

# **IMMIGRATION BENCHBOOK**

## **For Juvenile and Family Court Judges**

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## CHAPTER 1

### INTRODUCTION AND OVERVIEW

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#### **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.

According to the 2000 Census, one out of four persons residing in California is foreign-born. California is home to more than one-third of all foreign-born persons who live in the United States.<sup>1</sup> The foreign-born in the United States have a variety of immigration status: 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 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

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<sup>1</sup> This and other statistics about population cited in the Benchbook come from “Profile of the Foreign-Born Population of the United States, 2000,” from *Current Population Reports, U.S. Studies* from the U.S. Census Bureau’s reports on the 2000 census. The report is available at [www.census.gov/prod/2002pubs/p23-206.pdf](http://www.census.gov/prod/2002pubs/p23-206.pdf), or look at the census website for material on the “foreign born.” The census contains extensive statistics on the foreign-born, but not on immigration status. A certain number of the foreign born now are U.S. citizens, or may have obtained citizenship from birth.

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 16<sup>th</sup> 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**) and relief for abused spouses and children under the Violence Against Women Act (**Chapter 3**).
- **Chapter 5** discusses several immigration aspects of adoption, including the important rule that an adoption must be finalized by a child's 16<sup>th</sup> birthday to have immigration effect.
- **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 the CIS for "screening."
- **Chapter 8** discusses issues pertaining to children in detention, including how juvenile courts can apply for jurisdiction over children who are detained by immigration authorities, and the effect of an immigration "hold" 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 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 now found at [www.uscis.gov](http://www.uscis.gov). Most cases of noncitizens currently in removal proceedings are handled by ICE. Their website is now found at [ww.ice.gov](http://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 Puerto Rico 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 18<sup>th</sup> 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<sup>2</sup>, as well as certain Northern Marianas Islands residents who choose not to become citizens. Noncitizen nationals have an immigration status that combines elements of citizenship and lawful permanent residency.

## **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).<sup>3</sup>

In some cases the spouse and children under the age of twenty-one 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.<sup>4</sup> 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.

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

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<sup>2</sup> 8 USC § 1101(a)(22). Not all residents or people with ties to these territories are noncitizen nationals. For further discussion see Daniel Levy, U.S. Citizenship and Naturalization Handbook (West Group) § 2:15 - § 2:23 (2004).

<sup>3</sup> See the corresponding section in 8 USC § 1101(a)(15), e.g. § 1101(a)(15)(B) for visitors visas.

<sup>4</sup> Sarah B. Ignatius & Elizabeth S. Stickney, Immigration Law and the Family (West Group) § 14:25 (2004).

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.<sup>5</sup>

#### **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. Recent changes in the law allow certain undocumented young people residing in California to attend state schools paying 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 an enormous numbers of American families are “mixed,” containing documented and undocumented persons.<sup>6</sup> 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 immigration outcome. Here are important deadlines to keep in mind.

***An adoption must be finalized by the child’s 16<sup>th</sup> birthday.*** For a child to get any immigration benefits from an adoption, the adoption must be legally completed before the child’s 16<sup>th</sup> birthday. There is an exception for adopted sibling groups: if natural

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<sup>5</sup> See *Social Security Act, Sec. 1614(a)(1)(B)*; 20 CFR § 416.1618

<sup>6</sup> It is difficult to obtain estimates of the undocumented population in the United States. One indication of the number of mixed families is that according to the 2000 Census one out of six children lives with a foreign-born head of household.

siblings are adopted and one sibling's adoption is completed before the child's 16<sup>th</sup> birthday, the adoption of the others can be finalized any time before their 18<sup>th</sup> birthdays. See § 5.1.

