

Screening DACA Recipients for Special Immigration Juvenile Status Eligibility

By Sarah Bronstein and Martin Gauto

As the future of the Deferred Action for Childhood Arrivals (DACA) program becomes increasingly uncertain, it becomes more important to screen DACA recipients for eligibility for other immigration benefits. Special Immigrant Juvenile Status (SIJS) is one of the benefits for which DACA recipients should be screened. SIJS is an immigration benefit available to children who have been the victims of abuse, abandonment or neglect at the hands of a parent. SIJS provides eligible children with a pathway to lawful permanent residence. There is an age limitation on eligibility for SIJS such that only children up to the age of 21 may qualify, therefore SIJS will only be an option for younger DACA recipients. Nonetheless, it is likely that some DACA recipients will qualify for this very valuable benefit.

To be eligible for SIJS, a child must meet the following requirements under INA § 101(a)(27)(J):

- The child is dependent on a juvenile court or has been legally committed to, or placed under the custody of, an agency, entity or individual appointed by a juvenile court;
- The child's reunification with one or both parents is not viable due to abuse, neglect, abandonment or similar basis under state law, and
- It is not in the child's best interest to be returned to the child's or the parent's country of origin.

In addition, according to the regulations, a child must be under 21 and unmarried to qualify for SIJS.¹ SIJS is an unusual immigration benefit in that it involves

the intersection of state and federal law and the participation of a state court. In order to apply for SIJS, the child must obtain an order from a state juvenile court with findings that track the eligibility requirements above. A juvenile court is defined as a court that is authorized under state law to make judicial determinations about the care and custody of juveniles.² This could include a state court that handles matters of dependency, guardianship, delinquency or adoption, as well as proceedings in family court relating to custody determinations. Once the child has obtained the order from the state court, he or she may then file the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, with USCIS.

The regulations also require that the child remain under the jurisdiction of the juvenile court through the entire application process including the application for adjustment of status. Most state juvenile courts do not allow for jurisdiction after the child has turned 18 (see further discussion of this issue below). These regulations, however, predate the Trafficking Victims Protection and Reauthorization Act of 2008, which altered the SIJS statute significantly. Among other changes, the TVPRA provided age-out protections for SIJS applicants. As long as the child is under the age of 21 on the date the I-360 is properly filed, the child's application for SIJS cannot be denied solely due to age.³ As a result, it appears that the requirement that juvenile court jurisdiction exist through adjustment of status does not apply in situations where juvenile court jurisdiction terminates solely due to age.

Another notable change to eligibility for SIJS that was made in the TVPRA was to allow for SIJS eligibility based on a finding that reunification with one *or* both

¹ See 8 CFR § 204.11(c)(1-2).

² See 8 CFR § 204.11(a).

³ See TVPRA § 235(d).

Post-18 Jurisdiction

The following states have expanded state court jurisdiction past the age of 18 through judicial decision or by statute: California, Maryland, Massachusetts, New Jersey, New York and Washington. A little over 40% of DACA recipients live in these six states. Out of 798,980 total DACA approvals as of September 30, 2017, 224,737 live in California, 9,957 in Maryland, 8,172 in Massachusetts, 22,471 in New Jersey, 43,138 in New York and 18,037 in Washington.

Source: *USCIS*

parents is not viable.⁴ The statute no longer requires a finding that reunification with both parents is not viable. This change opened the door to SIJS eligibility in the common situation where a child enters the United States to reunify with a non-abusive parent residing in the United States. That child is now able to seek SIJS based on the abuse, abandonment or neglect on the part of the other parent in the home country or in the United States. “Single parent” SIJS cases, as they are commonly called, are most often handled in state family court through a custody action. These cases can be challenging in both state court and before USCIS. Consult with local immigration practitioners and family court practitioners before seeking an order in family court and pursuing one of these cases.

