where the child is from a country that is a signatory to the Hague Convention, an international treaty that establishes international standards for intercountry adoptions, there are additional requirements that must be met for the adoption to be recognized. See **Chapter 5 § 5.1** for a discussion on adoption issues.

E. Other Relief

There are several other ways that immigrants can obtain lawful status, such as asylum, temporary protected status, etc. In many cases a delinquency record will not serve as a bar. See summary in **Chapter 4**, and a checklist for determining eligibility to apply for status in **Appendix G.**

§ 7.4 Referring Children in Delinquency Proceedings to Immigration Authorities for Deportation

Referring a child to immigration authorities, or permitting a probation officer or other officers of the court to do so, is bad public policy and not a way to have the child "screened" to see if he or she qualifies for some lawful status. Immigration authorities' focus is on detaining and deporting the child, not on investigating relief from deportation. Children are not provided with attorneys in these adversarial hearings and they often go unrepresented. Children eligible for relief frequently are deported.[218]

A. Immigration Enforcement in the Juvenile Justice System[219]

There are several reasons that immigration enforcement measures applied in the juvenile justice system are bad public policy, or in some cases illegal.

Federal Law Does Not Require It. Due to the separation of powers between states and the federal government, the federal government cannot require state or local officials to enact or enforce federal regulations or schemes. Thus, there is no federal law that requires state and local law enforcement officials to affirmatively enforce federal immigration laws, and there is no duty under federal law for state or local law enforcement officials to report noncitizens to federal agencies like Immigration & Customs Enforcement (ICE). State or local law enforcement officials, however, may voluntarily report noncitizens to immigration authorities, and states and local governments can pass legislation and adopt policies that require or facilitate local cooperation with federal authorities. The states, however, cannot pass laws that regulate "who should or should not be admitted into the country and on what terms those lawfully

[218] See further discussion at § 8.1.
[219] Portions of this section were written by Shannan Wilber, Executive Director of Legal Services for Children in San Francisco, California.

admitted can remain here,"[220] as the federal government has broad and exclusive power to regulate immigration.

Potential Violation of Provisions of State Law. Enforcement of immigration laws against juveniles may violate provisions of state law. Many states, for example, prohibit the disclosure of information concerning juvenile offenders and provide no exceptions for disclosure of a juvenile's immigration status to federal immigration authorities. Reporting suspected undocumented immigrant juveniles to federal immigration authorities may constitute an unauthorized disposition under court procedure and violate confidentiality provisions.

Undermines the Fundamental Goals of the Juvenile Justice System. Reporting youth to immigration authorities undermines the fundamental goals of the juvenile justice system, including rehabilitation, treatment, accountability and reintegration of youth into their families and communities.

Immigration enforcement fails as a tool of rehabilitation first because it holds youth accountable for a status over which they have no control. A youth's immigration status is rarely a result of the youth's decisions and is more frequently based on decisions made for the youth by parents, guardians, or by exigent circumstances outside his or her control. Reporting youth to ICE punishes youth for decisions they have not made and often results in punishment grossly disproportionate to the original offense.

These problems are exacerbated in jurisdictions that report youth to ICE at the booking stage -- a practice that can result in erroneous referrals and prolonged detention both in juvenile and in immigration custody. According to a June 2009 study by the Department of Justice's Office of Juvenile Justice and Delinquency Prevention, only 56% of juvenile delinquency cases handled by probation departments nationwide during 2005 resulted in the filing of a petition against the youth. Of these, only 66% were sustained. Thus, almost 1/3rd of arrested youth (539,700 out of 1,697,900) had their cases dismissed altogether, and another 20% (344,300) were subject to only minor sanctions following an informal handling of their cases or the dismissal of a delinquency petition.[221] Thus, referral of youth to ICE prior to filing a petition or adjudication subjects a great number of youth, who otherwise would have been eligible for release, to extreme punishment. Moreover, placing an "immigration hold" on youth typically results in prolonged detention and placement in a secure detention facility, sometimes located hundreds or thousands of miles from their homes, families and communities. See **Chapter 8** for a discussion of immigration holds.

Many local juvenile justice officials believe that participation in immigration enforcement efforts and cooperation with federal immigration authorities will lessen the burden on the juvenile justice system while also assisting the federal deportation process.

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[220] *De Canas v. Bica*, 424 U.S. 351, 355 (1976)

[221] Melissa Sickmund, *Delinquency Cases in Juvenile Court*, *2005 Fact Sheet*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, June 2009. Available at: http://www.ncjjservehttp.org/NCJJWebsite/publications_detail.asp?n=NCJ224538

In many cases, however, the opposite is true. Immigration enforcement interferes with the effectiveness of juvenile justice procedures, creating conflicts between two very different systems. When minors are reported to immigration authorities prior to disposition, their cases are typically suspended indefinitely and the immigration removal process takes over. Youth are removed from a system designed to address their behavior and placed in one focused solely on removing them from the country. Alternatively, if the youth who has been referred is found ineligible for deportation for one of many possible reasons, he or she may be released to find the juvenile matter dismissed altogether, sending mixed messages about the effectiveness of the juvenile justice system.

Immigration enforcement also violates the core principle of confidentiality in the juvenile justice system. Confidentiality promotes rehabilitation because it avoids attaching the stigma of criminality to youth in the system. When delinquent youth are reported to ICE, information that is purportedly obtained by juvenile justice officials to help gauge the youth's needs and circumstances is instead used against them in the deportation process. Youth who are referred to immigration authorities are forever branded with the stigma of the delinquency charge. They are punished in the immigration system through secure detention, denial of immigration relief, separation from their families, and other serious deprivations.

Finally, immigration enforcement against juvenile offenders runs directly counter to the presumption that family reunification is the main vehicle through which youth obtain the care and guidance to rehabilitate themselves. Immigration enforcement does nothing to further solidify the ties between a youth and his/her family, but rather divides them. In many cases, referral ensures that some youth who have lived in the U.S. for all or most of their lives with their families will be orphaned regardless of their particular circumstances.

Undermines Public Safety and Trust in Law Enforcement. Policies authorizing investigation and disclosure of a juvenile's immigration status, or that of his or her family, by state or local authorities erode community trust and cooperation with law enforcement and the judicial system. Consequently, public safety suffers. For this reason, both the Major Cities Chiefs (an association of the 64 largest police departments in the U.S. and Canada) and the 20,000-member International Association of Chiefs of Police have opposed the local policing of federal immigration laws absent direct federal order or the presence of a federal warrant.[222]

Where local officials enforce civil immigration laws, noncitizen youth have legitimate reason to fear providing information to the police about crimes committed against them or that they have witnessed.[223] If youth are aware that probation and detention officials are disclosing information to immigration authorities, they may

[222] *See* MCC Immigration Committee Recommendations available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf and Police Chiefs Guide to Immigration Available at http://www.theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf

[223] National Immigration Law Center (November 2004). "Sample Language for Policies Limiting the Enforcement of Immigration Law by Local Authorities." Available at http://www.nilc.org/immlawpolicy/LocalLaw/sample%20policy_intro%20brief_nov%202004.pdf

withhold important information necessary to develop an effective case plan to promote their rehabilitation and prevent recidivism. If youth and their families know that the information of family members will be shared with immigration authorities, families are likely to abstain from participation in the juvenile justice process. Family involvement is crucial to the success and well-being of youth, and the viability of the case plan.

Increases Risk of Liability. Juvenile justice officials tasked with investigating and reporting suspected undocumented immigrant youth are placed into the dangerous position of interpreting and dealing with complex federal immigration law. If the law is applied or interpreted incorrectly, local officials may falsely identify youth as undocumented.

Immigration law is complex and subject to frequent changes, and an individual's immigration status is not verifiable by simply checking a database. Determination of immigration status is difficult and contains many fact-based exceptions that may make undocumented youth eligible for relief. Even youth are often unaware of their own status. Enforcement of such complex and ever-changing laws requires not only weeks of training and continuing education, but knowledge of case histories and files that only the Department of Homeland Security (DHS) has.

It is probable that law enforcement will attempt to determine immigration status based on physical appearance, accent, or surname. Deputizing local law enforcement officials to enforce immigration laws is likely to lead to increased racial profiling, civil rights violations, and mistakes, all of which can be very costly for state and local governments. Because local agencies currently lack clear authority to enforce civil immigration laws; are limited in their ability to arrest without a warrant; are prohibited from racial profiling; and lack the training and experience to enforce complex federal immigration laws, it is more likely that local enforcement agencies will face the risk of civil liability and litigation if they chose to attempt to do so.

Undermines Access to Immigration Relief. Congress has created several means by which undocumented youth may apply to adjust their immigration status, including Special Immigrant Juvenile Status for youth who have been abused, abandoned or neglected; asylum for youth who have been persecuted in their countries of origin; "T" visas for children who are the victims of trafficking; and "U" visas for children who are the victims of enumerated crimes. (See **Appendix G**). Notifying immigration authorities before having a qualified attorney or agency screen the youth, effectively cuts off these avenues of federal immigration relief for a majority of eligible youth. ICE neither screens youth for potential forms of relief nor provides them with immigration attorneys. ICE also may - and often does - transfer youth to detention facilities in remote areas without legal service agencies, making it virtually impossible for them to assert a viable claim for relief.

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Any investigation and disclosure of a juvenile offender's immigration status is poor policy. If such actions were authorized by state and/or local authorities, community trust and cooperation with the judicial system would erode and the punishment and rehabilitative goals of the juvenile court system would be undermined. It would stretch county resources since it would require local juvenile justice officials to interpret and apply complex immigration law even though they are unfamiliar with it. When these officials make mistakes—from potential illicit racial profiling to unlawful detention to violating state laws—the county will increase its risk of civil liability.

If the juvenile court wishes to ensure that a child gets some rudimentary screening for eligibility for immigration relief, the court instead may direct the child's attorney to review with the child a screening checklist such as the one provided at **Appendix G**, or may appoint immigration counsel for a more thorough review.

B. Disparate Treatment of Noncitizen Youth During Juvenile Proceedings

Noncitizen youth may not only face the disproportionate impact of immigration enforcement and deportation as a result of contact with the juvenile justice system, but also disparate punishment within the system as compared with U.S. citizen youth. Courts should be wary of such policies and practices.

Noncitizen youth, who might otherwise be diverted or released to their families after an arrest, may be detained because they are suspected of being unlawfully present in the U.S. These and other noncitizen youth who are placed in detention are at greater risk of being flagged by immigration authorities for deportation. Youth who are identified by immigration officials will receive an "ICE hold" or "detainer," which is a *request that an agency, such as a juvenile detention facility, notify them* prior to release of a noncitizen so that they can arrange to assume custody for the purpose of arresting and removing the person.[224] An ICE hold often results in a youth being detained for a longer period of time since he or she cannot be released into the community pending the completion of their juvenile proceeding. See **Chapter 8** for discussion of ICE holds. Instead, if ordered released, the youth will immediately be taken into the custody of immigration authorities regardless of the status of the juvenile case and will likely not be returned for any future court hearings to resolve the case. (Note, that there are important limitations to how long a youth may be held after ordered released in order for immigration authorities to come pick him or her up.)

In addition to being subject to detention more often and for longer periods of time, noncitizen youth may receive more severe dispositions. In many cases, District Attorneys may not be amenable to alternative plea offers where immigration concerns are at issue. The United States Supreme Court in *Padilla v. Kentucky* found, however, that "informed consideration" of immigration consequences by both the defense *AND THE*

[224] 8 CFR § 287.7.

PROSECUTION during plea negotiations, in order to reduce likelihood of deportation and promote interests of justice, is appropriate.[225]

Finally, noncitizen youth may fail to receive probation and other community services in lieu of incarceration due to their perceived immigration status and some courts may choose to order immigration related consequences as part of the disposition. Some examples of court dispositions that have been imposed include ordering a youth not to return to the country or to continue to appear in court despite referral to immigration authorities where the youth will be transferred outside of the geographic area. While there may be a belief that the youth will absolutely be deported, many youth are eligible to return to the community pending their removal proceedings and will return and may ultimately win relief against deportation. Courts should be aware that imposition of any immigration related condition in a court order may be preempted by federal immigration law and may frustrate the immigration legal process.

[225] *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010).

CHAPTER 8

CHILDREN IN DEPORTATION & DETENTION; ICE HOLDS AND DETAINERS

SUMMARY

- The U.S. Immigration and Customs Enforcement (ICE) detains accompanied minors and the Office of Refugee Resettlement (ORR) detains unaccompanied[226] minors whom ICE is trying to deport. A juvenile court can take jurisdiction over an abused, neglected or abandoned child in ORR detention, with ORR's consent. See § 8.1.

- If ICE has placed a detainer or "hold" on a noncitizen child in delinquency detention, the detention authorities may hold the child for ICE for only 48 hours after he or she otherwise would have been released. See § 8.2.

§ 8.1 Unaccompanied Minors in Removal Proceedings & Detention; Obtaining Juvenile Court Jurisdiction for SIJS[227]

State juvenile courts, attorneys and social workers may come into contact with unaccompanied noncitizen children detained by ICE or the ORR in state facilities and charged with immigration violations such as being present without lawful status. Some of these children have suffered abuse, neglect and abandonment and are amenable to juvenile court jurisdiction, as well as Special Immigrant Juvenile Status ("SIJS"), through a particular process. Others may be qualified to obtain immigration status under the Violence Against Women Act ("VAWA"), asylum, or other immigration law provisions.

Apprehension and Detention of Children. Roughly 8,000 unaccompanied minors are detained and officially enter into immigration proceedings every year.[228] These children, most of whom are in their teens, but some as young as infants, come from all over the world, often fleeing abuse, hardship, or persecution. Some of the children are apprehended immediately at ports of entry, such as airports, for lack of proper documentation. Others are apprehended after crossing the border without inspection,

[226] While immigration laws do not define the term "accompanied," it defines "unaccompanied" as an undocumented person under the age of 18 who does not have a parent or legal guardian who is willing or able to provide care and physical custody. See 6 USC § 279(g)(2) (defining the term "unaccompanied).

[227] Parts of this section are drawn from Nugent and Schuman, "Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children," 78 *Interpreter Releases* 39, pp. 1569-1591 (October 8, 2001), by permission of the authors.

[228] According to the data , provided to the Center for Public Policy Priorities (CPPP) in 2008 by Susana Ortiz-Ang, Deputy Director of the Division of Unaccompanied Children's Services (DUCS) within the ORR,

sometimes years after entry. Others have been referred to ICE after coming into contact with state systems.

When children are apprehended by immigration authorities, depending on the circumstances, the government may immediately return them to their country of origin, they may also release them to their families or other responsible adults, or detain them while their deportation proceedings are pending. If detained, they may be detained for a few months, and sometimes even years, in various immigration detention settings.

Once a child is arrested by a DHS officer, he or she must be expeditiously processed and be held in a facility that is safe and sanitary. DHS authorities will attempt to determine the child's age, ascertain his or her nationality, conduct background checks, and notify the appropriate country's consulate that the youth is being detained. A critical initial determination at this time also includes whether the juvenile is "accompanied" or "unaccompanied." While immigration laws do not define the term "accompanied," it defines "unaccompanied" as an undocumented person under the age of 18 who does not have a parent or legal guardian in the U.S. or a parent or legal guardian who is willing or able to provide care and physical custody.[229] The outcome of this initial assessment will determine what set of procedures apply to the child and who will have custody over the child.

Within 48 hours of apprehension, if the child is determined to be "unaccompanied," DHS must assess whether the child has been a victim of a severe form of trafficking and there is credible evidence that the child is at risk of being a victim of trafficking, has a fear of returning to his or her country, and is able to make an independent decision to withdraw his or her application to be admitted to the U.S.[230] If the child does not meet this criteria, is from a border country (e.g., Canada or Mexico), *and* is inadmissible, DHS can allow the child to withdraw his application for admission and return the child to his or her home country.[231] On the other hand, if the child meets such criteria or if DHS cannot make such a determination within 48 hours, the unaccompanied child must be immediately transferred to the custody of ORR. DHS will then generally place these children in removal proceedings. The TVPRA specifically provides that once a minor is determined to be unaccompanied or there is a claim or suspicion that the person in custody is under the age of 18, all federal departments and agencies must notify ORR within 48 hours.[232] DHS is further required under the TVPRA to transfer the child into the custody of ORR within 72 hours of apprehension, unless exceptional circumstances are present.[233]

If the minor is considered accompanied, DHS retains jurisdiction over the child. DHS may immediately remove the child (with his or her family or others) if apprehended near the border. If DHS does not immediately remove the child and initiates removal

[229] 6 USC § 279(g)(2).
[230] TVPRA § 235(a)(2)(A).
[231] TVPRA § 235(a)(2)(B).
[232] TVPRA §§ 235(b)(1)-(b)(2).
[233] TVPRA § 235(b)(3).

proceedings, the youth may be detained in a juvenile secure facility or in a family detention setting, granted parole, released on bond, or ordered released on recognizance pending those proceedings.[234] Provisions governing the release of an accompanied minor, including to whom, are provided in federal regulation at 8 CFR § 1236.3(h).

Federal regulation and the Flores Settlement Agreement (a settlement arising out of a lawsuit against federal immigration authorities entitled *Flores v. Reno*)[235] further provide that all children must be given a notice of rights upon apprehension by DHS. Each child is to be provided a notice of a right to a phone call, a list of free legal services, Form I-770 (Notice of Rights and Disposition), an explanation of the right to judicial review, and their right to a hearing before being presented with a voluntary departure form.[236] If the child is under 14 years of age or unable to understand Form I-770, the notice must be read and explained to the child in a language that he or she understands.

Deportation Proceedings. Once children are apprehended and detained, they are generally placed in immigration removal (deportation) proceedings before an immigration judge.[237] These proceedings are administrative and adversarial. Children are held to the same standard of proof as adults in fighting their deportation. They are provided with very little information about their legal rights, such as viable defenses against deportation, for which many of them are eligible. They often do not understand the nature of the proceedings due to age, language and cultural barriers.

The stakes of these proceedings – whether the child will be deported back to the home country – are high. The children are not entitled to government-appointed counsel or guardians ad litem, and many children in removal proceedings go unrepresented. Unaccompanied children in the custody of ORR, however, are now significantly more likely to receive representation due in part to ORR efforts to increase representation of unaccompanied children. (There is also an ORR pilot program to provide guardians *ad litem* to youth in custody.) Importantly, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) provides broader legal protections and access to services for unaccompanied youth. In particular, it promotes greater access to legal counsel for unaccompanied immigrant children by requiring "to the greatest extent practicable" that these children have legal representation, encourages the appointment of child advocates for trafficking victims and other vulnerable children, and requires more expansive training of federal officials who work with unaccompanied children. Those children fortunate enough to obtain representation are far more likely to be granted the

[234] 8 CFR § 1236.3.
[235] Stipulated Settlement Agreement, *Flores v. Reno*, Case No CV85-4544-RJK (C.D. Cal. 1996). (Hereinafter "Flores.")
[236] *Id*.
[237] Immigration courts are part of the EOIR (Executive Office of Immigration Review), the administrative body within the Department of Justice that oversees immigration adjudication. EOIR includes the immigration courts and the Board of Immigration Appeals (BIA). It is a separate entity from the ICE which is under the Department of Homeland Security.

relief requested. For example, they are more than four times as likely to be granted asylum by an Immigration Judge.[238]

Although children in removal proceedings currently have no right to appointed counsel, under federal regulation children must have a lawyer if not a friend in court before they can admit that they are deportable.[239] Failure to provide these protections invalidates the removal proceedings. Other protections during removal have also been secured for children. The Ninth Circuit, for example, in *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004), held that immigration authorities must provide notice of a removal or deportation hearing to the adult taking custody of a minor, including a minor over the age of 14.

Juvenile court jurisdiction over a child in immigration custody. The federal immigration statute makes specific provisions for how a juvenile court can take custody over a child in immigration detention if the child might be eligible to apply for Special Immigrant Juvenile Status ("SIJS"). If an unaccompanied immigrant child is already in immigration custody before coming to juvenile court, a juvenile court judge cannot make custody or care decisions about the child without ORR's permission. In cases where a juvenile court is not dealing with a child's custody or placement status, specific consent is not required to take jurisdiction over a child's case or to enter SIJS findings.

Requests for consent for a juvenile court to order a change in custody or placement determination over a child in ORR custody must be made in writing to ORR. For discussion of SIJS and the consent process for children in immigration custody, see **Chapter 2**, § 2.7. In addition, children in immigration custody frequently are eligible for other relief, discussed in **Chapters 3-4**.

Resources. For organizations that arrange pro bono co-counsel for unaccompanied minors consult resources listed in **Chapter 11**.

§ 8.2 Immigration "Holds" on Noncitizen Children Detained Pursuant to Delinquency Court Order[240]

As described in **Chapter 7**, there is a growing collaboration between local law enforcement and DHS to enforce immigration laws in the juvenile justice system. Once ICE becomes aware of a suspected deportable noncitizen in local juvenile custody, it may

[238] Pritchard, Helton, and Magruder, "The American Dream Betrayed: The Plight of Detained Immigrant and Refugee Children," 30 *Int'l Law News* 1 (2001); Barnett, "Dark Discoveries, New Hope: The ABA Aids Immigrant Detainees Facing Uncertain Futures," *A.B.A. J.*, Feb. 2001, at 8; Martin and Schoenholtz, "Asylum in Practice: Successes, Failures, and the Challenges Ahead," 14 *Geo. Immigr. L.J.* 589, 595 n.34 (2000) (citing EOIR, *Immigration Court Asylum Decisions: FY 1999)*; Finkel, "Voice of Justice: Promoting Fairness through Appointed Counsel for Immigrant Children," 17 *N.Y.L. Sch. J. Hum. Rts.* 1105 (2001); Tulsky, "Asylum Seekers Face Lack of Legal Help," *San Jose Mercury News*, Dec. 30, 2000, at A12.
[239] 8 CFR § 1240.10(c).
[240] Thanks to Ann Benson, Director of the Washington Defender Association's Immigration Project for providing portions of this discussion.

file an immigration "hold" or "detainer" with the local law enforcement agency that has custody of the child. A detainer is a *request that an agency, such as a juvenile detention facility, notify ICE* prior to release of a noncitizen so that ICE can arrange to assume custody for the purpose of arresting and removing the person.[241]

Issued on Form I-247, the detainer form plainly states, an immigration detainer is a notification request. By filing a detainer on an individual, ICE is requesting that the jail notify them upon the individual's release from criminal or juvenile custody.[242] The Board of Immigration Appeals has characterized a detainer as "merely an administrative mechanism to assure that a person subject to confinement will not be released from custody until the party requesting the detainer has an opportunity to act." [243]

Similarly, criminal courts have held that the lodging of an immigration detainer is a "mere expression of ICE's intention to seek future custody" of defendant and that it is not equivalent to more traditional criminal "detainers" or "holds" since it provides no concurrent criminal basis for continued custody (such as the existence of pending criminal charges in another jurisdiction).[244]

The legal authority for the issuance of detainers is found at 8 USC § 1357(d). Two notable features about this statutory provision are: (1) It limits the issuance of detainers to cases of noncitizens charged with controlled substance violations, and (2) it conditions the issuance of an ICE detainer upon a request initiated by the local, state or federal law enforcement officials who arrested and now have custody of the alleged noncitizen.

The federal regulations that purport to implement this statutory language are located at 8 CFR § 287.7. It is under this regulation that ICE detainers are issued.[245] Unlike the statute, the regulations contain no limitation to controlled substance violations. Moreover, under these regulations, the statutory requirement that the issuance of the detainer be predicated upon a request from the law enforcement agency is murky, at best.[246]

Despite the fact that the regulation is arguably *ultra vires*, ICE routinely issues detainers in all types of cases, not simply controlled substance violations. In fact, the standard used by ICE for issuing a detainer is quite broad -- anyone whom ICE *believes* to be a noncitizen and is *suspected* of being in violation of immigration laws can have a

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[241] 8 CFR § 287.7.
[242] *See* 8 CFR § 287.7. Note that the form requests the jail authorities to notify ICE upon release or provide 30 days or "as far in advance as possible" advance notice of release.
[243] *See Matter of Sanchez*, 20 I&N Dec. 223, 225 (BIA 1990), *citing Moody v. Daggett*, 429 U.S. 78, 80 n. 2 (1976).
[244] *See State of Kansas v. Montes-Mata*, 208 P.3d 770 (Kan. App. 2009) (holding presence of ICE detainer did not toll defendant's speedy trial clock.); *State v. Sanchez*, 110 Ohio St. 3d 274 (2006)(same.)
[245] Note that in addition to 8 USC § 1357(d), ICE asserts authority to issue detainers also pursuant to its general authority to detain pursuant to 8 USC § 1226 as well as its general authority to administer and enforce immigration laws under 8 USC § 1003.
[246] *See* 8 CFR §§ 287.7(a) and (c).

detainer placed on them. In many instances ICE issues the detainer prior to conducting any reliable investigation as to whether the person is, in fact, subject to deportation. It is now common practice for ICE agents to place detainers on anyone in criminal or juvenile custody who has admitted to being foreign-born. This has led to routine issuance of detainers in all types of cases including against undocumented and lawful immigrants, in some cases even U.S. citizens in error, those who are innocent of or have the criminal charges against them dismissed, and those who may not be deportable or have defenses against removal. There have been very few cases challenging this widespread practice to date, but the number of challenges is growing.[247]

State and local law enforcement officers may not, on their own, place a "hold" on an alleged noncitizen beyond the time the individual would otherwise be released. Only ICE is authorized to place an immigration detainer on an individual.[248]

Immigration Detainers Are Not Reliable Indicators of a Person's Immigration Status or Whether S/he Will Be Deported. As the detainer Form I-247 indicates, the presence of an ICE detainer means that ICE believes that the person is a noncitizen. The detainer Form I-247 makes no mention of the person's specific immigration status. While ICE places detainers against persons whom it believes are present in the U.S. without authorization, it also routinely places holds on those who are lawfully in the U.S., including U.S. citizens. The presence of an ICE detainer is not determinative of a person's immigration status.

Nor is the presence of a detainer determinative of whether or not a person will be deported. In some cases ICE does not pick up the person at all upon release from juvenile or criminal custody and the expiration of the detainer.

Form I-247 provides ICE with four options to indicate the basis for issuing the detainer. In the vast majority of cases ICE will check the box on the form indicating that the detainer is being issued against this person because "[a]n investigation has been initiated to determine whether this person is removable from the United States." Such ambiguous terminology on its face demonstrates that it is neither determinative of a person's immigration status but nor and indication as to whether the person will be subject to deportation.

No legal determination of the individual's deportability is made at the time that the detainer is issued. Removal/deportation proceedings generally involve four steps: 1. Issuance of a charging document (usually a Notice to Appear pursuant to 8 U.S.C. 1229(a)); 2. A removal/deportation hearing before and immigration judge (or sometimes only and ICE official); 3. Consideration of any applications for relief from removal/deportation; 4. Appeal of the immigration judge or ICE official's decision to the Board of Immigration Appeals or the federal district or circuit courts. Unless a person

[247] *See, e.g.*, *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F.Supp.2d 1177, 1196, 2009 WL 2382689 (N.D.Cal.).
[248] *See* 8 CFR § 287.7(d).

has a prior order of deportation, the ICE detainer is issued before any of these steps in the removal process.

It is important to note that many undocumented noncitizen youth have avenues to obtain lawful immigration status. See **Chapter 4** and **Appendix G**. The ICE detainer unit is not charged with specifying the charges that will be brought against a person in removal proceedings. Another unit, the ICE Notice to Appear Unit (NTA Unit), is charged with that task. The ICE detainer unit, therefore, is not concerned with the specific grounds, if any, for which a person may face deportation. It is merely concerned with identifying anyone whom it is interested in investigating for possible placement in removal proceedings.

Because the net is cast so widely, there is room for error. ICE holds inevitably affect U.S. citizens and individuals with lawful status who are not subject to deportation. It is important not to equate an ICE hold with the assumption that the person is deportable and will be deported or even that the case is active with ICE. ICE holds are merely allegations that must be vetted by several bodies, including the Notice to Appear Unit within ICE[249] and, in many cases, a federal immigration court. Some of noncitizens may not be removable at all or they may have a basis to contest their removal and request relief in immigration court. In many cases, they will re-enter their community.

Limitations on Detainers: The 48-Hour Rule. The regulation provides that the law enforcement agency can hold the noncitizen ***no more than 48 hours*** past the time when he or she otherwise would have been released, excluding weekends and holidays.[250] The 48 hour rule may be triggered in a number of situations: the case is still pending but the court orders release; the case is dismissed and the person is to be released; or the person has completed his or her sentence. If ICE has not arrived to claim the noncitizen by the 48-hour point, the noncitizen must be released. There are reports, however, that juvenile detention facilities in some areas have improperly held children for days and weeks past the 48-hour period, based on an ICE detainer. In adult cases courts have issued writs of habeas corpus to compel agencies to release noncitizens wrongly held past the 48 hours. There are a growing number of cases charging counties with liability for holding a noncitizen past the 48 hours.