***A child applying for SIJS must remain under the jurisdiction of the juvenile court until the CIS finally approves the 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"). Current regulation provides that the court must retain jurisdiction over the application until the CIS actually grants permanent residency. The CIS grant can occur from a few months to a few years after the application is submitted, depending on the local office and the case. This can result in courts retaining jurisdiction longer than they normally would, or having to re-impose jurisdiction. 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

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- Special Immigrant Juvenile Status (“SIJS”) provides lawful permanent residency to *children who are under the jurisdiction of a juvenile court and who will not be reunified with their 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 that supplies additional information and practice guides is available for free from [www.ilrc.org](http://www.ilrc.org) (click “programs” and “Advocating for Children” to download the manual). Or order a printed copy from ILRC, 1663 Mission St., Suite 602, San Francisco CA 94103 (request SIJS Manual). Ordering and price information for printed copies can be found at [www.ilrc.org/publications.html](http://www.ilrc.org/publications.html). 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 SIJS application should be submitted to the CIS as soon as possible, because the juvenile court must retain jurisdiction over the noncitizen child until the CIS approves the application. See § 2.2 **Part F**. In dependency proceedings the application can be filed 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**

- **Benefits of SIJS application**
  - Provides immediate employment authorization and ability to remain in the United States, and eventual lawful permanent resident status (a “green card”) (see § 2.4)
  - Provides, generally, an easier way to immigrate than through family immigration as an adopted child (see § 2.6)

- **Requirements for Special Immigrant Juvenile Status (see § 2.2)**
  - The court either must declare the child to be a court dependent or must legally commit the child to a state department or agency (see § 2.2 Part A). Delinquency and probate courts may have special considerations (see § 2.2 Part H).
  - The court must find that parental reunification is not a viable option for the child because of abuse, neglect or abandonment. (see § 2.2 Parts B, C)
  - The court must find that it is not in the child's best interest to return to the country of origin. (see § 2.2 Part D)
  - To become a lawful permanent resident under SIJS, the child must not come within certain “grounds of inadmissibility” (see § 2.3)

*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 are or might be HIV positive
- 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 under the jurisdiction of a juvenile court and will not be returned to his or her parents due to abuse, neglect or abandonment may be able to become a lawful permanent resident, i.e. get a “green card.”<sup>7</sup> To do this, the child must submit two applications and meet two sets of requirements:

<sup>7</sup> “Special immigrant juvenile” is defined in INA § 101(a)(27)(J), 8 USC § 1101(a)(27)(J), reprinted in **Appendix A**. The law was created by § 153 of the Immigration Act of 1990. See also 8 USC §§ 1255(h), 1227(c) (waivers of inadmissibility and deportability for SIJS applicants).

- 1) The child must apply for **special immigrant juvenile status**, and
- 2) Based on the special immigrant juvenile application, the child also must apply for **permanent residency** (the green card). In immigration terminology, applying for permanent residency is called applying for **adjustment of status** to that of a lawful permanent resident. See § 2.3.

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

## § 2.2 Requirements for Special Immigrant Juvenile Status

The requirements for special immigrant juvenile status (or “SIJS”) are set out in federal statute<sup>8</sup> and regulations.<sup>9</sup> Eligibility is based on findings about the child made by a state juvenile court. The court must make the following findings:

- The court either must declare the child to be a court dependent or must legally commit the child to a state department or agency.
- The court must find that the child is “deemed eligible for long-term foster care,” because of abuse, neglect or abandonment. “Eligible for long-term foster care” is defined for this purpose in federal regulation to mean that family reunification is not a viable option, and generally the child will proceed to long-term foster care, adoption or guardianship.<sup>10</sup>
- The court also must find that it is not in the child's best interest to return to the country of origin.

### A. What Courts Can Make Findings Required for SIJS? How Are the Findings Presented?

Federal regulation provides that any court in the United States that has authority to make placement and custody decisions over a juvenile is a “juvenile court” able to make the SIJS findings.<sup>11</sup> This would include dependency and delinquency courts, and in some cases probate or other courts. For special considerations for delinquency courts, see Part H below.

The required findings will be set out in a simple order prepared especially for the SIJS application and signed by the state court judge. The child’s attorney or social

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<sup>8</sup> *Id.*

<sup>9</sup> 8 CFR § 204.11, reprinted in **Appendix A**.

<sup>10</sup> 8 CFR § 204.11(a).