Children who have been approved for SIJS are able to take the second step and apply for adjustment of status once their priority date (the date they filed the I-360 petition) becomes current. In addition to having an approved I-360 and a current priority date, in order to be eligible for adjustment of status, the child cannot be inadmissible under INA § 212(a). Certain grounds of inadmissibility do not apply to Special Immigrant Juveniles, others are waivable for humanitarian purposes, family unity, or when it is otherwise in the public interest, and others are not waivable at all. Whether a child’s priority date is current is determined by looking at the fourth preference employment-based category (EB-4) in the monthly *Visa Bulletin*. There are about 10,000 visas

available in this category annually. Since the May 2016 *Visa Bulletin*, this category has been backlogged for SIJS adjustment applicants from certain countries including Honduras, El Salvador and Guatemala. If the child is applying affirmatively (meaning that she is not in removal proceedings), and a visa is available, the child may simultaneously file the Form I-485, Application to Register Permanent Residence or Adjust Status, and seek permanent residence. If the child is in removal proceedings, the child may file for adjustment of status in immigration court or seek termination of the removal case and file the I-485 with USCIS.

CA State Superior Court Venues

As noted above, in order to qualify for SIJS, a minor must obtain an order with the necessary findings from an appropriate state juvenile court. This order is often referred to as the “SIJS predicate order,” because without it, it is not possible to move on to the next stage of the SIJS process: filing the I-360 petition with USCIS.

Any CA Superior Court can technically issue an SIJS predicate order, so long as it makes “judicial determinations about the care and custody of juveniles.”⁵ However, in practice and by state statute, the courts that most frequently issue SIJS predicate

⁴ See TVPRA § 235(d)(1).

⁵ *B.F. v. Superior Court*, 207 Cal. App. 4th 621 (2012).

order are dependency courts, probate courts, family courts and delinquency courts.⁶ Which venue is appropriate will depend on a minor's unique set of circumstances, including his or her age and whether he or she lives with a parent. In some cases, the venue will be dictated by proceedings that have already begun. For example, if the minor is already in delinquency proceedings, the predicate order must be sought in that venue. In other instances, proceedings will need to be initiated in the appropriate venue.

In all cases, it is imperative that the proceedings be initiated for the *purposes intended under state law*, and not for the sole purpose of obtaining an immigration benefit. For example, if guardianship proceedings are initiated, it must be because the child needs a legal guardian, and in the course of that necessary action an SIJS predicate order can be sought. *Additionally, it is highly recommended to seek experienced co-counsel or advice before attempting to request an SIJS predicate order in CA state superior court for the first time.* Each of these venues is unique and has its own set of requirements and challenges.

The following is a list of CA venues in which it is possible to seek an SIJS predicate order, depending on the particular circumstances of a case.

Dependency Court

Dependency court proceedings are initiated when a child protective services agency believes that a minor under the age of 18 needs protection from abuse and/or neglect. These agencies have different names across the state and are administered at the county level. Only the government can initiate dependency proceedings and they may only be initiated while a minor is under the age of 18 (although dependency can extend beyond 18 once it is established). When intervention is needed to protect a minor, the court will take jurisdiction pursuant to CA Welfare & Institutions Code Section 300, and the minor will be considered "dependent" for SIJS purposes. An SIJS

predicate order can be sought if the court orders that reunification is not possible with one or both of the minor's parents, and that it's not in the minor's best interest to return to his or her home country.⁷

Probate Court

CA probate courts handle Guardianship of the Person proceedings, which are initiated when a minor needs someone other than his or her parents to legally take care of them. A number of individuals, including minors 12 years of age or older, may file a petition to initiate guardianship proceedings. It is important to note that the minor's parents do not lose their parental rights when their child is appointed a legal guardian. Parents retain the right to petition the court to have the guardianship terminated and have their care, custody and control of the minor reestablished. A minor can file a request for an SIJS predicate order if he or she is already under a legal guardianship or as an attachment to the initial petition for guardianship.⁸ For purposes of the SIJS predicate order, along with the required reunification and best interest findings, the judge needs to order that the child be "placed under the custody of an entity or individual."