Challenging or Lifting the Detainer. The immigration statute authorizing detainers does not include a mechanism to lift the detainer. In general, courts have held they lack jurisdiction to adjudicate a habeas or mandamus actions to remove unexpired

[249] A Notice to Appear is the charging document used by ICE to initiate formal removal proceedings under 8 USC § 1229a. Although ICE is required to serve the NTA on the noncitizen, these removal proceedings do not commence until ICE files the NTA with the immigration court having jurisdiction over the noncitizen's case.

[250] 8 CFR § 287.7(d) provides for "temporary detention" upon Service (CIS) request: "Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays and holidays in order to permit assumption of custody by the Department." Form I-247 indicates that "holidays" means Federal holidays.

detainers because the immigration detainer does not constitute custody. [251] Another obstacle to challenging detainers against defendants in state and local custody is that any attempt to lift the detainer would be through a federal, not state, action.

If a detainer seems to be erroneously issued, the court can direct local officials to contact ICE so that they can make a direct request to lift the detainer. However, ICE is not likely to respond without some evidence that the ICE detainer has been lodged incorrectly (e.g., against a U.S. citizen or against a lawful permanent resident (green card holder) who is not deportable). In some cases, ICE may be persuaded to exercise prosecutorial discretion and lift the immigration detainer on an individual eligible for immigration relief.

[251] A Florida defendant brought a state habeas action challenging the authority of the Sheriff to detain arrestees on immigration detainers. The trial court held it lacked jurisdiction to grant relief to arrestee held pursuant to federal Immigration and Customs Enforcement (ICE) detainer. *See Ricketts v. Palm Beach County Sheriff*, 998 So.2d 1146, 2008 WL 5195292 (Fla.). *See also Cuomo v. Barr*, 7 F.3d 17 (2nd Cir. 1993)(court denied mandamus, declaratory and injunctive relief to State on action to compel INS to pick up defendants from state jails). The majority of circuits hold that the immigration detainer alone does not place the petitioner in immigration custody. See *Zolicoffer v. United States Dep't of Justice*, 315 F.3d 538 (5th Cir.2003); *Prieto v. Gluch*, 913 F.2d 1159, 1162 (6th Cir. 1990); *Orozco v. United States Immigration and Naturalization Service*, 911 F.2d 539, 541 (11th Cir. 1990); *Campillo v. Sullivan*, 853 F.2d 593, 595 (8th Cir.1988), cert. denied 490 U.S. 1082 (1989). The Second Circuit recognizes custody in a future jailor where "there is a reasonable basis to apprehend that the jurisdiction that obtained the consecutive sentence will seek its enforcement." *See Simmonds v. I.N.S.*, 326 F.3d 351, 355 (2d. Cir 2003) (quoting *Frazier v. Wilkinson*, 842 F.2d 42, 45 (2d Cir.1988)). *Galaviz-Medina v. Wooten*, 27 F.3d 487 (10th Cir.1994)(finding that former INS as a future custodian has a heightened interest in custody after a final removal order). Citing to *Simmonds*, a federal district court in *Gillies v. Strange*, 2005 WL 3307349 (D.Conn. 2005), articulated five reasons for holding that the presence of an immigration detainer on petitioner, a Jamaican national with a final order of removal, was sufficient to determine that he was in ICE's custody. The court found, but for the ICE detainer, the prisoner would have been released to early parole. In this case, the prisoner desired early parole so that he could be released to immigration custody and deported to Jamaica.

CHAPTER 9

ADULT CRIMINAL CONVICTIONS

The very complex area of the immigration consequences of crimes cannot be covered in this benchbook. The following is some basic information about immigration consequences that flow from convictions common to domestic violence and child abuse situations. The focus is on the grounds of deportability, i.e. how a conviction could cause a non-citizen who already has lawful status to lose that status. Note that a civil finding of a violation of a protective order has consequences even absent a conviction, under the "domestic violence" ground discussed below.

Note: This area of the law is fast-changing and hyper-technical. This chapter provides an orientation and common examples to assist in flagging issues, but does not give enough information for analysis in individual cases. See **Chapter 11**, Resources, for information on obtaining books[252] and expert advice.

§ 9.1 Conviction of Any Crime of Violence with a One-year Sentence Imposed, of Rape, and of Sexual Abuse of a Minor -- All are "Aggravated Felonies"

Conviction of an aggravated felony brings the worst possible immigration consequences. The person will almost surely be removed (deported) as almost no waivers are available, absent a very strong claim to fear of persecution or torture in the home country.

- If a person who was convicted of an aggravated felony and removed then re-enters the United States illegally, the person is subject to an up to 20-year federal prison sentence for the illegal re-entry.[253]

The dozens of serious and minor offenses that constitute aggravated felonies are listed at 8 USC § 1101(a)(48)(B). Aggravated felonies that commonly arise in domestic violence situations include the following.

[252] This chapter will include citations to Brady et al., *Defending Immigrants in the Ninth Circuit* (Immigrant Legal Resource Center 2010). For more information on this book see **Chapter 11** or the ILRC website at www.ilrc.org. Another excellent resource is the website of the Law Offices of Norton Tooby at www.criminalandimmigrationlaw.com, which includes text of articles as well as information about their publications.

[253] 8 USC § 1326(b)(2).

A. Crime of Violence with a One-Year Sentence Imposed

Conviction of any "crime of violence" with one-year sentence imposed (including suspended sentence) is an aggravated felony.[254] As defined by federal statute, "crime of violence" includes any felony or misdemeanor that involves the intent to use or threaten force against a person or property, as well as any felony that carries an inherent risk that force will be used. [255]

The crime of violence analysis can become complex. The United States Supreme Court has held that the definition of a crime of violence under 18 USC § 16 involves *actual use or risk of use of violent physical force,* not merely causation or risk of causation of injury.[256] The Court held that negligent action that caused an injury is not a crime of violence and most circuits have held that reckless actions are not—even if they result in injury.[257] If the elements of the offense include a failure to act, the offense should also not be a crime of violence. Thus in an immigration case, criminally negligent child abuse under a Colorado statute, where the person negligently permitted a baby to drown in a bathtub, was found not to be a "crime of violence."[258] Child abuse, abandonment and neglect statutes arising in each state should be individually analyzed. Importantly, a simple battery is not a crime of violence if the crime can be committed by "mere offensive touching" and the record of conviction does not indicate that a higher level of force was used.[259]

Sentence of One Year. A sentence of a year or more must be imposed for the crime of violence to constitute an aggravated felony.

- An aggravated felony can be avoided in many situations by obtaining a sentence of 364 days or less instead of one year.

- A "sentence imposed" equals a straight sentence as well as a sentence imposed but suspended. Where imposition of sentence was suspended and jail imposed as a condition of probation, the amount of jail time imposed counts as the "sentence."[260]

B. Rape, Sexual Abuse of a Minor, Including Misdemeanor Statutory Rape

Rape is an aggravated felony regardless of sentence imposed.[261]

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[254] *See* definition of aggravated felony at 8 USC § 1101(a)(43)(F), and definition of sentence at 8 USC § 1101(a)(48)(B).
[255] 18 USC § 16.
[256] *Leocal v. Ashcroft*, 125 S.Ct. 377 (U.S. 2004).
[257] *See* discussion in *Leocal*, *supra*.
[258] *Matter of Sweetser*, Int. Dec. 3390 (BIA 1999).
[259] *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006).
[260] *See* definition of sentence at 8 USC § 1101(a)(48)(B), *see also Alberto-Gonzalez v. INS*, 215 F.3d 906 (9th Cir. 2000).
[261] 8 USC § 1101(a)(43)(A), *see, e.g.*, *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000).

Sexual abuse of a minor is an aggravated felony conviction regardless of sentence imposed or felony/misdemeanor classification.[262]

Misdemeanor statutory rape has been held to be an aggravated felony under the "sexual abuse of a minor" category in several jurisdictions.[263] Notably, however, the Ninth Circuit has held that statutory rape statute in California did not constitute an aggravated felony as sexual abuse of a minor.[264] Most statutory rape criminal charges arise after the baby's mother attempts to collect welfare benefits, while others may arise from court proceedings.

> **Example:** Maria, age 17, has a baby and identifies Juan, an 18-year old permanent resident, as the father. The baby is removed from Maria, and Juan is charged with misdemeanor statutory rape. If Juan is convicted this may be held an aggravated felony and he will lose his green card, be deported, and be permanently barred from re-entering the United States.

D. Strategies to Ameliorate Consequences

Alternative pleas that do not constitute sexual abuse of a minor might include such state offenses as assault, battery, false imprisonment, or witness dissuasion.

The "212(h)" Waiver and Petty Offense Exception. Persons who were not lawful permanent residents at the time of conviction of any of the above offenses may be able to apply for a *waiver of inadmissibility* if seeking new status. There is no inadmissibility ground based on conviction of an aggravated felony. However, the aggravated felonies discussed above also are crimes involving moral turpitude and as such may require a waiver of inadmissibility. See discussion of the "212(h) waiver" at § 9.3 (Part D). Further, an offense such as misdemeanor statutory rape might qualify under the "petty offense exception" to the moral turpitude ground and make a waiver unnecessary. Here there is no requirement that the person not have been a permanent resident at time of conviction. See § 9.3 Part C.

§ 9.2 The Domestic Violence Deportation Ground: Conviction of "Domestic Violence Offense," Stalking, or Child Abuse, Neglect or Abandonment, or Judicial Finding of Violation of Protective Order

Conviction of any of the following offenses makes the person deportable under the "domestic violence ground":

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[262] 8 USC § 1101(a)(43)(A).
[263] The Board of Immigration Appeals so held in *Matter of Small,* 23 I&N 448 (BIA 2002), reversing an earlier opinion holding that the offense must be a felony. *See also United States v. Marin-Navarette*, 244 F.3d 1284 (11th Cir. 2001), *United States v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001).
[264] *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (*en banc*).

- A specially defined "domestic violence" offense
- Stalking
- Child abuse
- Child neglect
- Child abandonment

In addition, a civil or criminal court finding of certain types of violations of protection orders also is a basis for deportation under this ground.[265]

A. Effective Date: September 30, 1996

The conviction or the violation of the protective order that is the subject of the court finding must have occurred on or after September 30, 1996 to be a basis for deportation under this ground.

B. Domestic Violence Offense

To be a "domestic violence offense" the offense must

(a) Be a crime of violence as defined in 18 USC § 16 (see § 9.1 Part A above), that is

(b) Committed against a person with whom the defendant has a certain kind of domestic relationship. This includes a current or ex-spouse, co-parent of a child, person who has co-habited as a spouse, and anyone else who is protected under state, local federal or Tribal domestic or family violence laws. Because the federal definition of domestic violence incorporates local domestic violence laws, consultation with the relevant laws to see what other victims may be included is necessary. For example, because California domestic violence laws protect persons with whom one had just a dating but not a cohabiting relationship, a crime of violence against a current or former date might form a basis for deportation under the domestic violence ground.

How to avoid deportability. In many cases not only the abuser, but also the abused spouse have strong objective reasons to not want the abuser deported. As long as the noncitizen pleads to an offense that is not a crime of violence or that was committed against a victim that does not have the required domestic relationship, the offense cannot be termed a domestic violence offense, triggering deportability. Alternate potential pleas that would avoid deportation under this ground include simple battery and assault where they can be committed by a mere offensive touching, false imprisonment, witness dissuasion, or other offenses not against a person, but against property such as theft or trespass. Note that some of these alternate offenses may be "crimes involving moral turpitude" which might cause immigration penalties under separate provisions and require separate analysis; see § 9.3.

[265] 8 USC § 1227(a)(2)(E).

C. Stalking; Child Abuse, Neglect or Abandonment

Child abuse for purposes of the deportation ground is defined as any act or omission that results in the maltreatment of a minor or that injures that minor's physical or mental well being.[266] This includes direct sexual acts, imposing physical harm or mental or emotional harm to a child even if minor, and exploitation of a minor by inducing him or her to engage in sexually explicit acts. This ground of deportation is not limited to parents or guardians committing the acts of abuse, but includes anyone who commits a child abuse offense.

Because this definition is so broad, many offenses against children could fall within the term "child abuse." In fact the Board of Immigration Appeals held that the "definition is comprehensive enough to subsume most, if not all, crimes of "child neglect."[267] However, the Board left open the definition of child abandonment. It is unclear whether child abuse applies to "crimes in which a child is merely placed or allowed to remain in a dangerous situation, without any element in the statute requiring ensuing harm, such as a general child endangerment statute, or selling liquor to an underage minor, or failing to secure a child with a seatbelt."[268]

There are no decisions defining stalking under this deportation ground. Unlike the child abuse provision, the stalking ground of deportation based on conviction does not seem to require that it be committed against a protected victim. At least one court has held that the stalking provision is not unconstitutionally vague on its face or as applied.[269]

D. Violation of Court Protection Order

A person is deportable who is the subject of a civil or criminal court finding that he or she violated a court ordered protective order designed to protect someone against threats of violence, repeated harassment, or bodily injury.[270] No conviction is needed. The violation must occur on or after September 30, 1996. See **Chapter 6 § 6.2** for further discussion.

E. The Domestic Violence Deportation Ground Applies Only to Persons Who Once Were Admitted to the United States. It Does Not Apply to Persons Who Entered the U.S. without Inspection.

The domestic violence ground is a ground of deportability but not a ground of inadmissibility. This means that a person with lawful status can lose the status if he or she comes within the ground, but the ground does not bar someone in attempting to get status. Furthermore, the ground does not apply to someone who entered the U.S. without inspection.

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[266] *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).
[267] *Id*. at 512.
[268] *Id*. at 518 (concurring opinion of Boardmember Pauley).
[269] *Arriaga v. Mukasey*, 521 F.3d 219 (2d Cir. 2008).
[270] 8 USC § 1227(a)(2)(E)(ii).

Example: Sam is a lawful permanent resident charged with misdemeanor child abuse. If convicted, Sam will be deportable under the domestic violence ground and may lose his green card. His criminal defender will try hard to negotiate to an alternate plea.

Example: Martin entered the U.S. without inspection by crossing the Rio Grande River. He is charged with spousal abuse. The grounds of deportability don't apply to him, because they only aim to take away lawful status. He does not need to avoid this particular offense out of fear of the domestic violence deportation ground. He is worried about the offense as a crime involving moral turpitude, but that is a different analysis with different rules; see § 9.3 below.

One exception to this rule is if an undocumented person is applying for some form of "cancellation of removal" for non-permanent residents (not to be confused with cancellation for permanent residents, discussed in the next section). Cancellation for non-permanent residents is a discretionary relief that prevents deportation and provides permanent residency to certain persons unlawfully in the U.S. who can show great hardship and meet other requirements.[271] A cancellation applicant will be barred if convicted of an offense that comes within the domestic violence ground.

F. The Domestic Violence Ground of Deportability Compared to Aggravated Felony

It is far worse to be convicted of an aggravated felony than to be "merely" deportable. A deportable person might be able to apply for a waiver of deportation of some kind, while a person convicted of an aggravated felony suffers the most severe punishment possible. See § 9.1 supra.

Conviction of offenses in the domestic violence deportation ground could become aggravated felonies if (a) the offense is a crime of violence and a sentence of a year is imposed *or* (b) the offense can be classed as sexual abuse of a minor. See § 9.1 above.

Example: Juan has been a permanent resident for seven years. He is convicted of his first offense, spousal abuse (which meets the definition of a domestic violence offense) with a 30-day sentence, which makes him deportable under the domestic violence ground. Because this is not an aggravated felony conviction, Juan is eligible to apply to an immigration judge for a discretionary "cancellation" of his deportation, based on his many years of permanent residency, rehabilitation and other equities. But if Juan received a one-year sentence, the offense would become an aggravated felony (because it contains elements that make it a "crime of violence") and Juan would not be eligible even to apply for the waiver.

[271] *See* 8 USC § 1229b(b).

G. Offenses Also May Be "Crimes Involving Moral Turpitude"

Many of the domestic violence ground offenses, and the alternate offenses to which one can plea to avoid deportability under this ground, also are "crimes involving moral turpitude" for immigration purposes. These may qualify for a separate basis for deportability or inadmissibility under the moral turpitude ground. See § 9.3.

§ 9.3 Crimes Involving Moral Turpitude

A. What is a Crime Involving Moral Turpitude?

The immigration category "crimes involving moral turpitude" is broadly and vaguely defined, but frequently employed.

In general, the following types of crimes have been held by courts to involve moral turpitude:

1) crimes, whether felony or misdemeanor, in which either an intent to defraud or an intent to steal (with intent to permanently deprive) is an element;

2) crimes (typically felonies) in which there is an intent to cause or threaten great bodily harm, or in some cases if such harm is caused by a willful act or recklessness;

3) felonies and some misdemeanors in which "malice" is an element;

4) some sex offenses in which "lewd" intent is an element.

Thus, murder, rape, voluntary manslaughter, robbery, burglary with intent to commit larceny, theft (grand or petit), arson, certain aggravated forms of assault, and forgery all have been consistently held to involve moral turpitude. On the other hand, crimes that involve none of the above elements have been held not to involve moral turpitude, including involuntary manslaughter (except where criminal recklessness is an element),[272] "breaking and entering" or criminal trespass, simple assault or battery, "joyriding," and various weapons possession offenses. Note that spousal abuse and child abuse involve moral turpitude, while drunk driving does not.

Moral turpitude does not depend on classification as a felony or misdemeanor, or on the severity of punishment allowable or actually imposed. Rather, a crime of moral

[272] The BIA held that where criminally reckless conduct is an element of the offense under the penal code, involuntary manslaughter is a crime involving moral turpitude. *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994); *see also Matter of Perez-Contreras*, 20 I&N *Dec*. 615 (BIA 1992) (third degree assault statute that involved criminal negligence but not recklessness is not turpitudinous). Recklessness may not be an element of involuntary manslaughter under some state statutes, *see e.g.*, Calif. Penal Code § 192(b).

turpitude has been defined as an act which is *per se* intrinsically wrong, or "*malum in se*."[273]

Recidivism also does not create a crime of moral turpitude. Instead, each conviction is considered separately to determine whether moral turpitude is involved. Therefore, multiple convictions of the same offense, each of which does not involve moral turpitude, cannot be considered cumulatively to determine that the offense involves moral turpitude.

State court rulings on moral turpitude for impeachment purposes are not controlling for immigration.[274]

Depending on the number of convictions, maximum possible sentence and sentence imposed, moral turpitude convictions can be bases for deportability or inadmissibility.

B. Moral Turpitude Ground of Deportability

A person is deportable and may lose his or her lawful status if either of the following conditions are met:

1) The person was convicted of one crime involving moral turpitude with a potential sentence of a year or more, committed within five years of the person's last admission into the United States; *or*

2) The person was convicted of two or more crimes of moral turpitude not arising out of a single scheme of criminal misconduct at any time since admission.[275]

Example: Franz became a lawful permanent resident (a form of admission) in 2002. He committed spousal abuse in 2008 and was convicted in 2009. He is not deportable because he did not commit the offense within five years after his last admission. Had he committed the offense in 2006, he would have been deportable.

In 2010 Franz was convicted of petty theft for shoplifting. Now he is deportable, because he has been convicted of two moral turpitude offenses since his admission.

C. Moral Turpitude Ground of Inadmissibility and the "Petty Offense" Exception

Up to now this chapter has covered grounds of deportability, but not grounds of inadmissibility. To be inadmissible is to be barred from acquiring lawful immigration status. For example a person might be married to a U.S. citizen and otherwise eligible to become a permanent resident, but barred from this because of a conviction that makes the

[273] *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), aff'd, 72 F.3d 571 (9th Cir. 1995).
[274] *Gonzalez v. Barber*, 207 F.2d 398, 400 (9th Cir. 1953), aff'd 374 U.S. 637 (1954).
[275] 8 USC § 1227(a)(2)(A)(i).

person inadmissible. We discuss the moral turpitude ground of inadmissibility because it commonly appears in domestic violence cases.

The general rule is that any conviction of a crime involving moral turpitude makes a person inadmissible. There is an exception, however, for a first, minor conviction. Under the "petty offense" exception to the inadmissibility ground, a person is *not* inadmissible if:

1) The person committed only one crime of moral turpitude, ever (no conviction is required);
2) The person received a sentence of six months or less; and
3) The maximum possible sentence for the offense was one year or less.[276]

Coming within the petty offense exception can benefit a person attempting to get lawful immigration status for the first time, or a person with status who has become deportable but has a way to immigrate again. Note, however, that the petty offense exception does not cure deportability. It is possible for someone to be admissible thanks to the petty offense exception but still be subject to deportation.

Example: Rudolfo is a permanent resident who was convicted of misdemeanor spousal abuse, his first conviction ever, and sentenced to 10 days in jail. This made him deportable under the domestic violence ground discussed in § 9.2 above. He and his U.S. citizen wife decide to remain together. Even though the spousal abuse conviction made him deportable and subject to forfeiting his lawful status, as long as Rudolfo remains admissible, his wife can file a new visa petition for him so that he can "re-immigrate." Spousal abuse is a moral turpitude offense: did the conviction make Rudolfo inadmissible under the moral turpitude ground?

Rudolfo is not inadmissible because he comes within the petty offense exception to the moral turpitude inadmissibility ground. He has committed only one moral turpitude offense, his actual sentence was less than six months, and the potential sentence for the misdemeanor was not more than a year.

D. The Moral Turpitude Waiver: Section 212(h)

A noncitizen who is inadmissible under the moral turpitude ground still can apply for status or admission if he or she qualifies for a so-called "212(h)" waiver.[277] A qualifying noncitizen can apply to waive any number of moral turpitude offenses. If the person was not a permanent resident at the time of conviction, the person even can apply to waive a moral turpitude offense that also is an aggravated felony. This is one of the few immigration options for persons convicted of aggravated felonies.

[276] 8 USC § 1182(a)(2)(A)(II).
[277] *See* 8 USC § 1182(h). The name derives from the fact that this is section 212(h) of the Immigration and Nationality Act (INA § 212(h)).

Example: Ron is undocumented. He has been convicted of spousal abuse and statutory rape outside of the Ninth Circuit. Both are crimes involving moral turpitude, and he is now inadmissible under the moral turpitude ground. In addition, statutory rape is an aggravated felony (see § 9.1).

Ron is attempting to become a permanent resident through a family visa petition. He can apply to waive the two moral turpitude convictions with a "212(h)" waiver. Because he was not a permanent resident when he was convicted, the fact that one of the convictions is an aggravated felony will not bar him from applying for the waiver.[278]

§ 9.4 Offenses Relating to Controlled Substances and Alcohol

While drug and alcohol abuse are not classed as family violence offenses, they often are present in those situations. The immigration penalties for controlled substance offenses are extraordinarily harsh. A permanent resident with a past conviction relating to controlled substances may already have a doomed immigration case, and should obtain expert counseling before considering pleas to additional charges.

Any trafficking offense relating to controlled substances as well as certain state offenses that are analogous to federal felony drug offenses are aggravated felonies,[279] and almost any drug related conviction is a basis for deportability and inadmissibility under the controlled substance conviction grounds.[280] Even minor offenses such as being under the influence of drugs, or possessing a small amount of drugs, will make the person inadmissible and deportable.

- Someone who has only one conviction of simple possession of 30 grams or less of marijuana is not deportable. That person, however, will be inadmissible, but may qualify for a waiver of inadmissibility of the offense.[281] This has been extended to being under the influence of marijuana, and possession or being under the influence of hashish.

- The United States Supreme Court has ruled that with few exceptions,[282] a first simple possession of a drug conviction is not an aggravated felony.[283] The Supreme Court has also held that a second or subsequent simple possession

[278] *Id*. By permitting non-permanent residents to apply for the waiver despite having an aggravated felony conviction while barring permanent residents, the immigration statute treats permanent residents worse than it treats undocumented persons. The Ninth Circuit has held that this does not violate Equal Protection requirements. *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002). See extensive discussion of the § 212(h) waiver in *California Criminal Law and Immigration* § 11.10.
[279] *See* 8 USC § 1101(a)(43)(B).
[280] 8 USC §§ 1182(a)(2)(A)(i)(II) (inadmissibility), 1227(a)(2)(B)(I) (deportability).
[281] *Matter of Martinez Espinoza*, 24 I&N Dec. 118 (BIA 2009).
[282] A first simple possession conviction for flunetrazepam (a date-rape drug) or more than five grams of crack cocaine is an aggravated felony conviction.
[283] *Lopez v. Gonzales*, 127 S.Ct. 625 (2006).

conviction is also not an aggravated felony, unless the conviction was based on the fact of a prior conviction.[284]

- Only in immigration proceedings held in the Ninth Circuit, a first conviction for simple possession or lesser offense (under the influence, possession of drug paraphernalia, etc.), whether felony or misdemeanor, can be eliminated for all immigration purposes by state "rehabilitative relief" in which, for example, the plea is adjudged withdrawn after completion of probation or later expunged as long as there are no probation violations.[285] Otherwise, once a plea of guilt or nolo contendere is taken, withdrawal of plea under such a program does not eliminate the conviction for immigration purposes, even if state law provides that there no longer is a conviction.[286]

- Any drug trafficking offense, defined by the U.S. Supreme Court as some sort of commercial dealing, is an aggravated felony.[287] This means, essentially, that any drug sale, possession for sale, and manufacture is an aggravated felony.

- State offenses that are not *aggravated felonies* include those that do not meet the definition of trafficking including being under the influence, transportation for personal use, or possession of paraphernalia, and those offenses that do not have analogues in the federal drug statutes. In the Ninth Circuit, solicitation (offer to sell) is also not an aggravated felony. [288] However, *conviction of any offense relating to controlled substances* makes the person deportable or inadmissible. [289]

- Many states have a state list of controlled substances (illegal drugs) that are slightly different from the federal list and may contain drugs not on the federal list. The federal definition of a controlled substance is the one used in immigration law. In those states, if the record of conviction of a controlled substance offense does not identify which controlled substance was involved, there is no proof that the drug was one that is on the federal list. Therefore, there is no proof that the offense "related to" controlled substances as defined in the Act, and the person is not deportable.[290]

- Some offenses don't "relate to" controlled substances. Accessory after the fact and misprision of felony are offenses that relate to helping someone who has committed a crime. The BIA has found that these offenses do not cause deportability or inadmissibility as controlled substance convictions, even if the

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[284] *Carachuri-Rosendo v. Holder*, No. 09-60 (June 14, 2010).
[285] *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). This also applies to a first conviction of an offense less serious than possession and not listed in the federal statute. *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000) (paraphernalia possession).
[286] 8 USC § 1101(a)(48)(A), and see discussion in *Lujan-Armendariz, supra.*
[287] *Lopez v. Gonzales*, 127 S. Ct. 625, 630 (2006).
[288] *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(en banc).
[289] 8 USC § 1182(a)(a)(2)(A)(i)(II).
[290] *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). The Ninth Circuit has affirmed this holding in *Ruiz-Vidal v. Gonzales*, 473F.3d 1072 (9th Cir. 2007).

crime that the other person had committed related to drugs.[291] This also might be true of state laws that punish "tampering with evidence" or "hindering prosecution." This type of conviction carries other risks, however. The BIA held that if a one-year sentence is imposed, accessory after the fact (although not misprision of felony) is an aggravated felony.[292]

- A person is inadmissible if the CIS has "reason to believe" that the person ever was or assisted a drug trafficker.[293]

- A person is deportable if he or she has been a drug addict or abuser since admission, and inadmissible if the addiction or abuse is current.[294] A conviction is not required for these grounds.

In contrast, offenses involving alcohol abuse do not receive as harsh treatment.

- Driving under the influence is not a crime involving moral turpitude (although the Arizona offense of driving under the influence while on a suspended license is).[295]

- Driving under the influence is not a crime of violence, and a one-year sentence imposed does not make the offense an aggravated felony.[296]

A person who is an alcoholic can be held inadmissible if the behavior poses a threat to self or others, e.g. if it results in multiple drunk driving convictions.[297]

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[291] *See, e.g.*, *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997).
[292] *Matter of Batista-Hernandez*, *supra*, and *Matter of Espinoza*, Int. Dec. 3402 (BIA 1999). While this holding appears open to challenge (see concurrence/dissent in *Matter of Espinoza*), it is being aggressively enforced.
[293] 8 USC § 1182(a)(2)(C).
[294] 8 USC § 1182(a)(1)(A)(iii).
[295] *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999); *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009)(deferring to the BIA's decision in Lopez-Meza).
[296] *See, e.g.*, *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002). The BIA had enforced the opposite rule for some years, but abandoned the rule after being overturned by most federal courts.
[297] 8 USC § 1182(a)(1)(A)(iii) (physical or mental disorder that poses a threat to property, safety or welfare of the person or others).