<sup>11</sup> 8 CFR § 204.11(a). The regulation defines a “juvenile court” as a court “located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.”

worker generally will prepare the order for the court's signature. The findings can be simple: "Due to [abuse, neglect or abandonment] of the child, the court has made the child a court dependent [or placed the child in the custody of a state agency], and finds that the child is deemed eligible for long term foster care, and 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. A sample SIJS court order appears at **Appendix D**.

**B. The Court Must Find that the Child is "Deemed Eligible for Long-Term Foster Care," which means that Parental Reunification is Not a Viable Option**

The statute provides that the child must have been "deemed eligible for long term foster care" by the court, due to abuse, neglect or abandonment of the child.<sup>12</sup>

The federal regulation on SIJS defines "eligible for long term foster care" to mean that the court has found that "family reunification is no longer a viable option" and the child "normally will be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation."<sup>13</sup>

**Example:** In dependency proceedings, Sandra is in a permanent plan now that reunification efforts with both parents have ended. She is in long-term foster care but might be adopted. She is "deemed eligible for long-term foster care" and therefore eligible for SIJS.

**Example:** Esteban's mother is being offered reunification services. He has been living in foster care for months, but since the judge has not yet found that reunification is not viable, he is not eligible for SIJS.

**Example:** Marisa is on probation after her delinquency proceeding. The judge placed her in a group home after determining that she could not be placed with her parents due to abuse. She is eligible for SIJS.

The regulation provides that a child who has gone on to adoption or guardianship still qualifies for SIJS. However, some children need to remain in a juvenile court's jurisdiction until the final adjudication of both the SIJS petition and the application for adjustment of status (green card). See further discussion of this issue in **section F** below and **Chapter 5**, § 5.4.

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<sup>12</sup> 8 USC § 1101(a)(27)(J)(i).

<sup>13</sup> See 8 CFR § 204.11(a).

<sup>15</sup> See 8 USC § 1101(a)(27)(J)(iii), as amended November 27, 1997: "in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status..."

### **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 specifically identify whether abuse, neglect or abandonment was the basis for the dependency or placement order and the finding that the child was “deemed eligible for long term foster care” (i.e., that reunification with the parents was not viable). For example, the order may state, “The minor made a dependent by this Court and deemed eligible for long term foster care under Calif. W&I Code §§ 300(a) (physical abuse) and 300(d) (sexual abuse)” or “The above orders and findings were made due to abandonment and neglect of the minor.” See sample SIJS court order in **Appendix D**.

*CIS “consent” and requests for additional information or documents regarding abuse.* Under a 1997 amendment to the SIJS law, the CIS must “consent” to the juvenile court judge’s order serving as a basis for the SIJS application.<sup>15</sup> Some CIS officials have interpreted this ambiguous amendment to mean that they have the power to evaluate whether the child actually suffered the required abuse, neglect, or abandonment because they may request records from the juvenile judicial proceedings. In some cases CIS officers have demanded sensitive court and agency documents regarding the abuse, neglect or abandonment of the child. However, in May 2004, CIS issued a field memorandum controlling this question to remind adjudicators that confidentiality rules often restrict disclosure of juvenile-related records. The memorandum also stated that CIS adjudicators “generally should not second-guess the court rulings or question whether the court’s order was properly issued.”<sup>16</sup> If the court receives a request from CIS that the court considers illegal or inappropriate, along with other responses it may be helpful for the child’s advocate to consult with an immigration resource center (see **Chapter 11** for referrals) who may be able to assist parties to negotiate the issue with the CIS. This issue is further discussed in the Immigrant Legal Resource Center’s SIJS manual described in **Chapter 11**. A copy of the memorandum appears in **Appendix B** of this manual, and also can be found at the government website at [http://uscis.gov/graphics/lawsregs/handbook/SIJ\\_Memo\\_052704.pdf](http://uscis.gov/graphics/lawsregs/handbook/SIJ_Memo_052704.pdf).