It used to be that guardianship proceedings had to be initiated before a minor reached the age of 18. However, that is no longer the case, and it is now possible in California to initiate guardianship proceedings for unmarried youth between the ages of 18-20. California law AB 900 came into effect on January 1, 2016 and established stronger protections for youth who previously had been eligible for SIJS under federal law, but were precluded from seeking SIJS predicate orders in California probate court because they were over the age of 18. Now that AB 900 is in effect, California state law is aligned with federal law, and has opened the path to SIJS protections for a significantly larger number of otherwise eligible youth. AB 900 also allows existing guardianships to be extended until the youth reaches

⁶ See Cal. Code Civ. Proc. § 155(a).

⁷ See Cal. Code Civ. Proc. § 155(a); *In re Y.M.* (2012), 207 Cal. App. 4th 892,915.

⁸ Requests for SIJS findings must be made in accordance with CA Rule of Court 7.1020 and on mandatory Judicial Council forms.

the age of 21, allowing time for the youth to complete the process of obtaining legal status through the SIJS process.⁹

Family Court

Family court proceedings are initiated when there are domestic issues, such as custody or divorce. These proceedings may be initiated by the parent(s) of a minor and are oftentimes the only venue available to seek an SIJS predicate order when the minor resides with a parent. SIJS predicate orders are requested in conjunction with one of the following family court proceedings: custody, parentage, divorce or legal separation, or domestic violence. Such requests must be made before the minor reaches the age of 18, because the family court loses jurisdiction over the custody when the minor reaches the age of majority.

Delinquency Court

Delinquency proceedings are initiated when a minor under the age of 18 is alleged to have violated a California law. Only the government can initiate delinquency proceedings and they may only be initiated while a minor is under the age of 18. It is normally a county district attorney's office that initiates the proceedings. If a minor is taken under the jurisdiction of the delinquency court pursuant to California Welfare & Institutions Code Section 602, he or she may be able to obtain an SIJS predicate order. The judge still needs to find that reunification with one or both parents is not possible and that it is not in the minor's best interest to return to his or her home country. For purposes of the required SIJS findings, the judge needs to order that the child be "placed under the custody of, an agency, entity or individual."¹⁰

Screening for SIJS Eligibility

Because SIJS involves protection of youth who have suffered from abuse, abandonment, neglect or

something similar, screening questions need to illicit information about a youth's upbringing, education, family relationships, delinquency history and other sensitive personal information. It is best to conduct the screening in a comfortable, confidential space, and it is important to ensure that the youth knows that the conversation is confidential. When appropriate, it is best to conduct the screening outside the presence of the youth's parents or other family members.

The following are sample questions for screening for SIJS eligibility:

- Who were you living with in your home country/while you were growing up?
- Who do you live with now?
- Do you know where your dad/mom is living now?
- When is the last time you spoke to him/her? How often do you speak to him/her?
- Have your parents always helped support you with money, clothes, food, shelter, etc.?
- Did you always have enough food/clothing/etc?
- Tell me about your school history?
- Tell me about your work history?
- When your parent(s)/caregiver(s) were upset with you, how did they punish you?
- Did your parent(s)/caregiver(s) ever say or do anything to you that made you feel bad?
- Did you always feel safe in your home while you were growing up?
- Have you ever been arrested?
- Have you ever talked to a judge?

Conclusion

The uncertainty surrounding the future of DACA makes this a challenging time for DACA recipients

⁹ See CA Probate Code §§ 1490, 1510.1, 1600, and 1601.

¹⁰ See *Leslie H. v. Superior Court* (2014), 224 Cal. App. 4th 340.

and advocates, alike. As the threat of losing the legal protections and work authorization afforded by DACA grows, it is important that advocates screen DACA recipients for eligibility for all potential forms of legal relief, including SIJS. The protection of vulnerable youth through SIJS requires advocates to operate under a unique combination of state and federal law. SIJS predicate orders can be sought in various California state supreme courts when there is a valid purpose under state law for the underlying case. If the SIJS predicate order is successfully obtained in state court, SIJS protection can then be sought before USCIS. Despite the difficult times, advocates should continue to work zealously on behalf of their clients and encourage DACA recipients not to give up in pursuit of their goals.