CHAPTER 10

GROUNDS OF INADMISSIBILITY AND DEPORTABILITY

- Certain behavior, medical conditions, criminal convictions and court findings can harm a non-citizen's immigration status by making him or her ***inadmissible or deportable.***

- This chapter provides, for those interested, a more in-depth look at ***how the grounds of inadmissibility and deportability work.*** It also includes a brief ***description of specific grounds.*** Note that adult criminal convictions are discussed in more detail in **Chapter 9** and juvenile delinquency dispositions are discussed in **Chapter 7**.

Special Considerations. Noncitizens appearing before state court judges may already be inadmissible or deportable. In addition, state court orders can *cause* a noncitizen to become inadmissible or deportable, by imposing certain adult criminal convictions and/or sentences; certain delinquency findings relating to drugs, prostitution, or sexual predator behavior; or a civil or criminal finding of violation of a protective order.

§ 10.1 Overview: Inadmissibility, deportability and waivers

A. How the Grounds of Inadmissibility and Deportability Work

Immigration law is about controlling which noncitizens enter the United States, and conferring immigration status upon noncitizens and taking it away. The Immigration and Nationality Act (INA) contains a few key lists of status "disqualifiers" called the grounds of inadmissibility[298] and the grounds of deportability.[299] These grounds impose immigration penalties based on:

- Certain adult criminal convictions,
- Certain bad conduct, even absent a conviction, such as engaging in prostitution or drug dealing, or violating a protective order,
- Mental and medical conditions such as being a drug addict or abuser, or posing a danger to self or others due to a mental condition,
- Poverty level and inability to show the person won't become a "public charge,"
- Suspected terrorist activities, and

[298] 8 USC § 1182(a).
[299] 8 USC § 1227(a).

- Immigration offenses such as visa fraud, alien smuggling, document fraud, illegal re-entry after being deported, and in some cases unlawful presence in the U.S.

The two lists – the grounds of inadmissibility and of deportability -- do not match exactly, and the same event might make a person inadmissible but not deportable, or vice versa.

The grounds have different functions. Generally the grounds of inadmissibility are the bars to obtaining status or lawful entry into the U.S., while the grounds of deportability are the means by which lawful status is taken away from someone who already has been admitted to the United States. See §§ 10.2 and 10.3.

B. Waivers of Inadmissibility and Deportability

Some but not all of the grounds of inadmissibility and deportability can be forgiven or "waived" in the discretion of the CIS or an immigration judge. In any analysis of the impact of someone being inadmissible or deportable, it is critical to determine if a waiver is available. Some waivers are specific to certain immigration applications.

Examples: A person applying for immigration through a family visa petition must show that she is not inadmissible under the public charge ground.

In contrast, a person applying to immigrate through Special Immigrant Juvenile Status does not have to meet the public charge inadmissibility ground at all..

Immigration authorities base the decision whether to grant the waiver on both statutory and discretionary factors including rehabilitation, hardship, humanitarian factors, etc. Some but not all waivers require the applicant to have certain U.S. citizen or permanent resident family members who would suffer hardship.

§ 10.2 When Do the Grounds of Inadmissibility Apply?

The grounds of inadmissibility apply in three situations.

A. The grounds of inadmissibility bar an otherwise eligible noncitizen from <u>obtaining</u> lawful status (unless a waiver of inadmissibility is available and is granted as a matter of discretion).

Noncitizens who are undocumented and hope to apply for lawful permanent residency or other status need to avoid becoming inadmissible.

Example: Fernando is eligible for Special Immigrant Juvenile Status but this will not do him any good unless, based on that status, he can become a permanent resident. He is inadmissible (and thus barred from permanent residency) because he engaged in

alien smuggling. Fortunately, there is a discretionary **waiver** of this ground of inadmissibility.

Example: Sara is married to a U.S. citizen and has an approved family visa petition. She has been convicted of possession for sale of drugs, however, which is a very serious ground of inadmissibility. There is no waiver of this ground for family visa applicants and Sara never will be able to become a permanent resident through her husband.

B. Some crimes-related grounds of inadmissibility also bar eligibility for naturalization, VAWA and some other relief because they are a bar to establishing "good moral character."

A person who is inadmissible under some of grounds related to crimes and bad behavior is not eligible to establish "good moral character."[300] A person must establish good moral character for a certain time period in order to be eligible for naturalization to United States citizenship, status under the Violence Against Women Act (VAWA),[301] cancellation of removal for non-permanent residents, and some other applications. The person must show good moral character for a certain period of time immediately preceding filing the application, e.g. three years for VAWA, five years for naturalization.

Example: Simone became inadmissible for a conviction six years ago, but has had no problems for the last six years. Now she wants to apply for naturalization to U.S. citizenship. She can do this because she can show good moral character for the last five years – her conviction fell outside the required five year period.

C. A noncitizen attempting to physically enter the United States must show that he or she is not inadmissible (or if inadmissible that a waiver is available and should be granted).

Except for permanent residents returning to the U.S. from a trip abroad, any non-citizen attempting to enter at a U.S border must show that she is not inadmissible. In some situations even a permanent resident returning to the United States will be barred.[302] See discussion of travel at § 10.4.

Example: Marie is coming to the U.S. on a student visa. She must show that she is not inadmissible.

Example: Francisco is a permanent resident who is inadmissible because of a conviction. He needs to get expert immigration advice before leaving the country. If

[300] The bars to establishing good moral character are set out at 8 USC § 1101(f). The grounds of inadmissibility that are incorporated into the bars include the moral turpitude, prostitution, drug admission and conviction, polygamy, and "reason to believe" drug trafficking ground, as well as the ground relating to a five year sentence imposed for one or more convictions.
[301] Some waivers of the good moral character and other requirements are available to VAWA applicants. *See* 8 USC §§ 1154(a)(1)(C), 1182(h), 1227(a)(7)(A).
[302] *See* 8 USC § 1101(a)(13).

he leaves the U.S., when he attempts to return he will be barred from re-entering and may be stripped of his status, after he has a full and fair hearing where he can confront the evidence against him. A waiver may be available for him.

§ 10.3 When Do the Grounds of Deportability Apply?

The grounds of deportability are specific factors that will cause a person to be stripped of lawful status and deported ("removed") from the United States. They apply only to persons who have been **admitted to the United States.**

When does an admission occur? An admission occurs when a noncitizen enters the United States after inspection by a U.S. official at a border or border equivalent (e.g., airport). In most jurisdictions an admission occurs even if the person used fake documents or committed fraud to get admitted.

A person who becomes a permanent resident through processing at a local CIS office within the United States ("adjustment of status") sometimes makes a new "admission," despite the fact that the person did not physically enter the U.S. as part of the process.[303]

An admission does *not* occur when a noncitizen (a) secretly enters the United States without inspection by a U.S. official; (b) enters the U.S. by falsely claiming to be a U.S. citizen; or (c) is refused official admission at the border but permitted to physically enter under special conditions. Since these people were not admitted, the grounds of deportability do not apply to them.

If a person who has been admitted comes within a ground of deportability, an immigration judge can take away the person's status and order the person deported ("removed").

> **Example:** Francois has been a permanent resident for 20 years and has a U.S. citizen wife and children. If he comes within a ground of deportability such as the domestic violence ground (for example, for conviction of misdemeanor spousal abuse), he can lose his green card and be removed.
>
> If Francois gets good legal advice, he will attempt to plead to some alternate offense and sentence that satisfies the authorities but that does not make him deportable. (Even if he does become deportable, however, he may be able to apply for a waiver for long-time permanent residents called "cancellation of removal."[304]).

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[303] Some persons who entered the U.S. with inspection, for example under a student visa, and then adjust status are not held to make a new "admission" at their adjustment. *See* S*hivaraman v Ashcroft*, 360 F.3d 1142 (9th Cir. 2004).
[304] *See* 8 USC § 1229b(a).

Example: Esteban secretly entered the U.S. from Mexico by wading across the Rio Grande River. Steve crossed into the U.S. from Canada by falsely claiming to be a United States citizen. Neither one has been admitted, so the grounds of deportability – including the domestic violence ground -- do not apply to them.

Note that Esteban and Steve have other problems: they can be "removed" from the U.S. based on their illegal entry and lack of status. The point is that they are not specifically concerned with the grounds of deportability and do not have to focus on making sure to avoid the domestic violence deportability ground. Instead, they are concerned with the grounds of inadmissibility if they should ever want to obtain lawful status in the United States.

§ 10.4 What if a Noncitizen is Deportable but not Inadmissible? Inadmissible but not Deportable? When is Travel Dangerous?

A. Deportable but Not Inadmissible

To be deportable means that the government can take away a noncitizen's current lawful status. To be admissible (i.e., not inadmissible) means that if the non-citizen is otherwise eligible to gain new status, there is no bar to doing so. Thus a person who is deportable but not inadmissible might lose his or her current status, but at the same time be permitted to apply to get new status.

Example: Marc is a permanent resident who is deportable under the domestic violence ground for a misdemeanor spousal abuse conviction. After counseling, he and his U.S. citizen wife decide that they want to remain together. This particular conviction does not make Marc inadmissible. At Marc's removal hearing, the judge may find that Marc loses his current permanent resident status, but may agree to consider Marc's new application for permanent residency based on a new family visa petition.[305]

B. Inadmissible but Not Deportable

The penalty for being inadmissible is that the person cannot enter the U.S. or acquire new lawful status. The penalty for being deportable is that current lawful status can be taken away.

Undocumented Persons. A person without lawful status who is inadmissible, but not deportable will be unable to acquire lawful status, if the inadmissibility ground applies to his or her particular situation and if a waiver is not available.

[305] *See Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992). This also can be combined with a waiver of inadmissibility, if needed. *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993).

Lawful Permanent Residents. A person who already has permanent resident status can simply "sit tight" if he or she is inadmissible but not deportable, and nothing will change. The government will not take her permanent residency away, because she is not deportable. She does not need to apply for new permanent residency, because she already has it.

Permanent residents do face two limitations if they become inadmissible. First, if a permanent resident leaves the United States while inadmissible for crimes, she can be barred re-entry at the border. See Part C below. Second, several grounds of inadmissibility act as bars to establishing "good moral character," a requirement for naturalization to U.S. citizenship. A permanent resident who is inadmissible will not be able to naturalize for some period of time. See § 10.2 above.

> **Example:** Matilda is a permanent resident who has just become inadmissible, but not deportable, because of a conviction. She can keep her permanent resident status. But she cannot apply for naturalization to U.S. citizenship for three (if married to a U.S. citizen) or five years. Moreover if she leaves the United States on a trip abroad, she will be found inadmissible and denied entry at the border upon her return, unless a waiver of the inadmissibility ground is available. See Part C, below.

C. Lawful Permanent Residents who Travel Abroad

In some situations a lawful permanent resident who travels outside the United States must meet the test of admissibility when coming back through the U.S. border. The statute provides that the permanent resident returning from abroad must seek admission when he or she:[306]

1) has abandoned or relinquished permanent resident status;
2) has been absent from the United States for a continuous period of more than 180 days;
3) has engaged in illegal activity after departing the United States;
4) has left the United States while under removal or extradition proceedings;
5) has committed an offense identified in INA § 212(a)(2) (grounds of inadmissibility relating to crimes), unless the person was granted § 212(h) relief or § 240A(a) cancellation of removal to forgive the offense; or
6) is attempting to enter or has entered without inspection.

Note that *any permanent resident who leaves the United States while inadmissible under one of the crimes grounds can be barred from re-entering the United States.* Unless a waiver of the ground of inadmissibility is available,[307] the person risks losing their permanent residency just by the fact of traveling.

[306] 8 USC § 1101(a)(13)(C).
[307] *See* 8 USC § 1182(h).

§ 10.5 Criminal Convictions and Juvenile Delinquency Dispositions

Adult Convictions. The complex law covering the immigration consequences of crimes is a subject beyond the scope of this manual. Some commonly encountered crimes are discussed at **Chapter 9**. Key resources are available.[308]

Delinquency Proceedings. A juvenile delinquency adjudication is not a "conviction" for any immigration purpose, regardless of the nature of the offense.[309] Therefore any immigration penalty that requires a conviction does not attach to a delinquency disposition. However the disposition may be used as evidence to show that the person has engaged in conduct or has a condition that is a basis for inadmissibility or deportability. The dispositions most likely to bring these penalties are drug offenses (which can show that the person is a drug addict or abuser or, more significantly, has ever aided or been a drug trafficker); prostitution; or evidence showing the person has a mental condition that poses a threat to self or others, such as sexual predator, alcoholic, having suicidal tendencies, etc. All juvenile delinquency adjudications will be considered as a matter of discretion in any application for an immigration benefit. See further discussion at **Chapter 7**, § 7.2.

§ 10.6 Medical Grounds[310]

The medical grounds of inadmissibility will be covered as part of the medical examination that all applicants for permanent residency undergo. The examining doctor, generally a doctor approved by DHS (called a "civil surgeon") or, in consular processing, a doctor approved by the United States consulate (called a "panel physician"), will take blood and urine samples and ask questions about the following grounds (e.g., "Have you been to any parties lately where they used drugs? Did you take any?"). The noncitizen can request a copy of the medical test immediately after the examination, before it is placed in a sealed envelope. The noncitizen can contest the doctor's finding and present medical evidence of his or her own. Government instructions to these examining physicians are found at http://www.cdc.gov/immigrantrefugeehealth/index.html.

As always, if there is a possibility that the person is inadmissible, expert immigration counsel should be consulted.

Except for the drug addict or abuser ground, a waiver is available for the medical grounds.[311] Also some grounds can be cured: the person may take the medication for tuberculosis or get the required vaccinations.

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[308] The website of the Law Offices of Norton Tooby contains a host of material, at www.criminalandimmigrationlaw.com. It also contains information about their excellent publications. For offenses in the Ninth Circuit the best resource is *Defending Immigrants in the Ninth Circuit* published by the Immigrant Legal Resource Center. Go to www.ilrc.org or see **Chapter 11** for ordering information.
[309] *Matter of Devison*, Int. Dec. 3435 (BIA 2000), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).
[310] 8 USC § 1182(a)(1).
[311] 8 USC § 1182(g). Special waivers that do not require qualified relatives are available for SIJS and VAWA.

Drug Addict or Abuser. A person is inadmissible who is a "current" drug addict or abuser, and deportable if he or she has been one at any time since being admitted to the United States.[312] The definition of abuser is not settled, and might even include more than one-time experimentation within the last three years. This means that drug abuse may be defined as nearly synonymous with drug use. Drug addiction is the non-medical use of a controlled substance "which has resulted in physical or psychological dependence."[313] Multiple delinquency findings of drug possession or being under the influence might or might not trigger a government charge that the person is an abuser or addict. (An adult conviction of such offenses in most cases also will make the person deportable and inadmissible; see **Chapter 10**.)

Mental Condition Posing Risk to Self and Others. Current suicidal tendencies, pathological or sexual predator tendencies, alcoholism, or existence of such conditions in the past with likelihood to recur, might come up under this ground. The noncitizen may assert that the condition does not exist, or concede that it existed in the past but now is over. This ground can be waived.

HIV Positive. Previously, the only communicable disease listed in the Immigration & Nationality Act itself was HIV, meaning that anyone who was HIV positive was deemed inadmissible. However, at the end of July 2008 President Bush signed a historic piece of legislation, the reauthorization of the President's Emergency Plan for AIDS Relief (PEPFAR), which removed from the statute infection with HIV as a communicable disease triggering inadmissibility. Effective January 4, 2010, HHS issued a final rule to remove HIV from the definition of "communicable disease of public health significance" and to remove HIV testing from the scope of the medical screening process for immigrants.

Other Medical Grounds of Inadmissibility. In addition to the grounds discussed above, there are also grounds of inadmissibility for persons who have a communicable disease of public health significance. These grounds are listed in the HHS regulation at 42 CFR § 34.2(b). Tuberculosis and sexually transmitted diseases such as gonorrhea and syphilis are also among the medical grounds of inadmissibility. A person testing positive for these illnesses can have the disease treated and cured and then qualify for immigration. Or, if an illness such as tuberculosis cannot be quickly cured, the person can apply for a waiver. For persons who have not been vaccinated against certain diseases including mumps, measles, rubella, polio, tetanus and diptheria toxoids, pertussis, influenza type B, hepatitis B, rotavirus (for children 6 through 32 weeks of age), hepatitis A (for children 12 through 23 months of age), tetravalent meningococcal conjugate or tetravalent meningococcal polysaccharide (to persons 11 through 18 years of age), obtaining required vaccinations cures the medical ground.[314]

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[312] 8 USC §§ 1182(a)(1)(A)(iii) (inadmissibility), 1227(a)(2)(B)(ii) (deportability).
[313] 42 CFR § 34.2(g).
[314] 8 USC § 1182(a)(1)(A)(ii), *see also* "Revised Vaccination Technical Instructions for Civil Surgeons," DHHS Memorandum from the Division of Global Migration and Quarantine (DGMQ) (May 8, 2008) at http://www.kdheks.gov/olrh/download/memo_tech_instruc_for_immunizations.pdf

In October 2008, the HHS further amended 42 CFR § 34.2(b), by adding two new categories of diseases that may trigger inadmissibility: (1) quarantinable diseases designated by Presidential Executive Order, and (2) diseases that qualify as a "public health emergency of international concern which require notification to the World Health Organization (WHO) under the revised International Health Regulations (IHR) of 2005."[315] These new categories, however, only apply to examinations performed in consular processing by "panel physicians" and will only take effect when HHS directly notifies panel physicians in the affected areas.[316] There is a waiver for failure to obtain the vaccination based on certain medical or religious reasons.[317]

§ 10.7 Bad Conduct that Doesn't Require a Conviction: Prostitution, "Reason to Believe" Drug Trafficking, Finding of Violation of a Protective Order

Prostitution. If a court finds that a non-citizen has provided sex for money in any ongoing manner, the person is in danger of being found inadmissible for "engaging in" prostitution.[318] A single act of prostitution does not amount to engaging in prostitution under this provision.[319] Rather, "prostitution" is defined as engaging in a pattern or practice of sexual intercourse for financial or other material gain.[320] Engaging in prostitution also does not encompass sexual conduct that falls short of intercourse.[321]

Conviction of running a prostitution business can bring severe immigration penalties as a ground of deportability or aggravated felony.

"Reason to believe" Drug Trafficking. If the CIS has "reason to believe" that a noncitizen has assisted or been a drug trafficker, the person is inadmissible, but not deportable.[322] Drug trafficking has been defined as "some sort of commercial dealing" [323] and "the unlawful trading or dealing of any controlled substance."[324] Immigration authorities must have "reasonable, probative and substantial" evidence that the noncitizen

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[315] *See* http://www.cdc.gov/immigrantrefugeehealth/pdf/addendum-ti-panel.pdf.
[316] *See* 85 *Interpreter Releases* 2714 (Oct. 13, 2008) and 85 *Interpreter Releases* 2830 (Oct. 27, 2008) for more information.
[317] 8 USC § 1182(g)(2).
[318] 8 USC § 1182(a)(2)(D).
[319] *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008); *Matter of T-*, 6 I&N Dec. 474 (BIA 1955).
[320] *Matter of Gonzalez-Zoquiapan*, *supra*. *See also* State Department regulations at 22 CFR § 40.24(b) which defines prostitution as "engaging in promiscuous sexual intercourse for hire … that must be based on elements of continuity and regularity, indicating a pattern of behavior of deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts."
[321] *Matter of Gonzalez-Zoquiapan*, *supra*. *See also Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006)(holding that prostitution for immigration purposes only encompasses offering sexual intercourse for a fee, as opposed to other sexual conduct).
[322] 8 USC § 1182(a)(2)(C).
[323] *Lopez v. Gonzales*, 549 U.S. 47 (2006).
[324] *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992).

was a knowing and conscious participant or conduit in the drug trafficking.[325] Evidence such as a police report or other documentation of the drug trafficking, testimony from police, detectives, or other officers, or admissions from the person himself, delinquency adjudications and adult convictions or other evidence of sale, possession for sale, and the like have been held to supply "reason to believe."[326]

Under a 1999 amendment, this ground also punishes the family members of the suspected drug trafficker. The spouse, son and daughters of a person who is inadmissible for drug trafficking are also inadmissible if they benefited financially or in any way from the trafficking within the last five years.

While many of the "conduct-based" grounds can be waived in the discretion of immigration authorities, the drug trafficking ground in most cases cannot be waived and is an absolute bar to status.[327] An exception is that a person inadmissible under this ground can apply for a "T" or "U" visa based on being a victim/witness of a serious crime or human trafficking. See **Chapter 4**.

Violation of a Protective Order. A person is deportable if a civil or criminal court finds that he or she has violated a protection order designed to protect against credible threats of violence, repeated harassment, or bodily injury.[328] See further discussion in **Chapter 6**, § 6.2.

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[325] *See, e.g.*, *Matter of R.H.*, 7 I&N 675 (BIA 1958)(admitted giving drugs away for free*); Matter of Martinez-Gomez*, 14 I&N 104 (BIA 1972) (maintaining place where drugs are dispersed); *Matter of Rico*, 16 I&N Dec. 181, 185-86 (BIA 1977); *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000); *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (government's knowledge or reasonable belief that an individual has trafficked in drugs must be based on "credible evidence"); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979).

[326] *Igwebuike v. Caterisano*, 230 Fed. Appx. 278 (4th Cir. 2007)(unpublished)(holding that the drug sale charges for which the petitioner was acquitted were alone insufficient to constitute "reason to believe," and that "reason to believe" charge triggering inadmissibility must be based on facts underlying an arrest and those facts must be cited in support of the charge); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1211 (9th Cir. 2004) (finding sufficient reason to believe the alien had committed illegal acts underlying previous drug trafficking arrest because the government submitted documents describing the police surveillance of the person and the person's subsequent attempt to escape with 147 pounds of marijuana); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003)(in addition to a previous arrest for drug trafficking, two undercover detectives testified that they had personally arranged drug deals with the petitioner); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979)(applicant admitted to participating in an attempt to smuggle a kilogram of marijuana into the United States); *Matter of Rico*, *supra* (BIA did not rest on evidence of arrest for drug trafficking, but testimony of the Border Patrol Agent and the Customs Inspector that he frequently drove the car in which 162 pounds of marijuana was found as well as testimony of special agents of the Drug Enforcement Administration in the investigation of the incident).

[327] For example, there is no waiver provided for applicants for special immigrant juvenile status or VAWA relief. A person can be granted asylum or withholding based on fear of persecution despite being inadmissible under the ground, but will not be permitted to become a permanent resident.

[328] 8 USC § 1227(a)(2)(E)(ii). See further discussion of the consequences of this finding in **Chapter 6**, **§ 6.2.**

§ 10.8 Immigration Violations: False Documents, Prior Deportation or Removal, Visa Fraud, Alien Smuggling, and Unlawful Presence and Entrance

The following are the most common immigration violations that may prevent a noncitizen's admission to the United States.

False Documents. It is unlawful for a person to knowingly forge or alter any document or to "use, attempt to use, possess, obtain, accept, or receive or provide" any such false document.[329] Many states have offenses concerning use of false documents (e.g., a fake passport) and immigration status. A conviction or a disposition in juvenile delinquency proceedings might provide evidence for a finding in a special civil court that in turn would trigger inadmissibility or deportability under the false documents grounds.[330]

A person can also be found deportable for conviction of falsification of documents.[331]

Visa Fraud. A noncitizen is inadmissible if he or she commits fraud or willfully misrepresents a material fact in obtaining a visa, admission to the U.S. or other immigration benefit.[332] This includes using a false or borrowed visa to enter the United States.

False Claim to U.S. Citizenship. Any person who falsely claims to be a U.S. citizen for any purpose or benefit under the INA, or under any other federal or state law on or after September 30, 1996 is both inadmissible and deportable. These two provisions are harsh, both because they are broadly written and because there is **no waiver,** except for permanent residents who qualify for Cancellation of Removal under INA § 240(A)(a). They punish people for claiming U.S. citizenship for entry into the United States, and any other purpose under any federal or state law. Therefore DHS could apply these provisions to someone who is under age and uses the U.S. passport of an older friend to get into a bar and have a drink, someone who votes in an election not realizing that she's not permitted to vote, or even someone who came to the U.S. as a baby and believes herself to be a U.S. citizen. No conviction is required.

Prior Deportation or Removal. Noncitizens who are ordered deported or removed from the U.S. are inadmissible for five years if they were removed in expedited removal proceedings, for ten years if they were removed in regular removal proceedings, for 20 years after a second removal, and forever if they were removed for an aggravated felony conviction.[333] If a noncitizen reenters the United States illegally after having been removed or deported, the prior order of removal is reinstated from its original date

[329] 8 USC § 1324(c)(a)(2).
[330] 8 USC §§ 1182(a)(6)(F), 1227(a)(3)(B)(iii).
[331] 8 USC § 1227(a)(3)(B)(iii).
[332] 8 USC § 1229(a)(6)(C).
[333] 8 USC § 1182(a)(9).

and the noncitizen will be removed (deported) without being permitted to apply for any immigration relief.[334] There is, however, an important exception for Special Immigrant Juveniles. Because applicants for Special Immigrant Juvenile Status are deemed to have been paroled in, this bar should not apply to them.

Alien Smuggling. Persons who knowingly encourage, induce, assist, abet or aid at any time any other noncitizen to enter the United States illegally will also be found inadmissible.[335] A person who commits alien smuggling—even if there is no conviction—can be found deportable, if it occurred at the time of any entry, prior to any entry, or within five years of any entry.[336] Furthermore, a conviction for alien smuggling is an aggravated felony, unless it was a first offense for smuggling only a parent, spouse or child.[337]

Unlawful Presence. Departing the United States after being "unlawfully present" may make a noncitizen inadmissible for a period of three or ten years, or permanently. Unlawful presence can accrue if a person enters the United States unlawfully (without being admitted or paroled by the CIS) or if a person remains in the United States after her nonimmigrant visa expires. The length of the inadmissibility period depends upon the duration of the unlawful presence and whether the person attempted to re-enter the United States illegally. There are special rules for calculating unlawful presence. For example, in some contexts unlawful presence under the age of 18 or presence that was due to domestic violence does not count against the person.[338]

[334] 8 USC § 1231(a)(5).
[335] 8 USC § 1182(a)(6)(E).
[336] 8 USC § 1227(a)(1)(E).
[337] 8 USC § 1101(a)(43)(N).
[338] 8 USC § 1182(a)(9). *See also* Department of State, Cable 98-State-060539 (April 4, 1998), concerning "P.L. 104-208 Update No. 36: § 1182(a)(9)(A)-(C), § 1182(a)(6)(A) and (B)," reprinted at 75 *Interpreter Releases* 543 (April 20, 1998).

CHAPTER 11

IMMIGRATION RESOURCES

Resources in this chapter are divided into two categories. The first category lists organizations and information sources for technical assistance and direct services organized by substantive area of immigration law. The second category is a list of other resources including more in-depth written materials, videos, listservs and websites available for the different areas of immigration law discussed in this bench book. The list represents resources as they exist in July 2010.

This list of resources is by no means exhaustive but provides some services available in various states as well as national organizations willing to provide technical assistance and materials.

§ 11.1 Technical Assistance and Direct Service Providers

A. Children's Immigration Issues (Including Special Immigrant Juvenile Status)

Center for Human Rights and Constitutional Law (CHRCL)
Unaccompanied Minors Project
256 S. Occidental Blvd.
Los Angeles, CA 90057
Tel. (213) 388-8693
Fax (213) 386-9484
www.centerforhumanrights.org

> CHRCL is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, and the poor. .

CLINIC National Pro Bono Project for Children
415 Michigan Ave. NE, Suite 200
Washington, DC 20017
(202) 635-2556
www.cliniclegal.org

> Matches unaccompanied immigrant children who have recently been released from government custody with pro bono attorneys; trains and supports pro bono attorneys across the country to assist unaccompanied children in need of legal representation.

Esperanza Immigrant Rights Project, a Project of Catholic Charities
1530 James M. Wood Blvd.
P.O. Box 15095

Los Angeles, CA 90015
Phone: (213) 251-3505
Fax: (213) 487-0986
http://www.esperanza-la.org/

Esperanza provides pro bono legal services to minors in removal proceedings in the Los Angeles area.

Florida Immigrant Advocacy Center (FIAC)
3000 Biscayne Blvd., Suite 400
Miami, FL 33137
Tel. (305) 573-1106
Fax (305) 576-6273
http://www.fiacfla.org

FIAC represents low-income immigrants to obtain permanent legal status, assists unaccompanied immigrant children by providing them legal relief and advocating on their behalf. FIAC provides support to immigrant women who are survivors of abuse, sexual assault, violent crimes, and human trafficking. .

Immigrant Legal Resource Center
1663 Mission Street, Suite 602
San Francisco, CA 94103
Tel. (415) 255-9499 ext. 6263
Fax (415) 255-9792
aod@ilrc.org
www.ilrc.org

California non-profits receiving IOLTA funding, Bay Area non-profits, and Vera subcontractors and pro bono attorneys assisting Vera subcontractors who assist children in juvenile court or immigration proceedings can contact the ILRC to get free advice on individual cases or policy issues by mail, email or fax, Monday through Thursday from 10 a.m. to 3 p.m. Ask for the attorney of the day and state that you are helping a child. Organizations and attorneys who do not fall in the above categories can consult with the attorney of the day for a fee. Go to www.ilrc.org and click on "technical assistance" to get information about rates and a contract. Some training may also be available. Any person can download resources on immigrant children and youth issues at our website at www.ilrc.org (go to "Immigrant Youth" tab). To order additional copies of this manual or any of our other immigration publications, go to www.ilrc.org at "publications." Some trainings are also available.