### **D. The Court Must Rule that It Is Not in the Child’s Best Interest to Be Returned to His or Her Home Country.**

The court should include in its SIJS order a finding that it is not in the child’s best interest to be returned to the home country.<sup>17</sup> In practice the evidence for this finding may range from a home study conducted by a foreign social service agency to determine

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<sup>16</sup> May 27, 2004, “Memorandum #3” issued by William R. Yates, Associate Director for Operations, reprinted as **Appendix B**.

<sup>17</sup> 8 USC § 1101(a)(27)(J)(ii) defines a special immigrant juvenile as an immigrant “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 the parent’s previous country of nationality or country of last habitual residence ...”

that a grandparent's home is not appropriate, to simply interviewing the child to learn that there are no known appropriate family in the home country.

### **E. The Child Must Submit Some 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.”<sup>18</sup>

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.<sup>19</sup>
- A variety of foreign documents as well as affidavits are acceptable proof of age.<sup>20</sup> 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.<sup>21</sup>

### **F. The Juvenile Court Must Retain Jurisdiction Until the CIS Finally Grants the Application**

Current federal regulation requires that the applicant remain under juvenile court jurisdiction until the immigration application is finally decided and the applicant is a lawful permanent resident.<sup>22</sup> *The CIS interview may take place from three months to*

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<sup>18</sup> 8 CFR § 204.11(d)(1). Immigration counsel may be able to assist with finding a foreign birth certificate.

<sup>19</sup> 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 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.).

<sup>20</sup> 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.

<sup>21</sup> Under Calif. 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 cert., but once that is shown, the Court Order Delayed Registration of Birth should be accepted.

<sup>22</sup> 8 CFR § 204.11(c)(5).

*three years, or even longer, after the SIJS application is filed*, depending on the local CIS backlog and complexity of the case. Jurisdiction must be retained over the child throughout this process or the SIJS application may be denied.

The regulation in some cases will cost juvenile systems time and resources by requiring children to stay longer under court jurisdiction than they otherwise would. The rule may be changed when the CIS publishes an updated regulation, but it is not possible to predict when that might occur. Counsel may be able to persuade the CIS to expedite the interview date if the child is about to age out of the juvenile court system.<sup>23</sup>

When the child goes to the CIS interview, s/he must have a copy of the minutes from his or her most recent court hearing to establish that s/he remains under juvenile court jurisdiction.

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 and eligible for long-term foster care, despite the fact that a final adoption normally would terminate court jurisdiction.<sup>24</sup> See discussion of the adoption issue in **Chapter 5**, § 5.4.

### **G. The Applicant Must Be Under 21 and Unmarried**

Under CIS regulations, any unmarried person under 21 who meets the SIJS requirements can apply for SIJS.<sup>25</sup> A 19-year-old can file a SIJS application and attend the CIS interview -- so long as s/he remains under the jurisdiction of a juvenile court, eligible for long term foster care and the subject of a court order declaring that it is not in his or her best interest to return to the home country.

**Example:** Julia entered the foster care system when she was 14 years old. Because social workers and counsel had not heard about SIJS earlier, Julia did not apply for SIJS until she was 19. The juvenile court retained jurisdiction over Julia until she was 20 and the CIS granted her SIJS application.

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

### **H. Special Considerations in Other Juvenile Court Proceedings**

Many children in delinquency proceedings and some children in placed in guardianship through a probate court have been granted SIJS. The CIS, however, has never discussed delinquency proceedings or guardianship cases in memoranda, and it is possible that a child will encounter a CIS officer who believes that SIJS orders only can

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<sup>23</sup> For more information on requesting a CIS interview to be expedited, see May 27, 2004, "Memorandum #3," supra, p. 6, reprinted as **Appendix B**.

<sup>24</sup> May 27, 2004, "Memorandum # 3," supra, p. 4, fn. 8, reprinted as **Appendix B**.

<sup>25</sup> 8 CFR § 204.11(c)(1).

come from dependency court and not delinquency, probate, or other courts. There is no basis in the controlling law for this view, but because of this possibility as well as the additional issues that delinquency dispositions can raise, a child in delinquency or legal guardianship proceedings applying for SIJS should consult with or be represented by an expert immigration attorney.