Kids in Need of Defense (KIND)
1331 G Street NW, Suite 900
Washington, DC 20005

(202) 824-8680
www.supportkind.org

KIND has an infrastructure of pro bono coordinators that assign, monitor, mentor and coordinate legal representation for unaccompanied minors provided by law firms and corporate legal departments in targeted cities. KIND also partners with NGOs with expertise in working with unaccompanied children.

Legal Services for Children
1254 Market Street, 3rd Floor
San Francisco, CA 94102
Tel. (415) 863-3762
Fax.(415) 863-7708
www.lsc-sf.org

Legal Services for Children provides representation to children under 18 in San Francisco County and has extensive experience with SIJS cases.

National Center for Refugee and Immigrant Children
U.S. Committee for Refugees and Immigrants
2231 Crystal Drive, Suite 350, Arlington, VA 22202
(703) 310-1130
www.nationalchildrenscenter.org

Provides pro bono legal and social services for unaccompanied immigrant children in the immigration process. Their website contains a resource library on various legal topics affecting immigrant children and youth.

National Immigrant Justice Center (NIJC)
208 S. La Salle St., Suite 1818
Chicago, IL 60604
Tel. (312) 660-1370
http://www.immigrantjustice.org/

NIJC has an Immigrant Children's Protection Project
that provides specialized legal services to and advocates for immigrant children, many of whom are fleeing human rights abuses such as forced recruitment as soldiers, sexual exploitation, child labour, and abuse.

Public Counsel
601 South Ardmore Avenue
Los Angeles, CA 90005
Tel. (213) 385-2977
Fax (213) 385-9089
www.publiccounsel.org

Public Counsel provides children's and immigration counsel as well as advice over the telephone and some training in Los Angeles area. Along with general expertise, they have special expertise in obtaining SIJS in delinquency and probate proceedings.

The Door
121 Avenue of the Americas
New York, NY 10013
Tel. (212) 941-9090
http://www.door.org/

The Legal Services Center at the Door provides different kinds of legal counsel, including support for immigrant youth.

Volunteer Lawyers Program Legal Services
625 Broadway, Suite 925
San Diego, CA 92101
Tel. (619) 235-5656
www.sdvlp.org

San Diego's Volunteer Lawyers Program can help eligible children with SIJS applications.

B. Violence Against Women Act (National and California Based)

National Immigration Project of the National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
Tel. (617) 227-9727
Fax. (617) 227-5495
www.nationalimmigrationproject.org

The Project provides technical assistance, advice and resources to legal practitioner and community groups throughout the country with a special emphasis and expertise in the area of VAWA. It sponsors seminars and produces publications on a variety of subjects to develop and improve legal and advocacy skills.

Asian Law Alliance
184 E. Jackson Street
San Jose, CA 95112
Tel. (408) 287-9710
Fax (408) 287-0864
www.asianlawalliance.org

Asian Law Alliance provides VAWA immigration and domestic violence legal services to low-income Asian/Pacific Islander residents in Santa Clara County.

Asian Pacific American Legal Center
1145 Wilshire Boulevard, 2nd Floor
Los Angeles, CA 90017
Tel. (213) 977-7500
Fax (213) 977-7595
www.apalc.org

The Asian Pacific American Legal Center (APALC) will assist low-income VAWA self-petitioners with their immigration cases. APALC partners with community based organizations and the legal community to provide immigration and citizenship assistance to individuals and their families to serve most of the Asian Pacific Islander population in Southern California.

API Legal Outreach
1121 Mission Street
San Francisco, CA 94103
Tel. (415) 567-6255
Fax. (415) 567-6248
or
1305 Franklin Street, Suite 410
Oakland, CA 94612
Tel. (510) 251-2846
Fax. (510) 251-2292
www.apilegaloutreach.org

API Legal Outreach provides free direct services for Asian immigrant clients on VAWA self-petitioning, battered spouse waivers, as well as U and T visa applications.

Bay Area Legal Aid
Various locations throughout the San Francisco Bay Area
www.baylegal.org

Bay Area Legal Aid provides free direct services to VAWA self-petitioners who fall within the legal services corporation funding guidelines.

California Rural Legal Assistance Foundation
631 Howard Street, Suite 300
San Francisco, CA 94105-3907
Tel. (415) 777-2752

Hotline (800) 477-7901
www.crla.org

CRLAF provides advice, counsel and direct representation on naturalization, domestic violence and VAWA self-petitions.

CARECEN
2845 West 7th Street,
Los Angeles, CA 90005
Tel. (213) 385-7800
Fax (213) 385-1094

Conducts informational immigration presentations on the ways to get legal status in the U.S., provides consultations regarding VAWA and U-Visa petitions.

Catholic Charities Diocese of San Diego
Refugee Services
4575-A Mission Gorge PlaceSan Diego, CA 92120
Tel. (619) 287-9454
http://www.ccdsd.org
or
Main Office
349 Cedar Street
San Diego, CA 92101
Tel. (619) 231-2828

Catholic Charities provides free or low cost immigration services to VAWA and asylum clients.

Catholic Social Services Solano County
125 Corporate Place, Suite A
Vallejo, CA 94590
Tel. (707) 644-8909
Fax (707) 644-6314
www.csssolano.org

Catholic Social Services provides a broad range of immigration assistance including VAWA cases. Also provides counseling services for families and children.

Central California Legal Services (Fresno County)
1401 Fulton Street, Suite 700
Fresno, CA 93721

Tel. (559) 570-1200
(800) 675-8001
www.centralcallegal.org

Central California Legal Services will assist low-income domestic violence victims with restraining orders and VAWA cases.

Central California Legal Services (Tulare and Kings Counties)
208 West Main Street, #U-1
Visalia, CA 93291
Tel. (559) 733-8770
Fax. (559) 635-8096

CCLF in Visalia will help low-income clients with restraining orders and VAWA immigration applications.

Central California Legal Services (Merced, Mariposa, and Toulumne Counties)
357 West Main Street, Suite 201
Merced, CA 95340
Tel. (209) 723-5466
Fax: (209) 723-1315

CCLF in Merced will help low-income clients with restraining orders and VAWA immigration applications.

Community Legal Services in East Palo Alto

2117-B University Avenue
East Palo Alto, CA 94303
Tel. (650) 326-6440
Fax (650) 326-9722

http://www.clsepa.org/index.html

The CLSEPA Immigration Program provides legal assistance to immigrants in and around East Palo Alto particularly in applying for domestic violence based U-visas and VAWA self-petitions.

International Institute of the Bay Area
657 Mission St., Ste. 500
San Francisco, CA 94105
Tel. (415) 538-8100
Fax. (415) 538-8111
www.iieb.org

405 14th St, Ste. 500
Oakland, CA 94612
Tel. (510) 451-2846
Fax (510) 465-3392

The Legal Department provides immigration legal services in the following areas: adjustment of status; consular processing; VAWA self-petitions, I-751 waivers; green card renewals; employment authorization renewals; NACARA; TPS; and citizenship. They also provide training workshops on VAWA to community-based organizations, provide presentations to the community on immigration law, and hold informational sessions for immigrants on current immigration law developments.

Katharine & George Alexander Community Law Center (formerly the East San Jose Community Law Center)
1030 The Alameda
San Jose, CA 95126
Tel. (408) 288-7030
Fax (408) 288-3581
www.scu.edu/law/kgaclc/

A project of Santa Clara University School of Law, the Community Law Center can help clients with VAWA cases, family-based immigration, deportation, political asylum, and immigration procedures generally.

Legal Aid Foundation of Los Angeles
5228 Whittier Blvd.
Los Angeles, CA 90022
Tel: (213) 640-3883
(800) 399-4529
Fax: (213) 640-3911

Legal Aid foundation of Los Angeles provides U.S. citizens, permanent residents, refugees and asylum seekers with assistance in family re-unification matters, and help battered immigrant women flee from domestic violence by establishing legal residency under the Violence Against Women Act. The foundation also helps victims of Human Trafficking. LAFLA's Torture Survivors Project conducts outreach in key ethnic communities, where there are large populations of asylees and refugees who have come to the U.S. from countries where torture is commonly committed.

Legal Aid Society of San Diego
110 South Euclid Avenue
San Diego, CA 92114
(877) LEGAL AID
http://www.lassd.org

Legal Aid Society of San Diego provides VAWA immigration services, deportation defense, adjustment of status and naturalization assistance.

National Immigration Law Center (NILC)
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
Tel. (213) 639-3900
Fax (213) 639-3911
www.nilc.org

NILC provides advice over the telephone and some training in Los Angeles area. Special expertise in public benefits law.

Public Counsel
601 South Ardmore Avenue
Los Angeles, CA 90005
Tel. (213) 385-2977
Fax (213) 385-9089
www.publiccounsel.org

Immigrants' Rights Project ob Public Counsel provides VAWA immigration assistance to

C. Asylum

The Center for Gender and Refugee Studies
U.C. Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
Tel. (415) 565-4877
Fax (415) 581-8824
http://cgrs.uchastings.edu/

The Center for Gender and Refugee Studies (CGRS) provides legal expertise and resources to attorneys representing women asylum-seekers fleeing gender related harm, at both the practice and policy levels, and seeks to track decisions in these cases. CGRS also works to coordinate legal and public policy advocacy efforts through domestic and international networking, and engages in public education efforts in order

to educate decision makers and the public and contribute to the formulation of national and international policy and practice.

Lawyers' Committee for Civil Rights of the San Francisco Bay Area
131 Steuart Street, Suite 400
San Francisco, CA 94105
Tel. (415) 543-9444
Fax (415) 543-0296
www.lccr.com
info@lccr.com

Provides representation to indigent refugees seeking asylum by recruiting lawyers and interpreters. Offers comprehensive training on asylum law and legal procedure as well as support and consultation to volunteers.

D. Other Legal Assistance

Local legal aid offices may be expert in this area and able to provide advice or direct representation of clients.

To obtain an immigration attorney, call one of the back-up centers for names in your area or contact the American Immigration Lawyers Association Immigration Lawyer Referral Service (AILA ILRS). The lawyers participating in the AILA ILRS are licensed to practice law in a state or territory of the United States and are currently a member in good standing of a State Bar Association. The AILA ILRS can be contacted on the web at www.aila.org.

If you are attempting to find pro bono attorney assistance, a local Bar Association should have a list of low fee or volunteer attorneys specializing in immigration law or in another field. The bar association may also know of other attorney volunteer organizations in the area.

§ 11.2 Written and Other Materials

A. Written Materials

Immigrant Legal Resource Center Publications

The ILRC publishes the following books about areas of immigration law relevant to family and juvenile court issues. For a more complete list of ILRC publications, and for information on the most current pricing and editions available, visit the ILRC website at www.ilrc.org and click on "Publications" or please call (415) 255-9499.

Asylum and Related Immigration Protections provides a detailed description of the key aspects of asylum law, and includes many case examples, practice tips and practical information for preparing your client's case, as well as preparing your client for his interview or hearing. An extensive and updated outline by co-author Robert Jobe provides expert analysis on all of the elements of an asylum claim, such as persecution, credibility, burden of proof, filing deadlines, corroborative evidence, judicial review, due process issues, and more. Also included is a discussion of related immigration protections, such as Withholding/Restriction on Removal and the Convention Against Torture.

A Guide for Immigration Advocates is a large and comprehensive book about immigration law, written for paralegals. It covers the basics of immigration law: family visa petitions, relief from removal, political asylum, bonds and detention, grounds of deportability and inadmissibility, removal proceedings, and constitutional and statutory rights of immigrants. The Guide is a how-to manual, containing clearly worded explanations of each subject and including sample applications, charts, and practical advice on working with your clients to elicit the information you need in order to assist them efficiently and accurately.

Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws. This manual shows step-by-step how to identify, analyze and defend against the adverse immigration consequences of charges, using a combination of user-friendly charts, summaries and practice aids, and in-depth discussion of defense strategies. It includes extensive discussion of California offenses, including new defense strategies for assault, domestic violence, drugs, sexual crimes with minors and other commonly charged offenses. A key section describes new strategies for how to control the record of conviction in pleas to "divisible" statutes. The book includes chapters on defense of juveniles, requirements for immigration applications (asylum, cancellation, etc.), immigration detainers and detention, and post-conviction relief.

Families & Immigration: A Practical Guide provides a comprehensive overview of family immigration law, reaches all aspects of family-sponsored immigration, and provides an understanding of qualifications for who can file and how to submit a family-based visa petition. This manual provides easy-to-follow steps and a comprehensive discussion about issues relating to immigration through marriage, including an essential understanding of: affidavit of support, adjustment of status, consular processing, Child Status Protection Act, grounds for obtaining waivers of the conditions on residence, conditional residence, grounds and waivers of inadmissibility, V and K visas. The guide also walks readers

through the Violence Against Women Act and explains the self-petitioning process for immigrant victims of domestic violence and presents alternate immigration remedies available to victims of domestic violence.

Hardship in Immigration Law: How to Prepare a Winning Case in Waiver and Cancellation of Removal Cases breaks down the elements that the BIA and federal courts have identified as relevant to claims of hardship, and demonstrates how to work with clients to elicit the information that will best present their hardship claims.

Inadmissibility & Deportability is a practical and easy to use manual on the grounds of inadmissibility, deportability and waivers. By clearly outlining the grounds of inadmissibility and deportability as well as the waivers available to overcome them, this resource should be a first step to provide clients with quality legal services in obtaining immigration status or avoiding removal.

Motions to Suppress - Protecting the Constitutional Rights of Immigrants in Removal Proceedings is an essential reference book for immigration practitioners covering the relevant sources of law needed to exclude unlawfully obtained evidence in immigration court, provides sample motions to suppress, suggests strategies for organizing a community response to raids, and addresses the rights of detained immigrants.

Naturalization and U.S. Citizenship: The Essential Legal Guide covers the entire process of representing a naturalization applicant from the initial client meeting through the oath of allegiance. Overall the reader will learn detailed eligibility requirements for naturalization and helpful suggestions on both procedural issues and ways to effectively work with naturalization clients. The Essential Guide contains also detailed information on good moral character and information on how to help applicants with disabilities apply for naturalization.

Remedies and Strategies for Permanent Resident Clients provides clear, concise, and detailed explanations of the grounds of removal permanent residents are most likely to face; when the grounds of inadmissibility and deportation do and don't apply; how to argue that they don't apply, and the immigration remedies available for each: LPR cancellation of removal, former § 212(c) relief, and relief under § 212(h) of the Immigration & Nationality Act, and a summary of other, less common remedies for permanent resident clients.

Special Immigrant Juvenile Status & Other Immigration Options for Children and Youth. This manual has a special focus on Special Immigrant Juvenile Status, but also provides information on other

immigration options for children and youth including: U Nonimmigrant Status, Violence Against Women Act protection, asylum, family-based immigration options, citizenship, and others. It also addresses specialized issues, such as working and representing child clients, immigration consequences of delinquency, and detention. The manual contains many useful items for practitioners, including sample screening intake forms, sample application forms, motions, court orders, and other papers that can be presented to the juvenile court, immigration court, and immigration authorities.

The U Visa: Obtaining Status for Immigrant Victims of Crime will guide you through the entire process of handling an immigration case for a U visa applicant – from eligibility screening through adjustment of status to assisting eligible family members. The entire manual includes expanded sections on the visa process for U nonimmigrants abroad, adjustment of status, stays of removal and more. There are also many sample materials including applications and declarations for adjustment applications, motions for use in removal proceedings, and explanatory materials for clients obtaining a U visa at a consulate abroad.

The VAWA Manual: Immigration Relief for Abused Immigrants is a comprehensive guide for advocates working with immigrant survivors of domestic violence. This manual includes in-depth information on the following critical areas: VAWA self-petitioning requirements and process, adjustment of status, inadmissibility grounds and waivers, removal proceedings and motions to reopen VAWA, VAWA cancellation of removal, conditional permanent residency, U nonimmigrant status for victims of crime, consular processing, and more. Also featured are practical tips for assembling and documenting a strong VAWA self-petition, and extensive appendices of CIS policy guidance, sample applications, fee waiver requests, declarations, and more.

Public Counsel

SIJS Manual. Public Counsel SIJS Manual provides information on SIJS cases with a particular emphasis on legal guardianship cases in probate court. The manual can be downloaded for free at http://www.publiccounsel.org/publications/SIJS%20Manual%202009.pdf

General Immigration Publications

Immigration Law and Defense (Clark Boardman) by the National Lawyers Guild is another excellent one volume treatise. Aimed at defense attorneys.

Immigration Law and the Family (West Group) by Sarah Ignatius & Elisabeth Stickney for the National Lawyers Guild. This is an excellent treatise that includes discussion of VAWA and SIJS as well as adoption and family-based petitioning.

Immigration Law and Procedure (Matthew Bender) is a multi-volume text on immigration law. The index is somewhat difficult to use and the writing is legalistic, but it contains a huge amount of information.

Interpreter Releases is a weekly update on changes in the law, government policy, published cases, and rumor about U.S. immigration

Kurzban's Immigration Law Sourcebook (Ira J. Kurzban) is a comprehensive reference sourcebook to federal and administrative cases, regulations and statutes and CIS ruling on significant issues in immigration law.

C. Listservs

Child Immigration Updates

The Child Immigration listserv is maintained by Lutheran Immigrant & Refugee Services and provides ongoing updates about changes in child immigration legal issues. To join the listserv contact Melanie Gibbons at MGibbons@lirs.org.

VAWA Updates

The VAWA Updates listserv is maintained by the National Immigration Project of the National Lawyers Guild and provides ongoing updates about changes in VAWA and the new U visa provisions. To join the listserv, contact Ana Manigat at ana@nationalimmigrationproject.org.

Immigration Advocates Network
www.immigrationadvocates.org

Contains links to many listservs that focus on immigration issues.

D. Websites

American Immigration Lawyers Association
www.aila.org

The AILA website contains links to AILA fact sheets and position papers, information on AILA publications and events, and an Immigration Lawyer Referral Service.

Immigrant Legal Resource Center
www.ilrc.org

The ILRC website includes information about ongoing ILRC seminars and publications on aspects of immigration law, as well as manuals and materials that can be downloaded and information about the Center's activities and policy work.

Immigration Advocates Network
www.immigrationadvocates.org

The website contains webinars on SIJS, asylum, U-visas, video trainings and tutorials, audio interviews with leading practitioners on the latest developments in immigration law.

US Citizenship and Immigration Services
http://www.uscis.gov/portal/site/uscis

The CIS website includes many links to the latest CIS policy and procedural information, the status of applications, and easy access to downloadable CIS forms.

Law Offices of Norton Tooby
http://criminalandimmigrationlaw.com/

This web site offers a wealth of information concerning immigration consequences of criminal convictions, post-conviction relief, and criminal defense of noncitizens by Norton Tooby, a criminal defense attorney who has specialized in these areas since 1986, and in criminal defense in general since 1971. Also includes information for ordering excellent books and free articles.

National Immigration Law Center (NILC)
www.nilc.org

NILC staff specializes in immigration law, and the employment and public benefits rights of immigrants. Their website contains links to their policy analysis and impact litigation, publications, technical advice, and trainings information.

National Immigration Project of the National Lawyers Guild
www.nationalimmigrationproject.org

The "domestic violence" link on the website of the National Immigration Project of the National Lawyers Guild contains extensive materials on VAWA, SIJS and

U visas, including links to background information, CIS policy memoranda and strategy articles.

Index of Appendices

Appendix A

Federal Statutes and Regulations

I. Federal Statutes (Laws Passed by Congress)

Definition of Special Immigrant Juvenile
8 USC § 1101(a)(27(J), INA § 101(a)(27)(J)

(J) an immigrant who is present in the United States--

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) 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; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that--

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) 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 chapter;

Adjustment of status of nonimmigrant to that of person admitted for permanent residence
8 USC § 1255(a), INA § 245(a)

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Special Immigrant Juveniles' Adjustment of Status, Waivers of Inadmissibility
8 USC § 1255(h), INA § 245(h)

(h) Application with respect to special immigrants

In applying this section to a special immigrant described in section 1101(a)(27)(J) of this title--

> (1) such an immigrant shall be deemed, for purposes of subsection (a) of this section, to have been paroled into the United States; and
>
> (2) in determining the alien's admissibility as an immigrant--
>
> > (A) paragraphs (4), (5)(A), (6)(A), (6)(C), (6)(D), (7)(A), and (9)(B) of section 1182(a) of this title shall not apply; and
> >
> > (B) the Attorney General may waive other paragraphs of section 1182(a) of this title (other than paragraphs (2)(A), (2)(B), (2)(C) (except for so much of such paragraph as related to a single offense of simple possession of 30 grams or less of marijuana), (3)(A), (3)(B), (3)(C), and (3)(E)) in the case of individual aliens for humanitarian purposes, family unity, or when it is otherwise in the public interest.

The relationship between an alien and the alien's natural parents or prior adoptive parents shall not be considered a factor in making a waiver under paragraph (2)(B). Nothing in this subsection or section 1101(a)(27)(J) of this title shall be construed as authorizing an alien to apply for admission or be admitted to the United States in order to obtain special immigrant status described in such section.

Automatic Waiver of Certain Grounds for Deportation for Special Immigrant Juveniles
8 USC § 1227(c), INA § 237(c)

(c) Waivers of Grounds for Deportation

Paragraphs 1(A), 1(B), 1(C), 1(D) and 3(A) of subsection (a) (other than so much of paragraph (1) as relates to a ground of inadmissibility described in paragraph (2) or (3) of section 212(a)) shall not apply to a special immigrant described in section 101(a)(27)(J) based upon circumstances that existed before the date the alien was provided such special immigrant status.

II. Federal Regulations (Created by the Immigration and Naturalization Service)

***PLEASE NOTE THAT THE REGULATIONS HAVE NOT BEEN AMENDED TO REFLECT THE 1997 AND 2008 TVPRA STATUTORY CHANGES. ***

Regulation Governing Application for Special Immigrant Juvenile Status
8 CFR § 204.11

Sec. 204.11 Special immigrant status for certain aliens declared dependent on a juvenile court (special immigrant juvenile).

(a) Definitions.

Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in guardianship situation after having been found dependent upon a juvenile

court in the United States will continue to be considered to be eligible for long-term foster care.

Juvenile court means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.

(b) Petition for special immigrant juvenile. An alien may not be classified as a special immigrant juvenile unless the alien is the beneficiary of an approved petition to classify an alien as a special immigrant under section 101(a)(27) of the Act. The petition must be filed on Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant.

(1) Who may file. The alien, or any person acting on the alien's behalf, may file the petition for special immigrant juvenile status. The person filing the petition is not required to be a citizen or lawful permanent resident of the United States.

(2) Where to file. The petition must be filed at the district office of the Immigration and Naturalization Service having jurisdiction over the alien's place of residence in the United States.

(c) Eligibility. An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien:

(1) Is under twenty-one years of age;

(2) Is unmarried;

(3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court;

(4) Has been deemed eligible by the juvenile court for long-term foster care;

(5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and

(6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned

to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents; or

(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I-360 before June 1, 1994.

(d) Initial documents which must be submitted in support of the petition.

(1) Documentary evidence of the alien's age, in the form of a birth certificate, passport, 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; and

(2) One or more documents which include:

(i) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary to be dependent upon that court;

(ii) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary eligible for long-term foster care; and

(iii) Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents.

(e) Decision. The petitioner will be notified of the director's decision, and, if the petition is denied, of the reasons for the denial. If the petition is denied, the petitioner will also be notified of the petitioner's right to appeal the decision to the Associate Commissioner, Examinations, in accordance with part 103 of this chapter.

[58 FR 42850, Aug. 12, 1993]

Regulation Concerning Substitute Documents to Prove Birth in Family Visa Petition Cases
8 CFR § 204.1(f), (g)(2)
(Reprinted here to provide suggestions for obtaining substitute documents to prove age in SIJS applications)

Sec. 204.1 General information about immediate relative and family-sponsored petitions.

(f) Supporting documentation.

(1) Documentary evidence consists of those documents which establish the United States citizenship or lawful permanent resident status of the petitioner and the claimed relationship of the petitioner to the beneficiary. They must be in the form of primary evidence, if available. When it is established that primary evidence is not available, secondary evidence may be accepted. To determine the availability of primary documents, the Service will refer to the Department of State's Foreign Affairs Manual (FAM). When the FAM shows that primary documents are generally available in the country of issue but the petitioner claims that his or her document is unavailable, a letter from the appropriate registrar stating that the document is not available will not be required before the Service will accept secondary evidence. The Service will consider any credible evidence relevant to a self-petition filed by a qualified spouse or child of an abusive citizen or lawful permanent resident under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act. The self-petitioner may, but is not required to, demonstrate that preferred primary or secondary evidence is unavailable. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

(2) Original documents or legible, true copies of original documents are acceptable. The Service reserves the right to require submission of original documents when deemed necessary. Documents submitted with the petition will not be returned to the petitioner, except when originals are requested by the Service. If original documents are requested by the Service, they will be returned to the petitioner after a decision on the petition has been rendered, unless their validity or authenticity is in question. When an interview is required, all original documents must be presented for examination at the interview.

(3) Foreign language documents must be accompanied by an English translation which has been certified by a competent translator.

(g) Evidence of petitioner's United States citizenship or lawful permanent residence--

(1) Primary evidence. A petition must be accompanied by one of the following:

(i) A birth certificate that was issued by a civil authority and that establishes the petitioner's birth in the United States;

(ii) An unexpired United States passport issued initially for a full ten-year period to a petitioner over the age of eighteen years as a citizen of the United States (and not merely as a noncitizen national);

(iii) An unexpired United States passport issued initially for a full five-year period to the petitioner under the age of eighteen years as a citizen of the United States (and not merely as a noncitizen national);

(iv) A statement executed by a United States consular officer certifying the petitioner to be a United States citizen and the bearer of a currently valid United States passport;

(v) The petitioner's Certificate of Naturalization or Certificate of Citizenship;

(vi) Department of State Form FS-240, Report of Birth Abroad of a Citizen of the United States, relating to the petitioner;

(vii) The petitioner's Form I-551, Permanent Resident Card, or other proof given by the Service as evidence of lawful permanent residence. Photocopies of Form I-551 or of a Certificate of Naturalization or Certificate of Citizenship may be submitted as evidence of status as a lawfully permanent resident or United States citizen, respectively.

(2) Secondary evidence. If primary evidence is unavailable, the petitioner must present secondary evidence. Any evidence submitted as secondary evidence will be evaluated for authenticity and credibility. Secondary evidence may include, but is not limited to, one or more of the following documents:

> (i) A baptismal certificate with the seal of the church, showing the date and place of birth in the United States and the date of baptism;
> (ii) Affidavits sworn to by persons who were living at the time and who have personal knowledge of the event to which they attest. The affidavits must contain the affiant's full name and address, date and place of birth, relationship to the parties, if any, and complete details concerning how the affiant acquired knowledge of the event;
>
> (iii) Early school records (preferably from the first school) showing the date of admission to the school, the child's date and place of birth, and the name(s) and place(s) of birth of the parent(s);
>
> (iv) Census records showing the name, place of birth, and date of birth or age of the petitioner; or
>
> (v) If it is determined that it would cause unusual delay or hardship to obtain documentary proof of birth in the United States, a United States citizen petitioner who is a member of the Armed Forces of the United States and who is serving outside the United States may submit a statement from the appropriate authority of the Armed Forces. The statement should attest to the fact that the personnel records of the Armed Forces show that the petitioner was born in the United States on a certain date.

(3) Evidence submitted with a self-petition. If a self-petitioner filing under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act is unable to present primary or secondary evidence of the abuser's status, the Service will attempt to electronically verify the abuser's citizenship or immigration status from information contained in Service computerized records. Other Service records may also be reviewed at the discretion of the adjudicating officer. If the Service is unable to identify a record as relating to the abuser or the record does not establish the abuser's immigration or citizenship status, the self-

petition will be adjudicated based on the information submitted by the self-petitioner.

[57 FR 41056, Sept. 9, 1992, as amended at 58 FR 48778, Sept. 20, 1993; 61 FR 13072, 13073, Mar. 26, 1996; 63 FR 70315, Dec. 21, 1998]

Federal Regulation Governing Fees and Fee Waivers
8 CFR §103.7(c)

(c) Waiver of fees.