The statute specifically makes SIJS available to children in all types of juvenile court proceedings other than dependency. The statute defines a special immigrant juvenile as an immigrant who is in the United States and

“who has been declared dependent on a juvenile court located in the United States or whom such court has legally committed to, or placed in the custody of, an agency or department of a State, and who has been deemed by that court eligible for long-term foster care due to abuse, neglect or abandonment”<sup>26</sup> (emphasis added)

The regulation defines a “juvenile court” as a court “located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.”<sup>27</sup> A court making rulings in delinquency proceedings meets these criteria. Other courts, such as probate courts in some areas that make determinations about the care and custody of juveniles also may be a “juvenile court” for this purpose.

***Delinquency and “Deemed Eligible for Long-Term Foster Care.”*** For the child to qualify for SIJS, the delinquency judge must issue a court order finding that the child is “eligible for long-term foster care” due to abuse, neglect or abandonment, and that it is in the child’s best interest not to be returned to the home country. As discussed above, federal regulation defines “eligible for long-term foster care” to mean that family reunification is no longer a viable option, and that the child normally will go on to foster care, adoption or guardianship.<sup>28</sup> In California children in delinquency proceedings may be placed in group homes or treatment facilities if parental reunification is not viable due to abuse, neglect, or abandonment. Or, the abused child may go on to guardianship or adoption, which are also acceptable alternatives under the SIJS regulation. (See discussion of adoption and SIJS in **Chapter 5**, § 5.4.)

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

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<sup>26</sup> 8 USC § 1101(a)(27)(J)(i).

<sup>27</sup> 8 CFR § 204.11(a).

<sup>28</sup> Id.

***Dangers of Delinquency.*** A few types of delinquency findings are dangerous because they are “grounds of inadmissibility” that can make a child ineligible for SIJS. The most dangerous finding is sale or possession for sale of drugs (as opposed to simple possession). A delinquency finding regarding prostitution or sex offenses can also cause problems. See further discussion in **Chapter 7**. However, many juvenile delinquency dispositions, including many offenses involving violence or theft, do not cause immigration problems. Again, any child with a delinquency record should have an expert in this area review the case at least to evaluate eligibility.

***Legal Guardianship and SIJS.*** A child may likewise qualify for SIJS when placed under legal guardianship through a probate court. CIS District Offices in California have approved SIJS applications submitted with a court order signed by a probate judge. All of the same eligibility requirements and applications requirements apply.<sup>29</sup>

### § 2.3 Application for 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. A child who comes 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, prostitution, or other crimes,
- are HIV positive
- are classed as mentally ill, suicidal, or a sexual predator
- committed visa fraud or 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 HIV or other designated diseases, and whether the child is mentally ill. The child also must truthfully answer **questions on the I-485 form** 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

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<sup>29</sup> Nonprofits legal services providers Public Counsel in Los Angeles and Legal Services for Children in San Francisco have been successful with SIJS applicants in probate court. The Center for Constitutional Law and Human Rights has also published a manual on SIJS and legal guardianships. Information about all three organizations can be found in **Chapter 11**.

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 child or any “responsible adult” can complete the I-360 Petition for Special Immigrant Juvenile status and I-485 Application for Adjustment of Status. Depending on local office rules the packet will be submitted to the local CIS by mail or in person. (Forms can be obtained from the CIS through their website at [www.uscis.gov](http://www.uscis.gov) or by calling CIS national customer service at 1-800-375-5283. The CIS website also includes information about local filing procedures for CIS district offices and sub-offices.) 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.<sup>30</sup>

Soon after receiving the application, the CIS will grant the applicant employment authorization. It will schedule a date for the SIJS interview, which might take place anytime from three to thirty-six months after the application is filed, depending on the backlog for adjustment interviews at the individual CIS office. If the child leaves juvenile court jurisdiction before the interview, current CIS policy is to deny the case. It is possible that the CIS will make this policy less strict in the future.