(1) Except as otherwise provided in this paragraph (c), any of the fees prescribed in paragraph (b) of this section relating to applications, petitions, appeals, motions, or requests may be waived by the Department of Homeland Security in any case under its jurisdiction in which the alien or other party affected is able to substantiate that he or she is unable to pay the prescribed fee. The person seeking a fee waiver must file his or her affidavit, or unsworn declaration made pursuant to 28 U.S.C. 1746, asking for permission to prosecute without payment of fee of the application, petition, appeal, motion, or request, and stating his or her belief that he or she is entitled to or deserving of the benefit requested and the reasons for his or her inability to pay. The officer of the Department of Homeland Security having jurisdiction to render a decision on the application, petition, appeal, motion, or request may, in his or her discretion, grant the waiver of fee. Fees for "Passenger Travel Reports via Sea and Air" and for special statistical tabulations may not be waived. The payment of the additional sum prescribed by section 245(i) of the Act when applying for adjustment of status under section 245 of the Act may not be waived. The fees for Form I-907, Request for Premium Processing Services, and for Forms G-1041 and G-1041A, Genealogy Program request forms, may not be waived. For provisions relating to the authority of the immigration judges or the Board to waive fees prescribed in paragraph (b) of this section in cases under their jurisdiction, see 8 CFR 1003.24and 1003.8.

(2) Fees under the Freedom of Information Act, as amended, may be waived or reduced where the Department of Homeland Security determines such action would be in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(3) When the prescribed fee is for services to be performed by the clerk of court under section 344(a) of the Act, the affidavit for waiver of the fee shall be filed with the district director or officer in charge of the BCIS having administrative jurisdiction over the place in which the court is located at least 7 days prior to the date the fee is required to be paid. If the waiver is granted, there shall be delivered to the clerk of court by a BCIS representative on or before the date the fee is required to be paid, a notice prepared on BCIS letterhead and signed by the officer granting the waiver, that the fee has been waived pursuant to this paragraph.

(4) Fees for applications for Temporary Protected Status may be waived pursuant to 8 CFR 244.20.

(5) No fee relating to any application, petition, appeal, motion, or request made to U.S. Citizenship and Immigration Services may be waived under paragraph (c)(1) of this section except for the following:

> (i) Biometrics; Form I-90; Form I-129CW; Form I-751; Form I-765; Form I-817; I-929; Form N-300; Form N-336; Form N-400; Form N-470; Form N-565; Form N-600; Form N-600K; and Form I-290B and motions filed with U.S. Citizenship and Immigration Services relating to the specified forms in this paragraph (c); and
> (ii) Only in the case of an alien in lawful nonimmigrant status under sections 101(a)(15)(T) or (U) of the Act; an applicant under section 209(b) of the Act; an approved VAWA self-petitioner; or an alien to whom section 212(a)(4) of the Act does not apply with respect to adjustment of status: Form I-485 and Form I-601; and
>
> (iii) Form I-192 and Form I-193 (only in the case of an alien applying for lawful nonimmigrant status under sections 101(a)(15)(T) or (U)).

Federal Regulation Governing Automatic Revocations
8 CFR § 205.1 (a)(3)(iv)

(a) Reasons for automatic revocation. The approval of a petition or self-petition made under section 204 of the Act and in accordance with part 204 of this chapter is revoked as of the date of approval:

(3) If any of the following circumstances occur before the beneficiary's or self-petitioner's journey to the United States commences or, if the beneficiary or self-petitioner is an applicant for adjustment of status to that of a permanent resident, before the decision on his or her adjustment application becomes final:

(iv) Special immigrant juvenile petitions. Unless the beneficiary met all of the eligibility requirements as of November 29, 1990, and the petition requirements as of November 29, 1990, and the petition for classification as a special immigrant juvenile was filed before June 1, 1994, or unless the change in circumstances resulted from the beneficiary's adoption or placement in a guardianship situation:

(A) Upon the beneficiary reaching the age of 21;

(B) Upon the marriage of the beneficiary;

(C) Upon the termination of the beneficiary's dependency upon the juvenile court;

(D) Upon the termination of the beneficiary's eligibility for long-term foster care; or

(E) Upon the determination in administrative or judicial proceedings that it is in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents.

[*41 FR 55849,* Dec. 23, 1976, as amended at *48 FR 19156,* Apr. 28, 1983; *49 FR 29567,* July 23, 1984; *49 FR 30679,* Aug. 1, 1984; *53 FR 30017,* Aug. 10, 1988; *58 FR 42850,* Aug. 12, 1993; *61 FR 13061, 13077,* March 26, 1996]

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy and Domestic Operations
Washington, DC 20529-2140

U.S. Citizenship and Immigration Services

HQOPS 70/8.5

Memorandum

TO: Field Leadership

FROM: Donald Neufeld /s/
Acting Associate Director
Domestic Operations

Pearl Chang /s/
Acting Chief
Office of Policy & Strategy

DATE: March 24, 2009

SUBJECT: Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions

1. Purpose

This memorandum will inform immigration service officers working Special Immigrant Juvenile (SIJ) petitions about new legislation affecting adjudication of petitions filed for SIJ status.

2. Background

On December 23, 2008, the President signed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457, 122 Stat. 5044 (2008). Section 235(d) of the TVPRA 2008 amends the eligibility requirements for SIJ status at section 101(a)(27)(J) of the Immigration and Nationality Act (INA), and accompanying adjustment of status eligibility requirements at section 245(h) of the INA. Most SIJ provisions of the TVPRA 2008 take effect March 23, 2009, although some provisions took effect on December 23, 2008, the date of enactment of the TVPRA 2008.

3. Field Guidance

Eligibility for Special Immigrant Juvenile Status

The TVPRA 2008 amended the definition of a "Special Immigrant Juvenile" at section 101(a)(27)(J) of the INA in two ways. First, it expanded the group of aliens eligible for SIJ status. An eligible SIJ alien now includes an alien:

- who has been declared dependent on a juvenile court;
- whom a juvenile court has legally committed to, or placed under the custody of, an agency or department of a State; or
- who has been placed under the custody of *an individual or entity appointed by a State or juvenile court*.

Accordingly, petitions that include juvenile court orders legally committing a juvenile to or placing a juvenile under the custody of an individual or entity appointed by a juvenile court are now eligible. For example, a petition filed by an alien on whose behalf a juvenile court appointed a guardian now may be eligible. In addition, section 235(d)(5) of the TVPRA 2008 specifies that, if a state or an individual appointed by the state is acting *in loco parentis*, such a state or individual is not considered a legal guardian for purposes of SIJ eligibility.

The second modification made by the TVPRA 2008 to the definition of special immigrant juvenile concerns the findings a juvenile court must make in order for a juvenile court order to serve as the basis for a grant of SIJ status. Previously, the juvenile court needed to deem a juvenile eligible for long term foster care due to abuse, neglect or abandonment. Under the TVPRA 2008 modifications, the juvenile court must find that the juvenile's *reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law*. In short, the TVPRA 2008 removed the need for a juvenile court to deem a juvenile eligible for long-term foster care and replaced it with a requirement that the juvenile court find reunification with one or both parents not viable. If a juvenile court order includes a finding that reunification with one or both parents is not viable due to *a similar basis found under State law*, the petitioner must establish that such a basis is similar to a finding of abuse, neglect, or abandonment. Officers should ensure that juvenile court orders submitted as evidence with an SIJ petition filed on or after March 23, 2009, include this new language.

A petitioner is still required to demonstrate that he or she has been the subject of a determination 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.

Age Requirements

Section 235(d)(6) of the TVPRA 2008 provides age-out protection to SIJ petitioners. As of December 23, 2008, if an SIJ petitioner was a "child" on the date on which an SIJ petition was properly filed, U.S. Citizenship and Immigration Services (USCIS) cannot deny SIJ status to

anyone, regardless of the petitioner's age at the time of adjudication. *Officers must now consider the petitioner's age at the time of filing to determine whether the petitioner has met the age requirement.* Officers must not deny or revoke SIJ status based on age if the alien was a child on the date the SIJ petition was properly filed if it was filed on or after December 23, 2008, or if it was pending as of December 23, 2008. USCIS interprets the use of the term "child" in section 235(d)(6) of the TVPRA 2008 to refer to the definition of child found at section 101(b)(1) of the INA, which states that a child is an unmarried person under 21 years of age. The SIJ definition found at section 101(a)(27)(J) of the INA does not use the term "child," but USCIS had previously incorporated the child definition at section 101(b)(1) of the INA into the regulation governing SIJ petitions.

Consent

The TVPRA 2008 also significantly modifies the two types of consent required for SIJ petitions.

Consent to the grant of SIJ status (previously express consent)

The TVPRA 2008 simplified the "express consent" requirement for an SIJ petition. *The Secretary of Homeland Security (Secretary) must consent to the grant of special immigrant juvenile status.* This consent is no longer termed "express consent" and is no longer consent to the dependency order serving as a precondition to a grant of SIJ status.

The consent determination by the Secretary, through the USCIS District Director, is an acknowledgement that the request for SIJ classification is bona fide. This means that the SIJ benefit was not "sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment." See H.R. Rep. No. 105-405, at 130 (1997). An approval of an SIJ petition itself shall be evidence of the Secretary's consent.

Specific consent

The TVPRA 2008 completely altered the "specific consent" function for those juveniles in federal custody. The TVPRA 2008 vests this function with the Secretary of Health and Human Services (HHS) rather than the Secretary of the Department of Homeland Security as previously delegated to Immigration and Customs Enforcement (ICE). In addition, Congress simplified the language to refer simply to "custody," not actual or constructive custody, as was previously delineated. However, the requirement remains that an SIJ petitioner need only seek specific consent if the SIJ petitioner seeks a juvenile court order determining or altering the SIJ petitioner's custody status or placement. If an SIJ petitioner seeks to obtain or obtains a juvenile court order that makes no findings as to the SIJ petitioner's custody status or placement, the SIJ petitioner is not required to have sought specific consent from HHS. Therefore, on or after March 23, 2009, *officers must ensure that juveniles in the custody of HHS obtained specific consent from HHS to juvenile court jurisdiction where the juvenile court order determines or alters the juvenile's custody status or placement*. USCIS will provide HHS guidance regarding adjudications of specific consent as soon as it is available.

Due to the complex nature and changing requirements of specific consent determinations, USCIS Headquarters (HQ) is temporarily assisting in making the determination on specific consent requirements. As outlined in the February 20, 2009 guidance email, Field Officers are instructed to forward certain documents to HQ for those SIJ petitions that may involve specific consent that are filed prior to March 23, 2009. HQ will notify the Field Office of the decision on specific consent. The Field Office will then complete adjudication of the petition. This temporary guidance providing HQ assistance with specific consent determinations will remain in effect until further notice.

Expeditious Adjudication

Section 235(d)(2) of the TVPRA 2008 *requires USCIS to adjudicate SIJ petitions within 180 days of filing*. Field Offices need to be particularly aware of this new requirement and take measures locally to ensure timely adjudication. Officers are reminded that under 8 CFR 245.6 an interview may be waived for SIJ petitioners under 14 years of age, or when it is determined that an interview is unnecessary. Eliminating unnecessary interviewing of SIJ petitioners may help in expeditiously adjudicating petitions. Necessary interviews should be scheduled as soon as possible. During an interview, an officer should focus on eligibility for adjustment of status and should avoid questioning a child about the details of the abuse, abandonment or neglect suffered, as those matters were handled by the juvenile court, applying state law. Under no circumstances can an SIJ petitioner, at any stage of the SIJ process, be required to contact the individual (or family members of the individual) who allegedly abused, abandoned or neglected the juvenile. This provision was added by the Violence Against Women Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2006) and is incorporated at section 287(h) of the INA. Officers must ensure proper completion of background checks, including biometric information clearances and name-checks.

Adjustment of Status for Special Immigrant Juveniles

The TVPRA 2008 amends the adjustment of status provisions for those with SIJ classification at section 245(h) of the INA, to include four new exemptions. Approved SIJ petitioners are now exempted from seven inadmissibility grounds of the INA:

- 212(a)(4) (public charge);
- 212(a)(5)(A) (labor certification);
- *212(a)(6)(A) (aliens present without inspection);*
- *212 (a)(6)(C) (misrepresentation);*
- *212(a)(6)(D) (stowaways);*
- 212(a)(7)(A) (documentation requirements); and
- *212(a)(9)(B) (aliens unlawfully present).*

On or after March 23, 2009, none of the above listed grounds of inadmissibility shall apply to SIJ adjustment of status applicants.

Officers are reminded that this list of exemptions is in addition to the waivers available for most other grounds of inadmissibility for humanitarian purposes, family unity, or otherwise being in

the public interest. The only unwaivable grounds of inadmissibility for SIJ petitioners are those listed at INA 212(a)(2)(A)-(C) (conviction of certain crimes, multiple criminal convictions, and controlled substance trafficking (except for a single instance of simple possession of 30 grams or less of marijuana)), and 212(a)(3)(A)-(C), and (E) (security and related grounds, terrorist activities, foreign policy, and participants in Nazi persecution, genocide, torture or extrajudicial killing).

4. Use

This guidance is created solely for the purpose of USCIS personnel in performing their duties relative to adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantial or procedural, enforceable at law by any individual or any other party in removal proceedings, in litigation with the United States, or in any other or form or matter.

5. Contact Information

This guidance is effective immediately. Please direct any questions concerning these changes through appropriate supervisory channels to Rosemary Hartmann, Office of Policy and Strategy or Tina Lauver, Office of Field Operations.

Distribution List: Regional Directors
District Directors
Service Center Directors
Field Office Directors
National Benefits Center Director

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy and Domestic Operations
Washington, DC 20529-2140

U.S. Citizenship and Immigration Services

HQADN 70/23

Interoffice Memorandum

To: Regional Directors
District Directors

From: William R. Yates /S/ by Janis Sposato
Associate Director for Operations

Date: May 27, 2004

Re: Memorandum #3 -- Field Guidance on Special Immigrant Juvenile Status Petitions

The purpose of this memorandum is to provide policy and procedural clarification on the adjudication of Special Immigrant Juvenile (SIJ) petitions. This guidance memorandum, the third since the 1997 statutory amendment, consolidates and supercedes all previous guidance issued by the Immigration and Naturalization Service.[1] **[Note that the 03/24/09 Neufeld Memorandum, see Appendix B, does not explicitly supercede this one, but it does substantially alter its contents. The memoranda must be read together.]**

Background

Section 203(b)(4) of the Immigration and Nationality Act (INA) allocates a percentage of immigrant visas to individuals considered "special immigrants" under section 101(a)(27) of the INA, including those aliens classified as special immigrant juveniles under Section 101(a)(27)(J). Section 113 of Pub. L. No. 105-119, 11 Stat. 2440 (November 26, 1997), amended the definition of a "special immigrant juvenile" to include only those juveniles deemed eligible for long-term foster care based on abuse, neglect, or abandonment, and added two provisions that require the consent of the Secretary of the Department of Homeland Security (DHS) (formerly the Attorney General) for SIJ cases. One provision requires specific consent to a juvenile court's jurisdiction over dependency proceedings for a juvenile in DHS custody; the other requires express consent to

[1] Initial guidance was provided by memorandum dated August 7, 1998. That was superceded by Memorandum #2, dated July 9, 1999, which is superceded by this memorandum.

the juvenile court's dependency order serving as a precondition to a grant of SIJ status. In the case of juveniles in custody due to their immigration status (either by US Immigration and Customs Enforcement (ICE) or by the Office of Refugee Resettlement (ORR)), the specific consent must be obtained before the juvenile may enter juvenile court dependency proceedings; failure to do so will render invalid any order issued as a result of such proceedings.

This memorandum addresses only those eligibility issues relating to the actual adjudication of the petition for special immigrant juvenile classification and the application for adjustment of status to that of lawful permanent residence, including the concept of "express consent.". It does not address eligibility criteria relating to "specific consent."

Effect of SIJ approval

Approval of an SIJ petition (Form I-360) makes a petitioner immediately eligible to adjust status by filing a Form I-485. Once the Form I-485 is filed (either concurrently with the I-360, as is strongly encouraged, or subsequent to approval of an I-360), the juvenile may receive employment authorization pursuant to the pending adjustment application.[2] Juveniles who adjust status as a result of an SIJ classification enjoy all benefits of lawful permanent residence, including eligibility to naturalize after five years; however, they may not seek to confer an immigration benefit to their natural or prior adoptive parents. INA §101(a)(27)(J)(iii)(II). The granting of an SIJ petition or an application for adjustment to a juvenile confers no Federal Government duty or liability toward state child welfare agencies, even for those juveniles placed in foster care.

Consent by Department of Homeland Security

Following the 1997 amendments to Sec. 101(a)(27)(J) and the Homeland Security Act of 2002, a juvenile alien seeking classification as a special immigrant juvenile based on a juvenile court's dependency order must have, in all cases, the "express consent" of the Secretary of the DHS. In those cases involving a juvenile in the actual or constructive custody of the federal government, the juvenile must first obtain "specific consent" to the juvenile court's jurisdiction from the Secretary, through ICE, before proceedings on issuing a dependency order for the juvenile may begin. Specific consent refers to a determination to permit a juvenile court, which otherwise would have no custody jurisdiction over the juvenile alien, to exercise jurisdiction for purposes of a dependency determination.

Express consent means that the Secretary, through the CIS District Director, has "determine[d] that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.]"[3] In other words, express consent is an acknowledgement that the request for SIJ classification is bona fide.

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[2] 8 CFR 27.12(c)(9)
[3] See H.R. Rep. No. 105-405, at 130 (1997).

CIS officers adjudicating SIJ petitions need only consider whether the juvenile court order satisfies express consent requirements; however, as discussed below, information relating to a grant of specific consent may also be considered when determining eligibility for express consent.

While this memorandum does not address the criteria for issuing specific consent, officers must be satisfied that specific consent from ICE was timely granted in cases where such consent was required. This is discussed further below.

Documentation Requirements for SIJ Petitions

Although current regulations allow for separate filing of the Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant) and the Form I-485 (Application To Register Permanent Residence or Adjust Status), USCIS strongly encourages concurrent filing of both forms in order to expedite the completion of the juvenile's application.

The Form I-360 must be supported by:

- Court order declaring dependency on the juvenile court or placing the juvenile under (or legally committing the juvenile to) the custody of an agency or department of a State.
- Court order deeming the juvenile eligible for long-term foster care due to abuse, neglect, or abandonment.[4]
- Determination from an administrative or judicial proceeding that it is in the juvenile's best interest not to be returned to his/her country of nationality or last habitual residence (or the juvenile's parents' country of nationality or last habitual residence)(hereinafter "home country")[5]; and
- Proof of the juvenile's age[6].

The Form I-485 must also be supported by documentation:

- Birth certificate or other proof of identity in compliance with 8 CFR 103.2;
- A sealed medical examination (Form I-639);
- Two ADIT-style color photographs; and, where applicable, also supported by:
- Evidence of inspection, admission or parole (if available; by law an individual with SIJ classification is deemed to be paroled for purposes of adjustment of status[7]);

[4] The regulations provide: "Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option." 8 C.F.R. § 204.11(a).
[5] INA §101(a)(27)(J)(ii) This requirement can be satisfied through a determination made by the juvenile court and incorporated in the juvenile court order. *See infra*.
[6] Examples include an official birth certificate, passport, or foreign identity document issued by a foreign government, such as a cedula or cartilla. 8 CFR§204.11(d).
[7] INA §245(h)(1). Although deemed paroled as a matter of law, applicants may still be subject to INA §212(a)(2)(A), (B), and (C), §212(a)(3)(A), (B), (C), and (E), and §241(a)(5). See discussion below.

- If the applicant is over 14, s/he must also submit a Form G-325A (Biographic Information);
- If the juvenile has an arrest record, s/he must also submit certified copies of the records of disposition; and
- If the juvenile is seeking a waiver of a ground of inadmissibility that is not otherwise automatically waived under INA §245(h)(2)(A), s/he must submit a Form I-601 (Application for Waiver of Ground of Excludability) and supporting documents establishing that waiver is warranted for humanitarian purposes, family unity, or in the public interest (supporting documents could include affidavits, letters, press clippings, etc.).

Applicants may also submit a Form I-765 (Application for Employment Authorization) based on the pending Form I-485, if needed.

The Court Order

The Court Order submitted in support of the Form I-360 must establish:

- The juvenile has been declared a dependent of the juvenile court or the court has placed the juvenile under (or legally committed the juvenile to) the custody of an agency or department of a State; and

The juvenile has been deemed eligible for long-term foster care due to abuse, neglect, or abandonment[8]

The Court Order will also preferably establish the following (these may be established in alternative ways as discussed later):

- Specific findings of fact in support of the Order, sufficient to establish a basis for USCIS express consent; and
- That it would not be in the alien's best interest to be returned to the alien's home country.

Evidence to establish the best interests of the child not to return to home country

As noted above, a petition cannot be granted unless it has been determined in an administrative or judicial proceeding 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. This determination may be made by the juvenile court. USCIS strongly encourages juvenile courts to address this issue and incorporate a finding into the court order. Nevertheless, the law contemplates that other judicial or administrative bodies authorized or recognized by the juvenile

[8] The regulation provides: "Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option." 8 C.F.R. § 204.11(a). A child adopted or placed in guardianship after receiving a dependency order continues to be considered eligible for long-term foster care under 8 C.F.R. §204.11(a), and, necessarily, remains considered a juvenile court dependent based on the prior dependency order.

court may make such a determination[9]. If a particular juvenile court establishes or endorses an alternate process for this finding, a ruling from that process may satisfy the requirement.

Evidence to establish express consent

The District Director, in his or her discretion, shall expressly consent to dependency orders that establish -- or are supported by appropriate evidence that establishes -- that the juvenile was deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and that it is in the juvenile's best interest not to be returned to his/her home country. Such express consent should be given only if the adjudicator is aware of the facts that formed the basis for the juvenile court's rulings on dependency (or state custody), eligibility for long-term foster care based on abuse, neglect, or abandonment, and non-viability of family reunification, or the adjudicator determines that a reasonable basis in fact exists for these rulings. The adjudicator generally should not second-guess the court rulings or question whether the court's order was properly issued. Orders that include or are supplemented by specific findings of fact as to the above-listed rulings will usually be sufficient to establish eligibility for consent. Such findings need not be overly detailed, but must reflect that the juvenile court made an informed decision.

The role of the District Director in determining whether to grant express consent is limited to the purpose of determining special immigrant juvenile status, and not for making determinations of dependency status.[10]

If an order (or order supplemented with findings of fact, as described above) is not sufficient to establish a reasonable basis for consent, the adjudicator must review additional evidence to determine whether a reasonable factual basis exists for the court's rulings. To do so, the adjudicator may request that the petitioner provide actual records from the judicial proceeding; however, adjudicators must be mindful that confidentiality rules often restrict disclosure of records from juvenile-related proceedings, so seeking such records directly from the court may be inappropriate, depending on the applicable State law. In the alternative, the adjudicator may request the petition to provide an affidavit from the Court, or the state agency or department in whose custody the child has been placed, summarizing the evidence presented to the court. Additionally, if the applicant had obtained a grant of specific consent from ICE, the grant should be considered a favorable factor in establishing express consent. The adjudicator may also consider the evidence that provided the foundation for the granting of specific consent.

If an adjudicator encounters what s/he believes to be a fraudulently obtained order s/he should promptly notify a supervisor, who should immediately notify USCIS Headquarters, Office of Field Operations and Office of Program and Regulation Development, through designated channels, to coordinate appropriate follow-up.

[9] 8 C.F.R. §204.11(c)(6).
[10] H.R. Rep. No. 105-405, at 130 (1997)

Because express consent essentially is a determination that the order reflects a bona fide basis for special immigrant juvenile status, approval of an SIJ application itself shall serve as a grant of express consent.

Validity of Juvenile Court Orders in Previously Detained Cases (Specific Consent)

The adjudicator must be satisfied that the petitioner obtained specific consent from ICE where necessary. If specific consent was necessary but not timely obtained, a juvenile court dependency order is not valid and the petition must be denied. INA § 101(a)(27(J)(iii)(I); 8 C.F.R. § 204.11(c)(3). Please check with the local ICE juvenile coordinator who handled the case to determine whether specific consent was required, and if so, whether it was timely granted.

Inadmissibility

SIJ beneficiaries are excused from many requirements that other applicants for adjustment must meet. Most notably, SIJ applicants are excused from several grounds of inadmissibility,[11] including provisions prohibiting entry of those likely to become a public charge,[12] those without proper labor certification,[13] and those without a proper immigrant visa.[14] In addition, most other grounds of inadmissibility may be waived for humanitarian purposes, family unity, or when it is otherwise in the public interest. The only grounds of inadmissibility that are not waivable for SIJ applicants are those listed in INA§212(a)(2)(A), (B), and (C)[15] and (3)(A), (B), (C), and (E).

Aging Out

Current regulations require that an applicant for SIJ adjustment must be under 21 years old, not only at the time of application, but also at the time of adjustment.[16] Failure to adjust prior to age 21 results in denial of the application, regardless of the merits of the underlying dependency order; this is known as "aging out." Applicants are strongly encouraged to submit petitions and applications in a timely fashion and to notify the agency when the risk of aging out is strong. In addition, District Offices should assess new applications to avoid the risk of SIJ age outs, and take the following precautions to prevent it:

- Schedule SIJ adjustment interviews well in advance of the petitioner's 21st birthday, or in jurisdictions where court dependency terminates before age 21, well in advance of that birth date (e.g. age 18 in New Jersey).

[11] See INA§245(h)(2)(A). In addition, the corresponding grounds of removal under INA §237(c) are also waived for juveniles granted SIJ.
[12] INA§212(a)(4)
[13] INA§212(a)(5)(A)
[14] INA§212(a)(7)(A)
[15] Except for a single instance of simple possession of 30 grams or less of marijuana.
[16] 8 CFR§205.1(a)(3)(iv)(A).

- Ensure proper completion of background checks, including fingerprint clearances and name-checks (this means all clearances should be scheduled no later than 60 days prior to the age-out date).
- Provide for expedited processing of cases at risk of aging out (e.g. in-person filing for applicants who age out within a year; priority interviews and fingerprinting; other appropriate administrative relief).

Officers are also reminded that, in many circumstances, Section 424 of the USAPATRIOT Act provides SIJ beneficiaries limited age-out protection by extending benefits eligibility for 45 days beyond the 21st birthday. Pursuant to Section 424(2), an alien who is the beneficiary of a petition or application filed on or before September 11, 2001, whose 21st birthday occurs after September 2001 is considered to be a child for 45 days after the alien's 21st birthday for purposes of adjudicating such petition or application.[17]

Fee Waivers

Adjudicators are reminded that, pursuant to 8 CFR 103.7(c), SIJ applicants may be eligible for fee waivers for forms I-360, I-485 and I-765. Requests for fee waivers should be adjudicated expeditiously, and consistent with prevailing policy guidance (see Memorandum from William Yates, Field Guidance on Granting Fee Waivers Pursuant to 8 CFR 103.7(c), March 4, 2004). In considering the applicant's inability to pay the fee, adjudicators should pay particularly close attention to fee waiver guidance relating to consideration of humanitarian or compassionate reasons in support of a request (Id., at 4). Recommendations on fee waiver requests must be forwarded to the appropriate supervisor for decision.

Vienna Convention on Consular Relations

Adjudicators should not ask SIJ applicants to provide proof of compliance with the Vienna Convention on Consular Relations (VCCR). The VCCR, which has little or nothing to do with SIJ classification, includes reporting requirements for government agencies encountering foreign citizens, usually in the context of criminal proceedings, but also in guardianship and trusteeship situations. In most cases, if a juvenile was in either the criminal justice system or under the care of a guardian or a trustee, the relevant state agency would have had a duty to report to the juvenile's consulate and afford the juvenile an opportunity to contact the consulate. The VCCR places no burden of reporting on the juvenile, and is therefore outside the scope of USCIS's determination of eligibility for SIJ classification or adjustment.

Further information

[17] This provision has been specifically applied to SIJ beneficiaries. See Pierre v. McElroy, 200 F.Supp.2d 251 (SDNY 2001). Note: This necessarily includes treating the juvenile as under juvenile court jurisdiction during the 45-day period.

Questions relating to this memorandum should be directed through appropriate channels by phone or e-mail to Steven D. Heller (Operation and Regulations Developments), or Leah Torino (Field Operations) through appropriate channels.

Index

LESLIE PARRISH (SBN 195861)
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles CA 90005
Tel: (213) 385-2977, ext. 133
Fax: (213) 385-9089

Attorney for Petitioner
Olivia Doe, a minor

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

In Re the Guardianship of the Person Of Olivia Doe, a Minor.	Case No. BPXXXXX ORDER REGARDING MINOR'S ELIGIBILITY FOR SPECIAL IMMIGRANT JUVENILE STATUS

THE COURT FINDS that the minor Olivia Doe ("Olivia") was born in Mexico on April 26, 1994 and is a citizen and national of Mexico.

THE COURT FURTHER FINDS that this Court has jurisdiction under California law "to make judicial determinations about the custody and care of juveniles" within the meaning of Section 101(a)(27)(J) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(27)(J), and 8 C.F.R. § 204.11(a). Olivia remains under this Court's jurisdiction.

THE COURT FURTHER FINDS that Olivia is dependent upon the Court or has been legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States within the meaning of INA Section 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

THE COURT FURTHER FINDS that reunification with one or both of Olivia's parents is not viable due to abuse, neglect or abandonment or similar basis found under State law under INA Section 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

THE COURT FURTHER FINDS that it is not in Olivia's best interest to be returned to her or her parents' previous country of nationality or country of last habitual residence – Mexico – within the meaning of Section 101(a)(27)(J) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J), and 8 C.F.R. § 204.11(d)(2)(iii). It is in Olivia's best interest to remain in the United States.

Dated: _____

_____

JUDGE OF THE SUPERIOR COURT

JV-224

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
Kristen Jackson (SBN 226255) Public Counsel 610 South Ardmore Avenue Los Angeles CA 90005 TELEPHONE NO.: 213-385-2977 FAX NO. *(Optional)*: 213-385-9089 E-MAIL ADDRESS *(Optional)*: kjackson@publiccounsel.org ATTORNEY FOR *(Name)*: Cassandra Roe immigration	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Bernardino STREET ADDRESS: 860 East Gilbert Street MAILING ADDRESS: 860 East Gilbert Street CITY AND ZIP CODE: San Bernardino 92415 BRANCH NAME: Juvenile Dependency	
CHILD'S NAME: Cassandra Roe	
ORDER REGARDING ELIGIBILITY FOR SPECIAL IMMIGRANT JUVENILE STATUS	CASE NUMBER: J1234567

The court has reviewed the supporting material on file, heard the arguments of counsel, and found the following:

1. The child was brought under the jurisdiction of the juvenile court of the county of *(specify)*: San Bernardino
   and committed to the custody of a state agency on *(specify date)*: 04/12/2008
   The child remains under this court's jurisdiction.
   ^state or ^or department, or an individual or entity
2. The child was deemed ~~"eligible for long-term foster care"~~* on *(specify date)*: 04/12/2009
   ^unable to reunify with one or both parents
3. It is not in the best interest of the child to be returned to his or her parent's previous country of
   nationality or country of last habitual residence *(specify)*: Haiti ^or his or her
   It is in the child's best interest to remain in the United States.
4. The above findings were made by reason of the ☑ abuse ☑ neglect ☐ abandonment ^or of the child.
   _____ similar basis found under State law.

Date:

_____
JUDICIAL OFFICER

** Language changes pursuant to the Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.

* Title 8, Code of Federal Regulations § 204.11(a) states: "Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered eligible for long-term foster care."

Under California law, an order not offering reunification services under Welfare and Institutions Code section 361.5(b) or 727.2; an order terminating services under Welfare and Institutions Code section 366.21, 366.22, or 727.3; or a guardianship order under section 360 means that the child is "eligible for long-term foster care" for Special Immigrant Juvenile Status purposes.

Form Adopted for Mandatory Use
Judicial Council of California
JV-224 [New January 1, 2007]

ORDER REGARDING ELIGIBILITY FOR SPECIAL IMMIGRANT JUVENILE STATUS

The Immigration Act of 1990 § 101(a)(27)(J),
8 U.S.C. § 1101 (a)(27)(J)
8 C.F.R. § 204.11
www.courtinfo.ca.gov
American LegalNet, Inc.
www.FormsWorkflow.com

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT CHAMPAIGN COUNTY, ILLINOIS

IN THE INTEREST OF:

[redacted]) No. [redacted]

A Minor.)

DISPOSITIONAL ORDER

This matter comes on for hearing on Tuesday, July 15, 2009. [redacted] appeared on behalf of the People of the State of Illinois; [redacted] and Mr. [redacted] appeared as counsel for the respondent minor. The guardian *ad litem* appeared and [redacted] appeared as counsel for the guardian *ad litem*. The respondent minor appeared personally. Ms. [redacted] appeared as attorney for the Department of Children and Family Services of Illinois (hereinafter DCFS), who also appeared by [redacted].

The Court having considered the evidence adduced at all hearings herein, the dispositional report, the stipulations and arguments of the parties finds:

1. that the respondent minor is an immigrant who is present in the United States of America;
2. that the respondent minor is a dependent minor;
3. that it would not be in the respondent minor's best interest to be returned to Honduras;
4. that reunification of the respondent minor with either of his parents is not viable due to abuse, neglect and abandonment;
5. that it is in the best interest of the respondent minor that he be adjudged a dependent minor and be declared a ward of the court;

6. that each of the respondent parents is unfit, unable and unwilling, for reasons other than financial circumstances alone to care for, protect, train and discipline the respondent minor and that placement of the respondent minor would be contrary to his health, safety, well-being and best interest;
7. that efforts at reunification of the respondent minor with either respondent parent cannot be made; and if attempted, will be unavailing and contrary to the respondent minor's health, safety, well-being and best interest;
8. that the respondent minor is a special immigrant minor within the meaning of section 2-4 of the Juvenile Court Act. (705 ILCS 405/2-4);
9. that [redacted] is an appropriate person to act s the custodian and guardian of the respondent minor and is fit, able and willing to do so;
10. that it is consistent with the health, safety, welfare and best interest of the respondent minor that he be placed in the custody and guardianship of [redacted]

WHEREFORE, IT IS HEREBY ORDERED:

A. The respondent minor is adjudged a dependent minor and a special immigrant minor.
B. The respondent minor is declared a ward of the Court.
C. Custody and guardianship of the respondent minor are placed in [redacted]
D. This cause is continued for a review hearing to October 26, 2009 at 9:00 A.M. o'clock in Courtroom F.
E. The Department of Children and Family Services of Illinois is to provide a review report to the Court and all parties, at least five (5) days before said hearing.

DATE: 2/4/09

John R. Kennedy, Judge

Attorney No. [redacted]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - COUNTY DIVISION

IN RE THE PETITION OF [redacted] and [redacted] TO ADOPT [redacted] a/k/a [redacted] A MINOR.	)	NO. [redacted]

ORDER

This cause coming before the Court:

A. Upon an evidentiary hearing regarding the placement and requested adoption of [redacted] a/k/a [redacted];

B. Upon the entry of an Interim Order awarding temporary custody of the minor to Petitioners, [redacted] and [redacted];

C. Upon the entry of a Default Order and Order Terminating Parental Rights of the minor's biological parents, [redacted] and [redacted], and finding that the biological parents of the minor abandoned her and failed to maintain a reasonable degree of interest, concern or responsibility as to her welfare,

and Petitioners are now seeking an Order in accordance with 8 U.S.C. §1101 (a)(27)J,

THE COURT FINDS:

1. That when [redacted] a/k/a [redacted] was 4 years old, her biological mother, [redacted], left Guatemala to come to the United States and left the child in the care of her sister, [redacted], in Guatemala; that [redacted], the biological father of [redacted] a/k/a [redacted], has had no contact with the child;

that [redacted] a/k/a [redacted] resided with her aunt, uncle, and cousins in Guatemala until she was 12 years old; that [redacted] and [redacted]; the biological mother and father of [redacted] a/k/a [redacted], abandoned the minor; and that the child's aunt, uncle, and cousins were physically and mentally abusive toward [redacted] a/k/a [redacted] during the time she resided with them;

2. That when [redacted] a/k/a [redacted] was 12 years old, she was brought to the United States by a human trafficker to be united with her biological mother, however, this never happened; that [redacted] a/k/a [redacted] was arrested after entering the United States and was placed in the custody of the Office of Refugee Resettlement ("ORR") at a juvenile detention center in Los Fresnos, Texas; that [redacted] a/k/a [redacted] talked to her mother on the phone after her arrival and told her of her arrest, but [redacted] did not come to pick the child up or attend her hearing; that [redacted] a/k/a [redacted] attended her court hearing all by herself; that the biological mother was unwilling to arrange for [redacted] release; and that instead, Petitioner, [redacted], completed the paperwork necessary for ORR and the child was then released from the detention center and placed into the care of [redacted] on September 5, 2006; and that the minor has continuously resided with Petitioners since September 5, 2006;

WHEREFORE, IN ACCORDANCE WITH 8 U.S.C. §1101 (a)(27)J, THE COURT DECLARES AND ORDERS AS FOLLOWS:

1. The minor, [redacted] a/k/a [redacted], is dependent upon this Court, located in the City of Chicago, the County of Cook, the State of Illinois, United States;

2. This Court has placed the minor under the custody of Petitioners, [redacted] and [redacted] individuals specifically appointed by this Court;

3. This Court is a State court located in the United States with jurisdiction under State law to make judicial determinations about the custody and care of juveniles;

4. This Court finds that reunification with one or both of the minor's parents is not viable due to neglect and abandonment;

5. This Court declares that it is not in the minor's best interest to be returned to Guatemala, her previous country of nationality;

6. The minor, [redacted] a/k/a [redacted], is unmarried and under 21 years of age.

ENTER:

JUDGE

ENTERED
JUDGE SUSAN COX GILLIS - 1793
SEP 08 2009
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

[redacted]
Attorney for Petitioners

[redacted]
Attorneys for Petitioners

State of Michigan 17th Judicial Circuit Family Division Kent County	ORDER OF ADJUDICATION/DISPOSITION & NOTICE OF HEARING	Case No. [redacted]

In the matter of [redacted] DOB: [redacted]

Date of Hearing: MAY 27, 2009

Presiding: Honorable PATRICIA D. GARDNER, Judge of Probate

A petition has been filed in this matter. Notice of hearing on the petition has been given as directed by the Court.

Present: [redacted], Atty. [redacted], [redacted] (BCS), and [redacted]

IT IS ORDERED that the material allegations of the Petition authorized to be filed on March 18, 2009 were proven by a preponderance of the evidence.

IT IS ORDERED that [redacted] is made a Temporary Ward of the Kent County Circuit Court, Family Division.

IT IS ORDERED that [redacted] is committed to the Michigan Children's Institute for observation pursuant to Public Act 220 of 1935, retroactive to March 18, 2009.

THE COURT FINDS that placement and supervision in long-term foster care or independent living status is in the child's best interest.

THE COURT FINDS that the above findings and actions were made due to abuse, neglect or abandonment of the minor.

THE COURT FINDS that it is not in the best interest of the child to be returned to his/her previous country of nationality, Mexico. It is in the minor's best interest to remain in the United States.

THE COURT FINDS that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.

IT IS ORDERED that the appointment of Attorney [redacted] to represent [redacted] as Lawyer-Guardian Ad Litem is continued until further order of the Court

IT IS ORDERED that a **Dispositional Review Hearing is scheduled on December 29, 2009 from 9:30 a.m. to 10:00 a.m., before Referee Nick Koster at the Kent County Juvenile Center, 1501 Cedar Street, Northeast., Grand Rapids, Michigan**, at which time there will be further evaluation by the Court.

The Department of Human Services and any/all other treating or supervising agencies are ordered to release all records related to the child(ren) and parent(s) named herein to the court and all attorneys of record upon verbal or written request, including but not limited to: Medical treatment records, substance abuse treatment records, mental health treatment and counseling records, and educational records.

The supervising agency shall provide documentation of progress relating to all aspects of the last court-ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time, not later than 5 business days before the scheduled hearing.

5/27/09
DATE

PATRICIA D. GARDNER P35521
JUDGE OF PROBATE

ORDER OF ADJUDICATION/DISPOSITION & NOTICE OF HEARING

Approved, SCAO

STATE OF MICHIGAN
JUDICIAL CIRCUIT - FAMILY DIVISION
INGHAM COUNTY

ORDER OF DISPOSITION (CHILD PROTECTIVE PROCEEDINGS), PAGE 1
SECOND AMENDED

JIS CODE: DSP
CASE NO.: [redacted]
PETITION NO.: [redacted]

Court address
313 W. Kalamazoo Street, Lansing, MI 48933

Court telephone no.
(517) 483-6105

1. In the matter of name(s), alias(es): [redacted], A/K/A [redacted], MINOR(S)
DOB(S): [redacted]

2. Date of hearing: Thursday, September 18, 2008 Judge/Referee: ATTORNEY REFEREE [redacted]
Bar no.

☒ 3. Removal date: 9-11-08 (specify for each child if different)

4. An adjudication was held and the child(ren) was/were found to come within the jurisdiction of the court.

☐ 5. Release of the parental rights to _____ (Name(s) of child(ren)) was executed by _____ (Name(s) of parent(s)) pursuant to the adoption code on _____.

THE COURT FINDS:

■ 6. Notice of hearing was given as required by law.

7. The lawyer-guardian ad litem ■ has ☐ has not complied with the requirements of MCL 712A.17d.

☒ 8. ☐ a. There is probable cause to believe the legal/putative father(s) is/are:
(name each child, his/her father, and whether legal or putative)

☒ b. The putative father of [redacted] is unknown and cannot be identified.
☐ c. The natural father was notified as required by law and failed to establish paternity within the time set by the court. The natural father waives all rights to further notice, including the right to notice of termination of parental rights and the right to an attorney.

9. In all cases except when all parental rights have been terminated, the court has considered the case service plan and other evidence presented. The findings are specific to this case and are based upon this hearing,and ☒ the following report(s):

(identify report[s] and date[s] of report[s].) Children's Foster Care Initial Service Plan/MDHS dated 8/22/08.
Specific conditions reviewed on the record as required by MCL 712A.18f(4) were

a. compliance with the case service plan with respect to services provided or offered to the child and his or her parent(s), guardian, or legal custodian and whether the parent(s), guardian, or legal custodian complied with and benefited from those services.
b. compliance with the case service plan with respect to parenting time with the child and whether parenting time did not occur or was infrequent and the reasons why.
c. the extent to which the parent(s), guardian, or legal custodian complied with each provision of the case service plan, prior court orders, and any agreement between the parent(s), guardian, or legal custodian and the agency.
d. likely harm to the child if the child continued to be separated from his or her parent(s), guardian, or legal custodian.
e. likely harm to the child if the child was returned to his or her parent(s), guardian, or legal custodian.

NOTE: If the child(ren) were not removed prior to the dispositional hearing and new allegations are made which require removal, a supplemental petition must be prepared and filed and an emergency removal hearing held, whereupon contrary to the welfare and reasonable efforts findings must be made. Use form JC75. A dispositional review hearing must be held within 14 days after the child is removed. See MCR3.974(C).

Do not write below this line – For court use only

USE NOTE: Use this form when a release has been executed pursuant to the adoption code after adjudication and before the dispositional hearing.

(SEE SECOND PAGE)

PL 96-272; 42 USC 670 et seq.; MCL 400.203; MCL 712A.1 3a; MCL 712A.13; MCL 712A.18f; MCL 712A.19; MCL 712A.19f; MCR 3.924(C); MCR 3.965(B)

RECEIVED JUG 14 2009

EXHIBIT F

Approved, SCAO

STATE OF MICHIGAN JIS CODE: DSP

JUDICIAL CIRCUIT - FAMILY DIVISION **ORDER OF DISPOSITION** **CASE NO.:** [redacted]
INGHAM COUNTY **(CHILD PROTECTIVE PROCEEDINGS), PAGE 2** **PETITION NO.:** [redacted]
SECOND AMENDED

Court address
313 W. Kalamazoo Street, Lansing, MI 48933

Court telephone no.
(517) 483-6105

In the matter of: [redacted], A/K/A [redacted], MINOR(S)

☒ 10. ☒ a. Reasonable efforts to prevent removal of the child(ren) from the home were made as determined in a prior order.

☐ b. Reasonable efforts were made to prevent removal of the child(ren) from the home. Those efforts include: (specify)

☐ c. Reasonable efforts to prevent removal of the child(ren) from the home were not made.

☐ d. Reasonable efforts to prevent removal were not required as determined in a prior order.

☐ 11. a. Reasonable efforts are not required to prevent the child(ren)'s removal from the home due to ☐ the ☐ mother ☐ father subjecting the child(ren) to the aggravated circumstance(s) of _____ as provided in section MCL 722.638(1) and (2), and as evidenced by _____.

☐ the ☐ mother's ☐ father's conviction for murder of another child of the parent.
☐ the ☐ mother's ☐ father's conviction for voluntary manslaughter of another child of the parent.
☐ the ☐ mother's ☐ father's conviction for aiding or abetting in the murder or manslaughter of another child of the parent, attempting to murder the child(ren) or another child of the parent, or conspiring or soliciting to commit the murder of the child(ren) or another child of the parent.
☐ the ☐ mother's ☐ father's conviction for felony assault that resulted in serious bodily injury to the child(ren) child(ren) or another child of the parent.
☐ the ☐ mother's ☐ father's involuntary termination of parental rights to a sibling of the child(ren).

b. Reasonable efforts to preserve and reunify the family to make it possible for the child(ren) to safely return home are
☐ not required because the parent subjected the child or another child of the parent to one of the circumstances stated above.
OR
☐ still recommended because:

(when item 11 is checked, either complete item 13 below or schedule a permanency planning hearing within 28 days of this determination)

☐ 12. ☐ a. Reasonable efforts shall be made to preserve and reunify the family to make it possible for the child(ren) to safely return home.

☐ b. Reasonable efforts shall not be made to preserve and reunify the family because it would be detrimental to the child(ren)'s health and safety.

☐ c. Reasonable efforts to preserve and reunify the family were not previously required, but due to a change in circumstances, reasonable efforts are now required. Those reasonable efforts have begun and include: (specify reasonable efforts, and if applicable, the reasons for return)

☐ The child(ren) should be released to _____ (Name of parent, guardian, or legal custodian).

13. ☐ Since reasonable efforts to prevent removal or to reunite the child(ren) and family are not required, a permanency planning hearing was conducted. (If so, and attach form JC 19, Order Following Dispositional Review Hearing, Permanency Planning...

(SEE THIRD PAGE)

Approved, SCAO

STATE OF MICHIGAN JIS CODE: DSP

JUDICIAL CIRCUIT - FAMILY DIVISION
INGHAM COUNTY

ORDER OF DISPOSITION (CHILD PROTECTIVE PROCEEDINGS), PAGE 3 SECOND AMENDED

CASE NO.: [redacted]
PETITION NO.: [redacted]

Court address
313 W. Kalamazoo Street, Lansing, MI 48933

Court telephone no.
(517) 483-6105

In the matter of: [redacted], A/K/A [redacted], MINOR(S)

14. Conditions of custody in the home and with the individual with whom the child(ren) reside(s)
- ☐ a are adequate to safeguard the child(ren) from the risk of harm to the child(ren)'s life, physical health, and mental well-being.
- ☒ b are not adequate to safeguard the child(ren) from the risk of harm to the child(ren)'s life, physical health, and mental well-being.
  - ☒ No provision of service or other arrangement except removal of the child(ren) is reasonably available to adequately safeguard the child(ren) from the risk of harm to the child(ren)'s life, physical health, and mental well-being.
  - ☒ Conditions of custody at the placement away from the home and with the individual with whom the child(ren) is/are placed are adequate to safeguard the child(ren)'s life, physical health, and mental well-being.

☐ 15 Parenting time with _____, even if supervised, may be harmful to the child(ren).

IT IS ORDERED:

☐ 16 _____ is warned and the jurisdiction of the courts is terminated.
Name

☐ 17 Notice is to be given to the legal/putative father(s) as required by law. ☐ The father was not present and must appear at the next hearing. ☐ The putative father was present at this hearing and shall establish paternity within 14 days.

☒ 18 The child(ren) is/are in the temporary custody of this court and

☒ is/are placed with the Department of Human Services/Lutheran Social Services of MI, for care and supervision, and
- a. the parent, guardian, or legal custodian shall execute all documents necessary to release confidential information regarding the child(ren) including medical, mental, and educational reports, and shall also, within 7 days, provide the Department of Human Services with the name(s) and address(es) of the medical provider(s) for the child(ren). Any medical provider of the child(ren) shall release the medical records of the child(ren) to the Department of Human Services.
- b. if a home study has not yet been completed, then one shall be performed by the Department of Human Services and a copy of the home study submitted to the court not more than 30 days after the placement.
- c. upon request, the Department of Human Services shall release to the foster parent the information concerning the child(ren) in accordance with MCL 712A.13a(13).

☐ remain home with or is/are released to _____
Name of parent, guardian, or legal custodian
under the supervision of the Department of Human Services. ☐ The following terms and conditions apply to the parent(s)/guardian/legal custodian:

☐ because the parent(s) released the child(ren) pursuant to the adoption code, the child(ren) is/are ☐committed to the Department of Human Services for permanency planning, supervision, care, and placement under MCL400.203.

☐other;

A post-termination review hearing will be held _____.
Date

☐ 19. The Director of the Michigan Department of Human Services is appointed special guardian to receive any benefits now due or to become due the child(ren) from the government of the united States.

20. ☐ a. The parent(s), guardian, or legal custodian shall comply with, and benefit from, the case service plan. ☐ In addition,

☐ b. The parent(s) need not comply with, and benefit from, the case service plan because parental rights were released pursuant to the adoption code.

☐ c. The parent(s) need not comply with, and benefit from, the case service plan because jurisdiction of the court is terminated.

(SEE FOURTH PAGE)

Approved, SCAO

STATE OF MICHIGAN
JUDICIAL CIRCUIT - FAMILY DIVISION
Error! Reference COUNTY

ORDER OF DIPOSITION (CHILD PROTECTIVE PROCEEDINGS), PAGE 4 SECOND AMENDED

JIS CODE: DSF
CASE NO.: [redacted]
PETITION NO.: [redacted]

Court address
313 W. Kalamazoo Street, Lansing, MI 48933

Court telephone no.
(517) 483-6105

In the matter of: [redacted] A/K/A [redacted], MINOR(S)

IT IS ORDERED: (continued)

☒ 21. Parenting time of PARENTS is
- ☐ supervised by the Department of Human Services and/or its designee.
- ☐ unsupervised at the discretion of the Department of Human Services.
- ☒ suspended until further order of the court.

☐ 22. Parenting time of _____ is
- ☐ supervised by the Department of Human Services and/or its designee.
- ☐ unsupervised at the discretion of the Department of Human Services.
- ☐ suspended while psychological evaluation or counseling is conducted, or until further order of the court.

☐ 23. Parenting time of _____ is
- ☐ supervised by the Department of Human Services and/or its designee.
- ☐ unsupervised at the discretion of the Department of Human Services.
- ☐ suspended while psychological evaluation or counseling is conducted, or until further order of the court.

■ 24. Reimbursement:

■ 25. Other: (attach separate sheet if needed)
That the agency providing foster care services shall inform the Lawyer/Guardian ad Litem for the Minor Children, in writing, of any proposed change in placement no later than seven (7) days prior to the date of the move, unless there are emergency circumstances which necessitate an immediate change of placement.

☒ The court finds that it would not be in the best interest of the child to be returned to HONDURAS and that it is in the best interest of the child to remain in the United States. The court's rulings are based on the court finding abuse, neglect or abandonment of the child as detailed in the allegations of the Petition authorized for filing on 9-11-08. The court finds that placement in long-term foster care is in the child's best interest, and reunification with one or both parents is not a viable option due to abuse, neglect, or abandonment.

26. Prior orders remain in effect except as modified by this order.

☐ 27. Review hearings shall be held as follows before: ☐Judge
☐Chief Attorney Referee Thomas Fruechtenicht
☐Attorney Referee Roderick Porter

(NOTE: The review hearing shall not be delayed beyond the number of days required regardless whether a petition to terminate parental rights or another matter is pending. MCL 712A.19a provides that the permanency planning hearing shall not be delayed beyond 12 months from the date of removal of the child and every 12 months thereafter.)

☐ dispositional review hearing _____ ☐ dispositional review hearing _____
☐ permanency planning hearing _____

The supervising agency shall provide documentation of progress relating to all aspects of the last court-ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time, not later than 5 business days before the scheduled hearing.

28. ☐ Notice of the next hearing has been provided as required by law. ☐ Notice of the next hearing shall be provided.

Recommended by: _____ 7/10/09
Referee signature R. PORTER

July 15 2009
Date

Judge

JC 17 (7/07)ORDER OF DISPOSITION (CHILD PROTECTIVE PROCEEDINGS), PAGE 4

Approved, SCAO

STATE OF MICHIGAN JUDICIAL CIRCUIT - FAMILY DIVISION Error! Reference COUNTY	ORDER OF DIPOSITION (CHILD PROTECTIVE PROCEEDINGS), PAGE 5 SECOND AMENDED	JIS CODE: DSP CASE NO.: [redacted] PETITION NO.: [redacted]

Court address

Court telephone no.

In the matter of: [redacted], A/K/A [redacted], MINOR(S)

MCL 722.638 - AGGRAVATED CIRCUMSTANCES

(1) The Department shall submit a petition for authorization by the court under Section 2(b) of Chapter XIIA of 1939 PA 288, MCL 712A.2, if one or more of the following apply:
   (a) The Department determines that a parent, guardian, or legal custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included one or more of the following:
      (i) Abandonment of a young child.
      (ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
      (iii) Battering, torture, or other severe physical abuse.
      (iv) Loss or serious impairment of an organ or limb.
      (v) Life threatening injury.
      (vi) Murder or attempted murder.
   (b) The Department determines that there is risk of harm to the child and either of the following is true:
      (i) The parent's rights to another child were terminated as a result of proceedings under Section 2(b) of Chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state.
      (ii) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under Section 2(b) of Chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state.

(2) In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the Department of Human Services shall include a request for termination of parental rights at the initial dispositional hearing as authorized under Section 19b of Chapter XIIA of 1939 PA 288, MCL 712A.19b.

Copies: (Resp.-Name)
☑ Placement - IL AM.
☑ Refugee Services
☑ FCW
☑ ~~MDHS/Supervisor~~ Child
✓ Pet'r.
✓ Jennipher R. Martinez, Atty-LGAL (for Child)
✓ P.A.
✓ Nat'l Immig. Jus. Cen. (Illinois) (Manj Govindaiah, Atty.-Child)

8 U.S.C. §1101 GF-42

(Special Immigrant Juvenile Status Order)

At a Term of the Family Court
of the State of New York, held
in and for the County of _____
at _____, New York
on _____, __.

PRESENT: Hon.

----------x

Docket No.
Family File No.
ORDER-Special Immigrant
Juvenile Status

----------x

This Court, after examining the motion papers and supporting affidavits, all the pleadings and prior proceedings in this matter, and/or hearing testimony, finds, in accordance with 8 U.S.C. § 1101(a)(27)(J), that:

1. The above-named child is under 21 years of age.

2. The above-named child is unmarried.

3. The above-named child is dependent upon the Family Court, or has been committed to or placed in the custody of a state agency or department, or an individual or entity appointed by the state or Family Court.

4. Reunification with one or both of his/her parents is not viable due to [check applicable box(es)]: ☐ abuse; ☐ neglect; ☐ abandonment; and/or ☐ a similar basis under New York law because [specify the basis for the determination]:

_____

_____

_____

.

5. It is not in the child's best interest to be removed from the United States and returned to [specify country]: _____, his/her country of nationality or country of last habitual residence of the child or of his/her birth parent or parents.

Dated: ENTER

_____
Judge of the Family Court

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE LAW GUARDIAN UPON THE APPELLANT, WHICHEVER IS EARLIEST.

Check applicable box:

☐ Order mailed on [specify date(s) and to whom mailed]:_____

☐ Order received in court on [specify date(s) and to whom given]:_____

At a Term of the Family Court
of the State of New York, held
in and for the County of Bronx on
[redacted]

PRESENT: [redacted]

----------x [redacted]

Proceedings for Guardianship for

Docket No. [redacted]

[redacted]

ORDER

a Minor.

----------x

This Court, upon examining the motion papers and supporting affidavits, and upon all the pleadings and prior proceedings herein, and hearing testimony in relation thereto, FINDS that:

1. The child, [redacted] is a citizen of Mexico and has not yet attained his 21st birthday.

2. The child, [redacted] is unmarried.

3. The child, [redacted], is dependent upon the juvenile court, has been placed in custody of the state, or has been placed in custody of an entity appointed by the state or this Court.

4. Reunification of the child, [redacted] with one or both of his parents is not viable due to abandonment. [redacted] as abandoned by both his father, [redacted], and his mother, [redacted] who both live in Mexico and whose whereabouts are unknown.

5. It is not in the best interests of the child, [redacted], to be returned to his or his parents' country of nationality or country of last habitual residence, Mexico.

Dated: [redacted]

ENTER

[redacted]

Appendix E

Understanding the Risks and Benefits of Applying for Special Immigrant Juvenile Status

What is "Special Immigrant Juvenile Status" ("SIJS")?

It is a way for someone who is not a U.S. citizen and who is under the jurisdiction of a juvenile court to become a permanent resident of the United States (get a green card).

Who Qualifies? What Do I Have To Do To Apply For My Green Card?

One important requirement is that a juvenile court must have found that you cannot return to live with your parents, because they abused, abandoned or neglected you. There are other requirements as well. The application procedure is fairly simple. You must fill out several forms, submit fingerprints and photographs, and have a medical examination. As soon as you submit the application to the immigration authorities, you can obtain a card that lets you work legally in the United States. Usually several months later you will have an interview at CIS, where they will approve or deny your application. If they deny it you can file an appeal. A social service worker, attorney, or other responsible adult can help you through the process.