At the interview the CIS may approve the case; request more information; or deny the case. There is an appeal process in case of denial. Further discussion and a sample application packet appear in the SIJS manual referenced in **Chapter 11**.

#### **§ 2.5 Original parents cannot benefit through grant of SIJS to child**

The statute provides that once SIJS is granted, the original parents (with whom the court refused to reunify the child) cannot derive any immigration benefit from the child.<sup>31</sup> Otherwise a child who gained permanent residency under SIJS and then became a U.S. citizen over the age of 21 would legally be able to petition for his or her original parents. See discussion of family immigration at § 4.2.

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

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<sup>30</sup> 8 CFR § 103.7(c). See discussion of applying for fee waivers in the SIJS manual cited in **Chapter 11** (Appendix I of that manual).

<sup>31</sup> 8 USC § 1101(a)(27)(J)(iii)(II).

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; the child may have to travel outside the United States for a few days to complete processing for permanent residency;<sup>32</sup> 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.

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 16<sup>th</sup> birthday. The only exception is that in the case of a sibling group. There, if one sibling’s adoption is completed by the 16<sup>th</sup> birthday, the others may be completed before their 18<sup>th</sup> birthdays. See **Chapter 5**, § 5.1.

### § 2.7 Children in immigration custody who apply for SIJS

If an immigrant child *is already in immigration actual or constructive custody before coming to juvenile court*, a juvenile court judge cannot make custody decisions about the child without the Bureau of Immigration and Custom Enforcement’s (ICE) permission.<sup>33</sup>

***What is “actual or constructive” immigration custody?*** Immigration custody of juveniles may be handled by ICE or the Office of Refugee Resettlement (ORR). While ICE has not defined these terms in writing, it appears that actual or constructive custody includes:

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<sup>32</sup> 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.

<sup>33</sup> No state juvenile court “has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General [CIS] unless the Attorney General specifically consents to such jurisdiction.” 8 USC § 1101(a)(27)(J)(iii)(as amended in 1997).

- Children currently held in ICE detention or ORR facilities;
- Children currently held by ICE in local jails or delinquency centers, where ICE is paying for the costs of detention; and
- Children currently held in an ICE- or ORR-sponsored “soft detention,” run by a private or non-profit group for unaccompanied immigrant children under ICE or ORR authority and pay. The site may meet state foster care licensing requirements.

If a child is not in such a setting, it appears that the child is not in “constructive” immigration custody and a juvenile court judge does not need permission to rule on the child’s placement. The fact that a child is in removal or deportation proceedings, or once was in immigration custody but has since been released, does not constitute custody for this purpose.

***Obtaining ICE Consent.*** The ICE has stated that requests for ICE consent for a court to take jurisdiction over a child in immigration custody should be made in writing to the ICE District Director with jurisdiction over the juvenile’s place of residence.<sup>34</sup> A new policy may be emerging that the request should be sent directly to the ICE Central Office in Washington D.C.<sup>35</sup> According to an internal memorandum issued previously by the INS, the ICE should consent to the juvenile court taking jurisdiction over the child if: (1) it appears that the juvenile would be eligible for SIJS if a juvenile court order is issued; and (2) in ICE judgment, the dependency proceeding would be in the best interest of the juvenile.<sup>36</sup>

Since dependency proceedings are expert governmental deliberations dedicated to identifying and implementing a plan that is in the best interests of the child, it should be an extremely rare case where the District Director decides that holding such proceedings are not in the child’s best interest. In practice, however, many local District Directors have denied such cases and the matter has been litigated. If the ICE Central Office takes over the role of providing consent, the situation may ease. Advocates dealing with children who may be in ICE custody should contact a resource center for information on how to best prepare a request for consent.<sup>37</sup> See **Chapter 11** for Immigration Resources.

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<sup>34</sup> July 9, 1999 “Memorandum #2” issued by Thomas E. Cook, Acting Assistant Commissioner, reprinted in **Appendix C**. See also May 27, 2004 “Memorandum #3,” supra, p. 2, reprinted as **Appendix B**.