What Benefits Do I Get As a Permanent Resident?

You get the right to live and work permanently in the United States, free of the fear of deportation. You can qualify for the cheaper in-state tuition if you attend state college, and may qualify for other college assistance. You will have the right to apply for U.S. citizenship 5 years after becoming a permanent resident. You will not get the right to help your biological parents to get their immigration papers. But if you later marry a non-citizen, you will be able to help him or her get a green card.

What Are the Risks of Applying for Special Immigrant Juvenile?

If the immigration authorities deny your case, they can put you into deportation proceedings. Your social worker or lawyer should evaluate your case carefully before filing anything with immigration. *It is extremely important to be completely honest with the adult helping you with the application*.

Is There Any Other Way For Me to Get My Green Card?

There are many ways to get a green card. If you do not qualify for SIJS, ask for a professional analysis of your situation to see if you might get a green card in some other way. For example, your spouse, parent, stepparent or adoptive parent can apply for you if they are U.S.

citizens or permanent residents, even if you don't live with them. If a U.S. citizen or permanent resident parent or spouse was abusive to you, you may be able to "self-petition" to get a green card even if they refuse to submit papers for you. If you fear returning to your home country, you might qualify for asylum. Also, the U.S. designates "temporary protected status" ("TPS") for people from certain countries where civil war or natural disaster has occurred recently.

Entendiendo los Riesgos y Beneficios de Aplicar para el Estado de Inmigrante Juvenil Especial

¿Que es el "Estado de Inmigrante Juvenil Especial?"

Es una manera por la cual una persona que no es ciudadano y que está bajo la jurisdicción de la corte juvenil, puede llegar a ser residente permanente de los Estados Unidos y obtener su tarjeta verde.

¿Quien califica? ¿Que Tengo Que Hacer Para Obtener Mi Tarjeta Verde?

Un requisito importante es que la corte juvenil concluya que usted no puede regresar a convivir con sus papas porque ellos le han abusado, abandonado, o descuidado. También existen otros

requisitos. El proceso para aplicar no es difícil. Usted tendrá que llenar diferentes formularios, entregar huellas digitales, tomarse fotografías, y hacerse un examen médico. Después de entregar su aplicación a los oficiales de inmigración, usted podrá conseguir un permiso para trabajar legalmente en los Estados Unidos. Normalmente, unos meses después usted tendrá una entrevista con el Servicios de Inmigración y Ciudadanía- CIS, en la cual aprobarán o negarán su aplicación. Si niegan su aplicación usted podrá apelar esa decisión. Un trabajador social, un abogado, o un adulto responsable le ayudará con el proceso.

¿Cuales Son Los Beneficios de Ser Residente Permanente?

Usted tendrá el derecho de vivir y trabajar permanentemente en los Estados Unidos, sin tener miedo de ser deportado. Usted también podrá calificar para cuotas de inscripción y matricula bajas si se inscribe en un colegio del estado y tal vez podrá calificar para otros tipos de asistencia. Usted tendrá el derecho de aplicar para la ciudadanía de los Estados Unidos después de 5 años de ser residente permanente. Si usted se casa con una persona sin documentos, usted podrá a ayudar el/ella a conseguir una tarjeta verde. Usted no tendrá el derecho de aplicar para que sus papas inmigren.

¿Cuales son Los Riesgos o Aspectos Negativos de Ser Inmigrante Juvenil Especial?

Si las autoridades de inmigración niegan su caso, ellos podrán comenzar el proceso de deportación. Su trabajador social y abogado van a evaluar su caso cuidadosamente antes de presentar los documentos al Servicios de Inmigración y Ciudadanía -CIS. *Es muy importante que usted sea completamente honesto con la persona que le ayuda a aplicar.*

¿Existen Otra Maneras de Obtener Mi Tarjeta Verde?

Hay varias maneras de conseguir su tarjeta verde. Si usted no califica por el Estado Juvenil Especial, consulte con un experto en las leyes de inmigración para ver si hay otra manera de obtenerla. Por ejemplo, su esposo o su papa, padrastro, o papa adoptivo puede aplicar para usted si es ciudadano de los Estados Unidos ("USC") o residente permanente legal ("LPR"),

aunque no vivan con usted. O, si una de estas personas lo ha abusado, usted podrá solicitar para su tarjeta verde aunque el o ella no quiera someter una petición para usted. Si usted teme volver a su país natal, usted podría calificar para asilo político. Además, en momentos de guerra civil o de un desastre en un país, Estados Unidos otorga un Estado de Protección Temporal- "TPS" para gente que vienen de ciertos países.

Appendix F

VAWA Self-Petitioning Preliminary Screening

Noncitizens who do not already have legal immigration status may be eligible to self-petition for an immigration visa through VAWA if they check the following boxes to indicate a "yes" response. They should be encouraged to speak with someone who specializes in assisting with VAWA petitions.

- ❑ Has s/he (or her/his children) been abused? (CIS defines abuse on a case-by-case basis. If the noncitizen has experienced any of the below s/he should be encouraged to consult a VAWA specialist).
  - ❑ Threatened to beat or terrorize her
  - ❑ Hit, punched, slapped, kicked, hurt, or emotionally abused her
  - ❑ Forced her to have sex against her will
  - ❑ Threatened to take or hurt her children
  - ❑ Controlled where she went, what she could do, who she could see
  - ❑ Engaged in a pattern of behaviors that when considered together might be defined as abuse.

- ❑ Was s/he the spouse, child or parent of the abuser according to the following definitions?
  - Spouse
    - Currently married, **OR**
    - Divorced within past 2 years because of abuse, **OR**
    - Marriage invalid due to abuser's failure to terminate prior or concurrent marriage, and client unaware of other marriage.
  - Child
    - Unmarried
    - Under 21 at time of filing
    - Recognized as "child" by CIS (i.e. either the biological, adoptive, or stepchild of the U.S. Citizen or Lawful Permanent Resident).
  - Parent
    - Son or Daughter must be a U.S. citizen

- ❑ Is or was the abuser a U.S. citizen or Lawful Permanent Resident (green card holder)? (You can check this box if the LPR was deported within two years before the self-petition is filed because of the abuse, or if a U.S. citizen abuser spouse died within two years before the self-petition is filed.)

- ❑ Did s/he live with abuser at some time? (If the noncitizen is a child, a visit is sufficient.)

- ❑ Does s/he live in the U.S.? (You may check this box if the noncitizen lives outside U.S. and the abuse took place in U.S. or if the qualifying abuser is a U.S. employee.)

- ❑ Did the abuse occur during the marriage (if noncitizen is spouse) or during residence with abusive parent (if noncitizen is child)?

- ❑ Did s/he marry the abusive spouse in "good faith?" (If s/he married in order to get a green card, this question cannot be answered "yes.")

- ❑ Does s/he have "good moral character?" (If s/he checks any of the statements on the attached "red flag" checklist s/he must see an immigration expert before s/he can answer this question.)

VAWA Self-Petitioning Screening Sheet (page 2)

Possible Problems Showing "Good Moral Character"

If any of the things listed below are true about the noncitizen, s/he must talk with an immigration expert before sending a self-petition to the CIS. These things DO NOT necessarily mean s/he can't self-petition under VAWA. But an immigration expert needs to know if there might cause a problem with his or her application. The Immigration Service may already know, or may find out because the noncitizen will have to send police clearance letters with the self-petition.

Check the box beside any of the following problems if the noncitizen may:

- ❑ Have ever been arrested by any law enforcement agency (including INS, DHS or ICE), or have been convicted of any crime.
- ❑ Have been, or is, in deportation or removal proceedings.
- ❑ Have helped someone come to the U.S., illegally, even if it was a relative.
- ❑ Have voted illegally in the U.S.
- ❑ Have said s/he was a U.S. Citizen when s/he really was not.
- ❑ Be a habitual drunkard, drug addict or drug abuser.
- ❑ Have been involved in prostitution.
- ❑ Have made a living from illegal gambling
- ❑ Have been or is a practicing polygamist (married to more than one person at a time).
- ❑ Have given false information or lied to get an immigration benefit, such as a visa to visit the U.S.

**IF THE NONCITIZEN CHECKS ANY OF THE ABOVE BOXES,
S/HE MUST TALK WITH AN IMMIGRATION EXPERT ABOUT IT!**

Appendix G

Nine Questions To Determine Potential Eligibility for Lawful Immigration Status

---

The following are basic threshold questions meant to flag possible eligibility for lawful status. If a noncitizen answers yes to one or more questions, the court or the person's counsel should consult the referenced section of this benchbook. Most importantly, the person should obtain a referral to a qualified immigration attorney.

1. <u>Is the noncitizen afraid to return to his or her home country?</u>

- Noncitizens from areas of war or human rights abuses where they face persecution or torture may be eligible for **political asylum**, **withholding of removal** or protection under the United Nations **Convention Against Torture**. A brief discussion is found in **Chapter 4**, see § 4.4 (asylum and withholding of removal) and § 4.5 (Convention Against Torture). A grant of asylum can lead to lawful permanent residency.

- People from certain countries that have experienced devastating 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. Nationals of El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan have had TPS. See **Chapter 4**, § 4.6.

2. <u>Does the noncitizen have a U.S. citizen parent, spouse, child brother or sister? Or does the noncitizen have a lawful permanent resident spouse or parent?</u>

- The noncitizen may be eligible for lawful permanent residency through a **family-based visa petition**. Note that some visa petitions involve a waiting list of many years. See **Chapter 4**, § 4.2 for a brief discussion of family-based petitioning.

- Adopted children may be able to obtain lawful permanent residency through an adoptive U.S. citizen or permanent resident parent. The adoption *must* be finalized before the child's 16th birthday, with an exception for adopted sibling groups. Where the child is from a country that is a signatory to the Hague Convention, additional rules apply. See **Chapter 5**.

3. <u>Was the noncitizen's parent or grandparent born in the United States or granted U.S. citizenship?</u>

- If so, the noncitizen may have unknowingly acquired U.S. citizenship already. See **Chapter 4**, § 4.1 for a discussion of **inherited citizenship** and **Appendix H** for a chart outlining eligibility for acquisition and derivation of U.S. citizenship.

4. <u>Is the noncitizen under the jurisdiction of a juvenile court and not going to be reunified with one or both parents due to abuse, neglect, or abandonment?</u>

- If the noncitizen child is under the jurisdiction of a court that can make decisions regarding care and custody of juveniles or the court has legally committed the child to, or placed him or her under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court, and reunification with one or both parents is not viable due to abuse, abandonment, or neglect, or the death of a parent or a similar basis under state law, and it would not be in the child's best interest to be returned to the home country, he or she may be eligible for **Special Immigrant Juvenile Status (SIJS)**. Special Immigrant Juvenile Status leads to lawful permanent residency. See discussion of SIJS in **Chapter 2**.

5. <u>Has the noncitizen been abused by a U.S. citizen or lawful permanent resident spouse or parent?</u>

- A noncitizen who has been subjected to physical abuse or extreme cruelty (including non-physical abuse) by a U.S. citizen or lawful permanent resident spouse or parent may be eligible to apply for permanent residency under the immigration provisions in the **Violence Against Women Act (VAWA)**. A child whose parent has been abused, or a parent whose child has been abused, may qualify even if the person him or herself was not abused. See **Chapter 3**.

6. <u>Has the noncitizen been the victim of a crime that led or might lead to a criminal investigation or prosecution?</u>

- The noncitizen may qualify for a **U visa** if he or she was a victim of certain crimes, suffered substantial physical or mental abuse as a result of the crime and can provide a certificate from a judge, prosecutor or law enforcement official stating that he or she is likely to be helpful in the investigation or prosecution of that crime. U visas are temporary but can lead to lawful permanent residency. See **Chapter 4**, § 4.3, Part B.

- The crimes that are covered by the U visa include rape, incest, domestic violence, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, abduction, unlawful criminal restraint, false imprisonment, felonious assault, witness tampering, or attempt, conspiracy, or solicitation to commit these *or similar offenses* in violation of federal, state or local criminal law. There is no requirement that the perpetrator have lawful immigration status or any family relationship with the victim.

7. <u>Has the noncitizen been the victim of human trafficking?</u>

- Noncitizens who have been trafficked into the U.S. may be eligible for a **T visa**. T visas can be granted to persons who have been (1) induced to come to the United States by force, fraud or coercion for commercial sex or are under the age of 18 and are brought for commercial sex purposes, or (2) recruited or transported to the United States by force, fraud or coercion for involuntary servitude, peonage or slavery. T visas are temporary but can lead to lawful permanent residency. See **Chapter 4**, § 4.3, Part A.

8. <u>Has the noncitizen lived in the United States since January 1, 1972?</u>

- If so, he or she may qualify lawful permanent residency under **registry**. See **Chapter 4**, § 4.8.

9. <u>Is the noncitizen in immigration removal proceedings?</u>

- The noncitizen may be eligible for certain defenses to removal which may lead to lawful permanent resident status. See **Chapter 4**, § 4.7.
    - If the noncitizen has lived in the United States (even though it was unlawful) for ten years or more, he or she may be eligible for a form of relief called **cancellation or removal**. The noncitizen must have close relatives who are U.S. citizens or permanent residents who would suffer exceptional and extremely unusual hardship if the noncitizen were to be deported. If granted cancellation of removal at the discretion of an immigration judge, the noncitizen will obtain lawful permanent residency.
    - Noncitizens who are abused by a U.S. citizen or permanent resident spouse or parent may also qualify for **VAWA cancellation of removal** and only need to have resided in the U.S. for 3 years.

Appendix H

Chart A: Determining Whether Children Born Outside the U.S. Acquired Citizenship at Birth (if child born out of wedlock see Chart B) – **Please Note: A child cannot acquire citizenship at birth through an adoption.**[1]

STEP 1 Select period in which child was born	**STEP 2** Select applicable Parentage	**STEP 3** Measure citizen parent's residence **prior** to the child's birth against the requirements for the period in which child was born. (The child acquired U.S. citizenship at birth if, at time of child's birth, citizen parent had already met applicable residence requirements.)	**STEP 4** Determine whether child has since lost U.S. citizenship. (Citizenship was lost on the date it became impossible to meet necessary requirements – never before age 26.) People who did not meet the retention requirement can now regain citizenship by taking an oath of allegiance.

PERIOD	**PARENTS**	**RESIDENCE REQUIRED OF USC PARENT**	**RESIDENCE REQUIRED OF CHILD**
Prior to 5/24/34	Father or mother citizen	Citizen father or mother had resided in the U.S.	None
On/after 5/24/34 and prior to 1/14/41	Both parents citizens	One had resided in the U.S.	None
	One citizen and one alien parent	Citizen had resided in the U.S.	5 years residence in U.S. or its outlying possessions between the ages 13 and 21 if begun before 12/24/52, or 2 years continuous physical presence between ages 14 and 28, or 5 years continuous physical presence[2] between ages 14 and 28 if begun before 10/27/72.[3] No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. [*See*, Volume 7 of the Foreign Affairs Manual citing section 302(g) of the Nationality Act of 1940.][4]

On/after 1/14/41 and prior to 12/24/52	One citizen and one alien parent	Citizen had resided in U.S. or its outlying possessions 10 years, at least 5 of which were after age 16. If citizen parent served honorably in U.S. Armed Forces between 12/7/41 and 12/31/46, 5 of the required 10 years may have been after age 12.[5] If the citizen parent served honorably in U.S. Armed Services between 1/1/47 and 12/24/52, parent needed 10 years physical presence, at least 5 of which were after age 14.[6]	2 years continuous physical presence between ages 14 and 28, or 5 years continuous physical presence[7] between ages 14 and 28 if begun before 10/27/72. [8] No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. [*See*, Volume 7 of the Foreign Affairs Manual citing section 302(g) of the Nationality Act of 1940.] (This exemption is not applicable if parent transmitted under the Armed Services exceptions.) People born on or after 10/10/52 have no retention requirements.[9]
	Both parents citizens; or one citizen and one national[10]	One had resided in the U.S. or its outlying possessions.	None
On/after 12/24/52 and prior to 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possession.	None
	One citizen, one national parent[11]	Citizen had been physically present in U.S or its outlying possessions for a continuous period of one year.	None
	One citizen and one alien parent	Citizen had been physically present in U.S. or its outlying possessions 10 years, at least 5 of which were after age 14.[12]	None
On/after 11/14/86	Both parents Citizens	One had resided in the U.S. or its outlying possessions.	None
	One citizen and one national parent[13]	Citizen had been physically present in U.S. or its outlying possessions for continuous period of one year.	None
	One citizen and one alien parent	Citizen had been physically present in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14.[14]	None

Produced by the ILRC (January 2008) -- Adapted from the INS Chart

Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information. Please see notes on next page.

Endnotes for Chart A

[1] See *Marquez-Marquez v. Gonzalez*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by United States citizen since INA § 301(g) did not address citizenship through adoption); See also *Colaianni v. INS*, 490 F.3.d 185 (2nd Cir. 2007) (same). But see *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), which found that a child acquired U.S. citizenship at birth even though neither of his biological parents were citizens, but at the time of his birth his mother was married to a U.S. citizen; *see also Solis-Espinoza v. Gonzales*, 401 F. 3d 1091 (9th Cir. 2005).

[2] For a discussion of continuous physical presence related to these provisions of the law, please see INS Interpretations 301.1(b)(6).

[3] If a person did not learn of the claim to U.S. citizenship before reaching age 23 or 26, whichever age was applicable, the two year retention requirement might be deemed to have been constructively met (in other words, it may be waived). *See*, INS Interpretations 301.1(b)(5)(iii) and 301.1(b)(6)(iii); *See also Matter of Yanez-Carrillo,* 10 I&N Dec. 366 (BIA 1963) (holding that the retention requirement does not bar citizenship until the person has a reasonable opportunity to enter the United States as a citizen after learning of such a claim to citizenship).

[4] People who have not fulfilled the residence requirement now are permitted to regain their citizenship by taking an oath of allegiance to the United States (*See*, Immigration and Nationality Technical Corrections Act of 1994 § 103 (a) and INA § 324 (d)(1)). It is the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" should mean prior to or on the date of the birthday. *See Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952); *however see also* INS Interpretations 320.2. Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."

[5] *See*, INS Interpretations 301.1(b)(3)(ii) for a discussion of the residence requirements for parents who served in the Armed Forces between 12/7/41 and 12/31/46.

[6] *See*, *U.S. Citizenship and Naturalization Handbook*, (Daniel Levy) citing INS Interpretations 301.1(b)(4)(iii) & (iv) and the Act of March 16, 1956, Public Law 84-430, 70 Stat. 50.

[7] For a discussion of continuous physical presence related to these provisions of the law, please see INS Interpretations 301.1(b)(6).

[8] *See* endnote 2.

[9] The retention requirement was repealed by Act of 10/10/78 (P.L.95-432). People who have not fulfilled the residence requirement now are permitted to regain their citizenship by taking an oath of allegiance to the United States (*See*, Immigration and Nationality Technical Corrections Act of 1994 § 103 (a) and INA § 324 (d)(1). For information on the status of people who had on 10/10/78 failed to remain in the U.S., *please see* INS Interpretations 301.1(b)(6)(ix).

People who have not fulfilled the residence requirement now are permitted to regain their citizenship by taking an oath of allegiance to the United States. [*See*, Immigration and Nationality Technical Corrections Act of 1994 § 103 (a) and INA § 324 (d)(1)] It is the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" should mean prior to or on the date of the birthday. *See*, INS

Interpretations 320.2 and *Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952). Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."

[10] For a definition of "National," please *see* INA §§ 308 and 101(a)(29) and Chapter 7-5 of the ILRC's manual, *Naturalization: A Guide for Legal Practitioners and Other Community Advocates*.

[11] *See* endnote 9.

[12] *Please see*, INA § 301(g) for exceptions to the physical presence requirements for people who served honorably in the U.S. military, were employed with the U.S. Government or with an intergovernmental international organization; or who were the dependent unmarried sons or daughters and member of the household of a parent in such military service or employment.

[13] *See* endnote 9.

[14] *See* endnote 11.

Appendix H

CHART B: ACQUISITION OF CITIZENSHIP DETERMINING IF CHILDREN BORN OUTSIDE THE U.S. AND BORN OUT OF WEDLOCK ACQUIRED U.S. CITIZENSHIP AT BIRTH

PART 1 – Mother was a U.S. citizen at the time of the child's birth.
PART 2 – Mother was not a U.S. citizen at the time of the child's birth and the child was legitimated or acknowledged by a U.S. citizen father.

Please Note: A child cannot acquire citizenship at birth through an adoption.[1]

PART 1: MOTHER IS A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH

Date of Child's Birth:	**Requirements:**
Prior to 12/24/52:	Mother was a U.S. citizen who had resided in the U.S. or its outlying possessions at some point prior to birth of child. A child whose alien father legitimated him did not acquire U.S. citizenship through his U.S. citizen mother if: 1. The child was born before 5/24/34; 2. The child was legitimated before turning 21; AND 3. The legitimation occurred before 1/13/41. **NOTE:** A child born before 5/24/34 acquired U.S. citizenship when the Nationality Act of 1940, effective 1/13/41, bestowed citizenship upon the child retroactively to the date of birth.
On/after 12/24/52:	Mother was U.S. citizen physically present in the U.S. or its outlying possessions for a continuous period of 1 year at some point prior to birth of child.

PART 2: MOTHER WAS NOT A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH AND THE CHILD HAS BEEN LEGITIMATED OR ACKNOWLEDGED BY A U.S. CITIZEN FATHER[2]

Date of Child's Birth:	**Requirements:**
Prior to 1/13/41:	1. Child legitimated at any time after birth, including adulthood, under law of father's domicile. 2. Use CHART A to determine if child acquired citizenship at birth.
On/after 1/13/41 and prior to 12/24/52:	1. Child legitimated before age 21 under law of father's domicile, or paternity established through court proceedings before 12/24/52.[3] 2. Use CHART A to determine if child acquired citizenship at birth.
On/after 12/24/52 and prior to 11/15/68:	1. Child legitimated before age 21 under law of father or child's domicile. 2. Use CHART A to determine if child acquired citizenship at birth.

On/after 11/15/68 and prior to 11/15/71:	1. Child legitimated before age 21 under law of father or child's domicile. 2. Use CHART A to determine if child acquired citizenship at birth. **-- OR –** 1. Child/father blood relationship established by clear and convincing evidence;[4] 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, or father must acknowledge paternity of child in writing under oath, or paternity must be established by competent court. 5. Use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/71:[5]	1. Child/father blood relationship established by clear and convincing evidence;[6] 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, or father must acknowledge paternity of child in writing under oath, or paternity must be established by competent court. 5. Use CHART A to determine if child acquired citizenship at birth.

Produced by the ILRC (January 2008)

Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information.

PLEASE SEE ENDNOTES ON NEXT PAGE.

Endnotes for Chart B

[1] See *Marquez-Marquez v. Gonzalez*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by United States citizen since INA § 301(g) did not address citizenship through adoption); See also *Colaianni v. INS*, 490 F.3.d 185 (2nd Cir. 2007) (same). But see *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000), which found that a child acquired U.S. citizenship at birth even though neither of his biological parents were citizens, but at the time of his birth his mother was married to a U.S. citizen; *see also Solis-Espinoza v. Gonzales*, 401 F. 3d 1091 (9th Cir. 2005).

[2] If the child did not acquire citizenship through its mother, but was legitimated by a U.S. citizen father under the following conditions, apply the acquisition law pertinent to legitimate children born in a foreign country. (CHART A) Please note that the United States Supreme Court ruled that even though the laws treat children born out of wedlock to U.S. citizen fathers differently than the laws treat children born out of wedlock to U.S. citizen mothers, those laws are constitutional and do not violate equal protection. *See Tuan Anh Nguyen v INS*, 121 S. Ct. 2053 (2001).

[3] If legitimated before age 21, US. Citizen father must comply with residence requirements of the Nationality Act of 1940 (See Chart A, period 1/13/41 to 12/24/52).

[4] *See Miller v. Albright*, 523 U.S. 420, 437 (1977) (clear and convincing standard of proof of paternity does not require DNA evidence). Prior to the 1986 amendment requiring proof of blood relation by clear and convincing evidence, paternity could be shown by birth certificates, school records, or hospital records. However, under State Department guidelines, an actual blood relationship must be shown; being born in wedlock is insufficient, even if the child is presumed to be the issue of the parents' marriage by the law of the jurisdiction where the child was born. *See* 7 FAM 1131.4(a). *Miller v. Albright* indicated that DNA evidence is unnecessary, but that was mere dictum in a plurality opinion joined by only one justice. Certainly DNA evidence would suffice, but it is unclear how much less convincing evidence could be and still overcome the "clear and convincing" hurdle. Practitioners would be prudent to have DNA testing conducted if possible. But *see* also *Stanley Russell Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) (holding that there is no requirement of a blood relationship between petitioner and his citizenship father to acquire citizenship at birth since he was born in wedlock).

[5] *See* endnote 3. Note that if the child was born on or after 11/15/86, the residence requirement for the U.S. citizen father
under CHART A changes. *See also Chau v. Dep.'t of Homeland Sec.*, 424 F. Supp. 2d 1159, 1166 (D. Ariz.) (noting that the transitional rule providing for the right to elect for application of either the post or pre-1986 version of INA § 309, which did not impose the written statement concerning financial statement, applied to petitioner since he was born before 1986).

[6] *See* endnote 4.

Appendix H

CHART C: DERIVATIVE CITIZENSHIP - LAWFUL PERMANENT RESIDENT CHILDREN GAINING CITIZENSHIP THROUGH PARENTS' CITIZENSHIP

Date of Last Act	Requirements - [Please note that it is the ILRC's position that all advocates should argue that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means prior to or on the date of the birthday. (*See Matter of L-M- and C-Y-C-*, 4 I. &N. Dec. 617 (1952) which supports this proposition with respect to retention requirements for acquisition of citizenship; INS Interpretations 320.2.) Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."] Note that in at least one federal district court case, the court held that a child derived citizenship automatically even though his mother naturalized after his 18th birthday because due to factors beyond his mother's control, the mother's citizenship interview had been rescheduled to a date past the child's 18th birthday. *Rivas v Ashcroft*, F. Supp. 2d _, U.S. Dist. Lexis (16254) (S.D.N.Y. 2002). See also *Harriott v. Ashcroft*, 2003 U.S. Dist Lexis 12135 (E.D. Pa.).
Prior to 5/24/34:[1]	a. Either one or both parents must have been naturalized prior to the child's 21st birthday;[2] b. Child must be lawful permanent resident before the 21st birthday;[3] c. Illegitimate child may derive through mother's naturalization only; d. A legitimated child must have been legitimated according to the laws of the father's domicile;[4] e. Adopted child and stepchild cannot derive citizenship.
5/24/34 to 1/12/41:	a. Both parents must have been naturalized and begun lawful permanent residence in the U.S. prior to the child's 21st birthday; b. If only one parent is being naturalized and s/he is not widowed or separated, the child must have 5 years lawful permanent residence in the U.S. commencing during minority, unless the other parent is already a U.S. citizen;[5] c. Child must be lawful permanent resident before the 21st birthday; d. Illegitimate child may derive through mother's naturalization only, in which case the status of the other parent is irrelevant; e. Legitimated child must have been legitimated according to the laws of the father's domicile;[6] f. Adopted child and stepchild cannot derive citizenship.

1/13/41 to 12/23/52:	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen, or, be deceased, or the parents must be legally separated[7] and the naturalizing parent must have legal custody;[8] b. Parent or parents must have been naturalized prior to the child's 18th birthday; c. Child must have been lawfully admitted for permanent residence before the 18th birthday; d. Illegitimate child can only derive if while s/he was under 16, s/he became a lawful permanent resident and his/her mother naturalized and both of those events (naturalization of mother and permanent residence status of child) occurred on or after 1/13/41 and before 12/24/52;[9] e. Legitimated child must be legitimated under the law of the child's residence or place of domicile before turning 16 and be in the legal custody of the legitimating parent;[10] f. Adopted child and stepchild cannot derive citizenship.[11]
12/24/52 to 10/5/78:[12]	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,[13] or be deceased, or the parents must be legally separated[14] and the naturalizing parent must have custody.[15] b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes.[16] If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead.[17] c. Parent or parents must have been naturalized prior to the child's 18th birthday;[18] d. Child must have been lawfully admitted for permanent residence before the 18th birthday;[19] e. Child must be unmarried;[20] f. Adopted child and stepchild cannot derive citizenship [21]
10/5/78 to 2/26/01:	a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,[22] or be deceased, or the parents must be legally separated [23] and the naturalizing parent must have legal custody.[24] b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes. If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead.[25] c. Parent or parents must have been naturalized prior to the child's 18th birthday;[26] d. Child must have been lawfully admitted for permanent residence before the 18th birthday;[27] e. Child must be unmarried;[28] f. Adopted child may derive citizenship if the child is residing in the U.S. at the time of the adoptive parent(s)'s naturalization,[29] is In the legal custody of the adoptive parent(s), is a lawful permanent resident and adoption occurred before s/he turned 18.[30] Stepchild cannot derive citizenship.

Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen:[31] Another way to look at it is anyone born on/after 2/28/83 and meets the following requirements is a U.S. citizen.	a. At least one parent is a U.S. citizen either by birth or naturalization.[32] b. In the case of a child who was born out of wedlock, the mother must be the one who is or becomes a citizen[33] OR, if the father is a US citizen through naturalization or other means then the child must have been legitimated by the father under either the law of the child's residence or domicile or the law of the father's residence or domicile and the legitimation must take place before the child reaches the age of 16.[34] c. Child is under 18 years old.[35] d. Child must be unmarried.[36] e. Child is a lawful permanent resident.[37] f. Child is residing in the U.S. in the legal and physical custody of the citizen parent.[38] g. Adopted children qualify so long as s/he was adopted before the age of 16 and has been in the legal custody of, and has resided with, the adopting parent(s) for at least two years.[39] An adopted child who qualifies as an orphan under INA § 101(b)(1)(F) also will qualify for derivation.

Produced by the ILRC (January 2008)

Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information.

Endnotes for Chart C:

[1] Prior to 1907 a mother could transmit citizenship only if she was divorced or widowed. *See U.S. Citizenship and Naturalization Handbook by Daniel Levy* (Thomson West).

[2] It is the ILRC's position, and the ILRC believes that all advocates should argue, that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means prior to or on the date of the birthday. ***See Matter of L-M- and C-Y-C-,*** 4 I. &N. Dec. 617 (1952) which supports this proposition with respect to retention requirements for acquisition of citizenship; ***however, see also*** INS Interpretations 320.2. Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18th birthday" or "prior to the 21st birthday" means "prior to or on the 18th birthday" or "prior to or on the 21st birthday."

[3] Prior to 1907 the child could take up residence in the U.S. after turning 21 years of age. *See U.S. Citizenship and Naturalization Handbook by Daniel Levy* (Thomson West), citing Sec. 5, Act of March 2, 1907.

[4] Legitimation could take place before or after the child turns 21. The child derives citizenship upon the naturalization of the parent(s) or upon the child taking up residence in the U.S. *See U.S. Citizenship and Naturalization Handbook by Daniel Levy* (Thomson West), citing Sec. 4, Act of 1802 as supplemented by Sec. 5, Act of 1907. *See* also INS Interpretations 320.1.

[5] The five year period can commence before or after the naturalization of the parent and can last until after the child turns 21 and until after 1941. *See* Sec. 5, Act of March 2, 1907 as amended by Sec. 2, Act of May 24, 1934 and INS Interpretations 320.1(a)(3).

[6] *See* endnote 4 above.

[7] "Legal separation" of the parents can be a complicated topic. In *Matter of H*, 3 I.&.N. Dec.742 (BIA 1949), the BIA found that "Legal Separation" as used in the context of derivation of citizenship means some sort of limited or absolute divorce through judicial proceedings. Several appeals courts have

weighed in on the issue as well and now there is a split in circuit courts regarding the definition of legal separation. Volume 11 of *Bender's Immigration Bulletin* has an excellent article on the definition of legal separation for derivation purposes. *See Bender's Immigration Bulletin*, Volume 11, Page 694 (June 1, 2007). *See also Wilson v. Mukasey*, 2008 U.S. App. LEXIS 681 (9th Cir. 2008); *Lewis v. Gonzales*, 481 F.3d 125, 130-32 (2nd Cir. 2007); *Afeta v. Gonzalez*, No. 05-1174 (4th Cir. 2006);*Bagot v Ashcroft*, 398 F.3d 252 (3rd Cir. 2005); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000); and *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001); *but see*, *Brissett v. Ashcroft*, 363 F. 3d 130, 132 (5th Cir. 2004) [while the court denied that Brisett derived citizenship, the court found that there could be an order that doesn't necessarily state it creates a legal separation, but "may nonetheless effect such a drastic change in the couple's marital existence that the couple may be considered legally separated" for the purposes of 8 USC §1432 (a)(3)."]

[8] *See* 7 FAM 1153.4-3 (Foreign Affairs Manual). Until recently, the general rule was that if the parents have a joint custody decree (legal document), then both parents have legal custody for purposes of derivative citizenship. *See U.S. Citizenship and Naturalization Handbook* (Daniel Levy, Thomson West Publications) citing Passport Bulletin 96-18 (November 6, 1996). Yet, in the 5th Circuit, the court of appeals recently ruled that the naturalizing parent must have sole legal custody for the child to derive citizenship and thus, at least in the 5th Circuit, a joint legal custody decree will not be sufficient to allow a child to derive citizenship. *See Bustamante-Barrera v. Gonzalez*, 447 F.3d 388 (5th Cir.2006) (requiring naturalized citizen parent to have sole legal custody of the child for derivative citizenship). *See also Rodrigues v. Attorney General of U.S.*, 321 Fed. Appx. 16, 2009 WL 984511 (C.A. 3rd Cir.). The ILRC believes these two cases include faulty reasoning and practitioners should be prepared to argue so if the CIS or other courts follow the Bustamante case.

When the parents have divorced or separated and the decree does not say who has custody of the child and the U.S. citizen parent has physical custody (meaning the child lives with that parent), the child can derive citizenship through that parent provided all the other conditions are met. See United States Department of State Passport Bulletin - 96 -18, issued November 6, 1996, entitled "New Interpretation of Claims to Citizenship Under Section 321(a) of the INA" which referenced Passport Bulletin 93-2, issued January 8, 1993.

According to INS Interpretations 320.1, in the absence of a state law or adjudication of a court dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for "derivation purposes," provided the required "legal separation" of the parents has taken place. *See* INS Interpretations 320.1(b), *Matter of M*- 3 I.&N. 850 (BIA 1950). Where the actual "parents" of the child were never lawfully married, there can be no legal separation. *See* INS Interpretations 320.1(a)(6), citing, *In the Matter of H –*, 3 I.&N. Dec. 742 (1949). Thus, illegitimate children cannot derive citizenship through a father's naturalization unless the father has legitimated the child, the child is in the father's legal custody, and the mother was either a citizen (by birth or naturalization) or the mother has died. Where the actual "parents" of the child were never lawfully married, there could be no legal separation. For more on this topic, please see *Bagot v. Ashcroft*, 398 F.3d 252 (3rd Cir. 2005), and *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001).

Citizenship derived through the mother by a child who was illegitimate at birth will not be lost due to a subsequent legitimation. See Gordon, Mailman, and Yale-Lohr, Immigration Law and Procedure, Volume 7, Chapter 98, § 98.03[4](e).

[9] *See* INS Interpretations 320.1(c).

[10] *See* INS Interpretations 320.1(a)(6), explaining that in the absence of a state law or adjudication of a court dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for "derivation purposes," provided the required "legal separation" of the parents has taken place; *see Matter of M*- 3 I.&N. (BIA 1950), INS Interpretations

320.1(b) and endnote 8 above. **Please note,** the only way that an illegitimate child can derive citizenship through a father's naturalization is if 1) the father legitimates the child, and 2) both parents naturalize (unless the mother is already a citizen, or the mother is dead). Under any other circumstances, an illegitimate child never derives from a father's naturalization. The definition of "child" in INA § 101(c)(1) requires that the legitimated child be legitimated under the law of the father's or child's domicile before turning age 16.

[11] Although both the CIS and the State Department take the position that adopted children during this period could not derive citizenship, an argument can be made that children who were adopted before turning 16 and who were in the custody of the adopting parent(s) could derive citizenship. *See U.S. Citizenship and Naturalization Handbook*.

[12] Traditionally, the view has been that as long as all the conditions in this section are met before the child's 18th birthday, the child derived citizenship regardless of the order in which the event occurred. *See* Department of State Passport Bulletin 96-18, issued November 6, 1996, entitled "New Interpretation of Claims to Citizenship Under Section 321(a) of the INA." The BIA cited this Passport Bulletin in *In Re Julio Augusto Fuentes-Martínez*, Interim Decision 3316 (BIA, April 25, 1997)*; Matter of Baires-Larios*, 24 I. & N. Dec. 467, Interim Decision, (BIA Mar. 10, 2008); U.S. Citizenship and Immigration Services, Dep't of Homeland Security, Adjudicators's Field Manual, ch. 71, §71.1(d)(2) (Feb. 2008). But in *Jordan v. Attorney General of the U.S.*, 424 F.3d 320 (3d Cir. 2005), the 3rd Circuit Court came out with a different position by finding that where the separation occurred after the parent naturalized, the child did not derive citizenship. Hopefully, the CIS and most circuit courts will not follow the 3rd Circuit's decision in *Jordan*.

[13] *See* 7 FAM 1153.4-4 (Foreign Affairs Manual) for a general description of the law.

[14] *See* endnote 7 above.

[15] *See* endnote 8 above.

[16] In order for an illegitimate child to derive citizenship through her mother s/he must not have been legitimated prior to obtaining derivation of citizenship. *See* INA § 321(a)(3) as amended by Pub. L. No. 95-417. However, if the father legitimated the child before derivation, then both parents must naturalize in order for the child to qualify unless one parent is a U.S. citizen or is deceased. *See* INA § 321(a)(1) as amended by Pub. L. No. 95-417. If legitimation occurs after the child has derived citizenship, the child remains a U.S. citizen even if the father did not naturalize. See Gordon, Mailman, and Yale-Lohr, Immigration Law and Procedure, Volume 7, Chapter 98, §98.03[4](e).

[17] *See* endnote 9 above.

[18] 1952-1978 law stated prior to "16th birthday." The new law stating prior to the "18th birthday" is retroactively applied to 12/24/52. *See In Re Julio Augusto Fuentes-Martínez*, Interim Decision 3316 (BIA, April 25, 1997), citing Passport Bulletin 96-18.

[19] A small minority of practitioners believes that a strict reading of INA § 321(a)(5) would allow a child to derive citizenship if both parents naturalized while the child was still under 18 years old and was unmarried even if the child was not a lawful permanent resident – but only if the child began to reside permanently in the United States while under the age of 18 and after his or her parents naturalized. The argument is that there is a difference between being a lawful permanent resident and to "reside permanently." The CIS and most practitioners, however, are of the opinion that the child must be a lawful permanent resident to derive citizenship no matter the circumstances. Although there is no authoritative case law on a national level, there is some case law agreeing with the CIS' opinion on this issue. [*See* Gordon and Mailman § 98.03(3)(f)]

[20] *See* INA § 101(c)(1).

[21] *See* endnote 11 above.

[22] *See* 7 FAM 1153.4-4 (Foreign Affairs Manual) for a general description of the law.

[23] *See* endnote 7 above.

[24] *See* endnote 8 above.

[25] *See* endnote 10 above.

[26] *See* endnote 18 above.

[27] *See* endnote 19 above.

[28] *See* endnote 20 above.

[29] Adopted children must be residing in the U.S. pursuant to a lawful admission for permanent residence at the time of the adoptive parent(s)' naturalization. *See* Passport Bulletin 96-18. Thus, in derivation cases for adopted children, the sequence of events can be important. This is different than the practice in derivation cases for biological children. *See* endnote 11.

[30] Between 10/5/78 and 12/29/81, adopted children could only derive citizenship if adoption occurred before the child turned 16. [*See* INS Interp.320.1 (d)(2)]

[31] People born between 2/27/83 and 2/26/01 may derive citizenship by satisfying the requirements of either this row or the "10/5/78 to 2/26/01" row.

[32] INA section 320 as amended by the Child Citizenship Act of 2000.

[33] Please see U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship. Although the ILRC believes this Citizenship and Immigration Service memo should apply to mothers who naturalized or who became U.S. citizens by birth in the U.S., derivation, or acquisition of citizenship, the CIS may successfully argue that it only applies to naturalized mothers because the memo specifically states "Assuming an alien child meets all other requirements of Section 320 and 322, an alien child who was born out of wedlock and has not been legitimated is eligible for derivative citizenship when the mother of such a child becomes a naturalized citizen."

[34] The text of INA section 320 as amended by the Child Citizenship Act of 2000 does not mention illegitimacy, but INA section 101(c)(1) excludes illegitimate children from the definition of "child," unless legitimated by the father under either the law of the child's domicile or the law of the father's domicile. The legitimation requirement will be a hurdle for some people for two reasons. First, the legitimation must take place before the child turns 16. Once s/he turns 16, it is too late for the legitimation to count for § 320 citizenship purposes. Please note that neither INA §320 nor 8 CFR 320.1 state the legitimation must occur before the 16th birthday. Thus, some argue that such a legitimation could take place even between the 16th and 18th birthdays. This argument appears weak because of the definition of child found in INA §101(c), which applies to the citizenship and naturalization contexts. Second, many people do not think about or know about the legitimation process. It is important to note that according to the U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship only naturalized mothers can confer citizenship upon their unlegitimated children born of wedlock under INA section 320. ILRC assumes that mothers who are U.S. citizens by other means such as birth in the U.S. also can confer citizenship under INA §320 to such children.

[35] INA section 320 as amended by the Child Citizenship Act of 2000.

[36] INA section 320 as amended by the Child Citizenship Act of 2000.

[37] INA section 320 as amended by the Child Citizenship Act of 2000.

[38] INA section 320 as amended by the Child Citizenship Act of 2000. It is the ILRC's interpretation that for purposes of the Child Citizenship Act of 2000, the CIS will presume that a child who was born out of wedlock and has not been legitimated and whose mother has naturalized or is a U.S. citizen through any other means (i.e., birth in U.S, acquisition or derivation) would be considered to be in the legal custody of

the mother for section 320 citizenship. See U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services Memo Number HQ 70/34.2-P, dated September 26, 2003 and titled, Eligibility of Children Born out of Wedlock for Derivative Citizenship. Additionally, 8 CFR §320.1 sets forth several different scenarios in which the CIS presumes, absent evidence to the contrary, that the parent has the necessary legal custody to apply for §320 citizenship for his/her child. First, the CIS will presume, absent evidence to the contrary, that both parents have legal custody for purposes of §320 citizenship where their biological child currently resides with them and the parents are married, living in marital union, and not separated. Second, the CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of §320 citizenship where his/her biological child lives with him/her and the child's other parent is dead. Third, the CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of §320 citizenship if the child was born out of wedlock, the parent lives with the child, and the parent has legitimated the child while the child was under 16 and according to the laws of the legitimating parent or child's domicile. Fourth, where the child's parents are legally separated or divorced and a court or other appropriate governmental entity has legally awarded that the parents have joint custody of the child, the CIS will presume, absent evidence to the contrary, that such joint custody means that both parents have legal custody of the child for purposes of §320 citizenship. Fifth, in a case where the parents of the child have divorced or legally separated, the CIS will find that for the purposes of citizenship under INA §320 a parent has legal custody of the child where there has been an award of primary care, control, and maintenance of a minor child to a parent by a court or other appropriate government agency pursuant to the laws of the state or county of residence. Sixth, the regulations state there may be other factual circumstances under which the CIS will find that a U.S. citizen parent has legal custody for purposes of §320 citizenship. Advocates and their clients should be creative in thinking of other ways to prove that the CIS should determine that a U.S. citizen parent has legal custody if the parent - child relationship does not fit into one of the categories listed above.

[39] INA section 320 as amended by the Child Citizenship Act of 2000 and INA §101(b)(1).

NOTICE TO PERSONS WHO ARE *NOT* UNITED STATES CITIZENS

AND WHO ARE THE SUBJECT OF A RESTRAINING ORDER

As you know, the laws of the United States make it a crime to commit violent acts against any person, including a husband, wife or child. Breaking these laws might pose a threat to your immigration status, even if you are a lawful permanent resident (have a "green card").

If a court in the United States finds that you have violated a restraining order that was meant to guard against violent behavior, stalking, or similar acts, you could become deportable and lose your immigration status.

The same is true if a criminal court in the United States finds you guilty of certain crimes relating to domestic violence or child abuse or abandonment.

If you have questions about what behavior is illegal under criminal laws, or what behavior will cause you to violate your protective order, ask your attorney.

GLOSSARY OF TERMS

This section provides definitions for some terms one might encounter when dealing with the CIS or immigrants. The CIS website (www.uscis.gov) can provide additional information if needed.

Accredited Representative: A paralegal or other immigration advocate who is authorized by the Board of Immigration Appeal of the U.S. Department of Justice to represent immigration clients. The process of getting authorized (accredited) is complex and requires significant training. Contact ILRC for more information.

Acquired Citizenship: Citizenship conferred at birth to children born abroad to a U.S. citizen parent(s).

Adjust Status: The process by which a VAWA self-petitioner goes from having "deferred action" status to "lawful permanent resident" status. Example: When a VAWA petition has been approved the petitioner will be given "deferred action" status. In order to get "lawful permanent resident" status (a green card) s/he will then have to fill out an additional form (I-485) and complete a CIS interview. This process is called "adjusting status."

Adoption: See **Chapter 5** for a full discussion. See also Orphan.

Alien: An immigration term for any person not a citizen or national of the United States.

Cancellation of Removal: If an individual who does not have legal status in the U.S. is deemed deportable (removable) s/he can file a petition to cancel that removal ("cancellation of removal"). If his/her petition is granted this means that the plan to remove (deport) him/her is cancelled and instead his/her status can be adjusted from "deportable alien" to "lawful permanent resident." One can only apply for cancellation of removal when in removal proceedings. Under VAWA, there are special, easier rules for battered spouses and children to qualify for cancellation of removal. See **Chapter 4**, § 4.7 for a fuller discussion.

Child: The definition of "child" includes biological, step, and adopted children who are under 21 years of age and unmarried. Additionally, for stepchildren the relationship creating the stepparent relationship must have occurred prior to the "child's" 18th birthday; and for adopted children the adoption must have taken place before the 16th birthday and other requirements have to have been fulfilled as well.

Citizenship: The status of being a U.S. citizen, either by birth in the U.S., birth (in some cases) to a U.S. Citizen, or through the naturalization process after five years of being a lawful permanent resident.

Citizenship & Immigration Services (CIS): CIS is responsible for processing and making decisions on all applications for immigration benefits, many of which are filed affirmatively. These include applications for Special Immigrant Juvenile status, asylum, lawful permanent residency, and citizenship. Although CIS can initiate deportation proceedings, they can and commonly refer cases that are denied to Immigration and Customs Enforcement (ICE), the interior enforcement arm of DHS, to do so.

Customs and Border Protection (CBP): CBP is responsible for inspecting visitors and cargo at ports of entry and tries to secure the borders between the U.S. land, sea, and air ports of entry. CBP is also given the authority to arrest, transport, and detain noncitizens, but unlike ICE, it focuses on those who are caught in violation of immigration laws at the border and ports of entry.

Deferred Action Status: A type of immigration status in which the DHS knows that a person is in the U.S. unlawfully, but the DHS will not take steps to remove him or her. For example, when a VAWA petition has been approved, the petitioner gets deferred action status until the times comes for him/her to apply to get his/her green card.

Department of Homeland Security (DHS): As a result of the Homeland Security Act of 2002, introduced in the aftermath of the September 11 attacks, the former "Immigration and Naturalization Service" (INS) ceased to exist as an independent agency within the Department of Justice and its functions were transferred to various agencies within the newly formed "Department of Homeland Security" (DHS). The DHS now has primary responsibility for administering and enforcing immigration laws. Three agencies within the DHS handle these responsibilities: U.S. Citizenship and Immigration Services (CIS or "the Service"), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).

Deportability (Grounds of): The grounds of deportability are the laws which Congress passed to determine what types of people can be "removed" (i.e., forced to leave the U.S.). The term "removed" has combined into one what used to be called "deported" and "excluded" from the U.S. Immigrants can now be "removed" if they fall within the grounds of deportability or inadmissibility. See **Chapter 10**.

Deportable Alien: Now called "removable." An individual who is subject to being deported from the U.S. For example, someone who resides in the U.S. illegally or who violates the terms of his or her visa may be considered a "deportable alien."

Deportation: Now called "removal." When an individual ("alien") is formally removed from the U.S. after having been found to fall within the grounds of deportability.

Derivative Beneficiary: In petitioning for VAWA relief, a qualifying petitioner can include his/her children (if the child is unmarried and under 21), on his/her petition. If the petition is approved the child/children will gain legal status as "derivative beneficiaries" of his/her parent's petition.

Derivative Citizenship: Citizenship conveyed to children through the naturalization of parents or, under certain circumstances, to foreign-born children of U.S. citizen parents, provided certain conditions are met.

Employment Authorization: Permission to work legally in the U.S.

Family Preference System: The DHS has a system whereby certain groups of people can petition (apply) for certain relatives to become lawful permanent residents. This system is called the "family preference system" and includes four categories of persons. In terms of family-sponsored visas the preferences are: 1) unmarried sons and daughters of U.S. citizens; 2) spouses, children, and unmarried sons and daughters of permanent resident aliens; 3) married sons and daughters of U.S. citizens; and 4) brothers and sisters of U.S. citizens.

Good Faith Marriage: A term used by the DHS to describe the requirement that the marriage was not entered into for the primary purpose of gaining legal status in the U.S. but instead the purpose was to live as husband and wife.

Good Moral Character: For naturalization and VAWA purposes, the DHS requires that the applicant or self-petitioner has "good moral character." To determine Good Moral Character the INS will look at whether the applicant has committed certain acts or engaged in certain behaviors (such as committing a crime or being a drug addict), and the DHS will look at whether the applicant's character meets the standards of the average citizen in that community.

Green Card: Alternative name for an immigrant visa or lawful permanent residence. Many years ago, when immigrant visa cards were issued they were the color green and the term "green card holder" has persisted even though the color of the card is no longer actually green. A green card is proof of status as a lawful permanent resident.

Illegal Alien: A term often used to describe persons who do not have permission to be in the U.S. and are subject to deportation.

Immediate Relatives: Persons who are allowed to immigrate to the U.S. based on a petition filed by close relative who is a U.S. citizen. (i.e. a U.S. Citizen can file a petition for legal status on behalf of his/her close relatives). The DHS defines "immediate relatives" as the spouses of U.S. Citizens, children (under 21 years of age and unmarried) of U.S. Citizens, and parents of Citizens 21 years of age or older.

Immigrant Visa: Alternative name for a green card or lawful permanent residence. The name indicates that it is a visa – lawful permission to stay in the U.S., and that it is for the purpose of immigrating (remaining permanently) in the U.S. In contrast, a non-immigrant visa only allows the visa holder to remain in the U.S. temporarily.

Immigration & Customs Enforcement (ICE): ICE is the "interior" enforcement arm of the DHS (i.e. not at the border) and has a goal of identifying and removing all removable persons located within the U.S. One of its primary targets is "criminal aliens." It therefore has a strong presence in the criminal and juvenile justice systems especially in jails, prisons, and increasingly, in youth detention centers. ICE has the authority to arrest, transport, and/or detain (except for certain juveniles) individuals in violation of immigration laws. Not only do ICE attorneys represent the government in removal proceedings, but ICE also carries out the actual removal of noncitizens who are ordered deported.

INA: The Immigration and Nationality Act (INA) is the complete law passed and frequently amended by Congress that deals with all issues of immigration and naturalization. The law changes frequently.

Inadmissibility (Grounds of): The name of the group of acts that may bar persons from obtaining status or lawful entry into the U.S. See **Chapter 10** for a full discussion.

Inadmissible: An alien seeking admission to the U.S., who does not meet the criteria in the INA for admission is inadmissible (s/he can not come to the U.S.). The alien may be placed in removal proceedings or, under certain circumstances, allowed to withdraw his or her

application for admission.

Intended Spouse: This is a term used under VAWA only, for a person who believed s/he was legally married to another person but in fact was not because the abusive spouse's prior or concurrent marriage was not legally terminated. The intended spouse must also have reasonably believed that she was legally married because, despite the abuse's bigamy, a marriage ceremony was performed she did not know the other marriage was still valid.

Lawful Permanent Resident: Someone, who has an immigrant visa, or a "green card," is a lawful permanent resident. Lawful permanent residents have the right to live and work permanently in the United States unless they complete certain deportable offenses.

Nationals: Nationals of the United States include United States citizens or noncitizen nationals. Noncitizen nationals are people who were born in a United States possession or have ties to a United States possession. Currently, the only people with noncitizen national status are American Samoans and Swain Islanders, as well as certain Northern Marianas Islands residents who choose not to become citizens. The noncitizen national status of a person from a United States possession is terminated if the United States terminates its nationality tie with that possession.

Naturalization: The name for the process by which a lawful permanent resident (immigrant visa or green card holder) becomes a U.S. Citizen. Generally, a LPR must wait 5 years before s/he can naturalize.

Naturalization Provisions: General provisions require an applicant to be at least 18 years of age and a lawful permanent resident with five years of continuous residence in the United States, have been physically present in the country for half that period, establish good moral character for at least that period, be attached to the principles and form of U. S. government, be able to pass English and U.S. civics and history exams and the oath of allegiance to the U.S.

Nonimmigrant Visa Holder: Someone who has been given permission to enter and remain in the U.S. temporarily for some specific purpose. The most common "nonimmigrant visas" include: "B" for people who visit the United States temporarily for business (B-1) or pleasure (B-2); "F" visas for students to enter the United States to study at a college, university, seminary, conservatory, academic high school, elementary school, language training program, or other academic institution; "H" visas for medical trainees, temporary workers in certain occupations (including H-1B for specialty occupations, H-1C for nurses, H-2A for temporary agricultural workers, H-2B for skilled/unskilled workers, H-3 for medical trainees, and H-4 for accompanying spouses and children); "J" visas for people who will participate in specialized teaching, lecturing, studying, or research; "K" visas for spouses, minor children and approved fiancees of U.S. citizens who seek entry to the United States while waiting for approval of an immigrant visa petition; and "L" visas for people who, within 3 years prior to the visa application, have been employed continuously for one year and will continue in the United States with the same employer in a managerial or executive capacity or a capacity that involves specialized knowledge.

Office of Refugee Resettlement (ORR): On March 1, 2003, DHS established that custody of

"unaccompanied" alien children would be placed with the Office of Refugee Resettlement (ORR). ORR, which is a division of the U.S. Department of Health and Human Services, created "DUCS"—the Division of Unaccompanied Children's Services—to provide care and services to this population pending the conclusion of the immigration case. However, DHS through ICE continued to retain control and oversight of "accompanied" alien children.

Orphan: There are numerous circumstances under which a child may be considered an orphan. Most commonly, a child is considered an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents. See **Chapter 5**.

Principal Alien: The individual who is the main beneficiary of a petition for immigrant status and from whom another individual may derive lawful status under immigration law or regulations. In VAWA cases, this would be the person filing the self-petition. If the self-petitioner includes the names of her minor children on the petition, then her children would be considered "derivative beneficiaries."

Priority Date: The date that the immigration petition is filed. If a person is put on a waiting list to get a green card then s/he will know it is his/her turn to apply to get the card when his/her priority date appears on the visa bulletin.

Refugee: A person who is given permission to come to the U.S. because s/he has a well-founded fear of persecution in his/her home country. The fear must be related to his/her race, religion, nationality, membership in a particular social group, or political opinion. Refugee status is granted by the U.S. State Department not by the DHS. There are limits to the number of people who can get refugee status in a given year.

Removal: The expulsion of an alien from the United States. This expulsion may be based on grounds of inadmissibility or deportability.

Self-petition: In the context of VAWA, a qualifying spouse or child of a U.S. Citizen or Lawful Permanent Resident is allowed to submit his/her own petition for legal status. Under the usual family preference system the U.S. Citizen or Lawful Permanent Resident would have to submit the petition on behalf of the spouse or child. Thus, VAWA self-petitioners are called "self-petitioners."

Temporary Protected Status (TPS): A type of immigration status whereby the Attorney General designates nationals of a foreign state to be eligible to stay in the U.S. temporarily if it is found that conditions in their country pose a danger to personal safety due to ongoing armed conflict or an environmental disaster. Grants of TPS are initially made for periods of 6 to 18 months and may be extended depending on the situation. Removal proceedings are suspended against aliens while they are in Temporary Protected Status.

U.S. Citizen: A person who has the right to live in the U.S. permanently, can travel with a U.S. passport, can vote and work in the U.S., and generally can not be deported.

Undocumented: A person who entered the U.S. without permission or has violated the terms of a visa. An undocumented person can be placed in removal proceedings at any time.

Visa Bulletin: Every month, the DHS publishes a bulletin in which the State Department

indicates which priority dates (see definition above) are current. Individuals who filed immigrant petitions on or before those dates are now eligible to adjust status to lawful permanent resident. For example, if the bulletin indicated that the priority date of June 15, 1988 is current, this means that those individuals who filed their petition on or before June 15, 1988 can submit an I-485 to apply to adjust their status to that of LPR. The State Department Visa Bulletin can be found on the web at http://travel.state.gov

Waiver: When an individual is excused from all or part of a requirement. In the VAWA context a petitioner can submit a form requesting that s/he be excused from paying the application fee, if the request is granted this means that the DHS has "waived" the fee requirement.