<sup>35</sup> At this writing that would be to John Pogash, Office of Juvenile Affairs, 801 I Street NW, Suite 800, Washington D.C. 20536, telephone 202-307-6007. Counsel should confirm the address and position of the person to whom such requests should be sent. The request should be copied to local Juvenile Coordinator, District Director, District Counsel and Immigration Judge.

<sup>36</sup> July 9, 1999 “Memorandum #2”, supra.

<sup>37</sup> In California, Public Counsel in Los Angeles, Legal Services for Children in San Francisco, and CLINIC throughout the state all are actively working with detained children and SIJS. See **Chapter 11** for contact information.

## CHAPTER 3

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

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- Noncitizens who have been *abused by a U.S. citizen or permanent resident spouse or parent* 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 is available from ILRC, 1663 Mission St., Suite 602, San Francisco CA 94103 (please fax 415-255-9792 for order form). That manual can also be downloaded for free from the ILRC website at [www.ilrc.org](http://www.ilrc.org). 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

- 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 their spouses and children through a “family visa petition.” In some abuse situations, spouses or parents with lawful status use immigration status to exert control over their undocumented family members, by threatening to call ICE on them and refusing to file petitions for them. The Violence Against Women Act permits an abused spouse or child of a USC or LPR 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. and will be eligible for certain public benefits.

**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).**<sup>38</sup>
- **Abused spouses of Lawful Permanent Residents (LPRs).**<sup>39</sup>

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<sup>38</sup> 8 USC § 1154(a)(1)(A)(iii)

<sup>39</sup> 8 USC § 1154(a)(1)(B)(ii).

- **Non-abused spouses of USCAs or LPRs where the child is abused, even if the child is not related to the USC or LPR abuser.**<sup>40</sup>
- **Abused children of USCAs or LPRs.**<sup>41</sup>

**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.<sup>42</sup> The children will qualify for any benefits the parent receives.

### **§ 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).

- The abuse may have occurred before or after the abuser became a USC or 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 self-petition was *filed within two years* of the date the abuser lost his lawful immigration status.<sup>43</sup> 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.<sup>44</sup>

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" visa for victims of serious crime who cooperate 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 H-1B 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.

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<sup>40</sup> *Id.*

<sup>41</sup> 8 USC § 1154(a)(1)(A)(iv) [children of U.S. citizens]; 8 USC § 1154(a)(1)(B)(iii) [children of lawful permanent residents].

<sup>42</sup> USC § 1154(a)(1)(A).

<sup>43</sup> 8 USC § 1154(a)(1)(B)(ii)(II)(aa)(CC)(aaa), 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(CC)(bbb).

<sup>44</sup> 8 USC § 1154(a)(1)(A)(vi); 8 USC § 1154(a)(1)(B)(v)(I).

### § 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.<sup>45</sup> This definition is broadly and flexibly defined in CIS regulations and memoranda, and encompasses physical, sexual, and psychological acts, as well as economic coercion.<sup>46</sup> A person who has suffered no physical abuse may still be eligible to self-petition.<sup>47</sup> The abuse must rise to a certain level of severity, however, to constitute battery or extreme cruelty.<sup>48</sup> 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.

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.<sup>49</sup> 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.<sup>50</sup>

### § 3.4 The self-petitioner lived with (or visited) the LPR/USC abuser

The self-petitioner must have resided at some point with the abuser, either inside or outside the United States.<sup>51</sup> 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.

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<sup>45</sup> 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].

<sup>46</sup> 8 CFR § 204.2(c)(1)(vi) [abused spouses]; 8 CFR § 204.2(e) [abused children].

<sup>47</sup> *Id.*

<sup>48</sup> 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].

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 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].

For children, residence with the abusive USC parent includes any period of *visitation* in the United States.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

### § 3.6 Special issues for self-petitioning spouses

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

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.<sup>55</sup>

- 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.<sup>56</sup> The divorce decree need not specifically state that the termination of the marriage was due to domestic violence.<sup>57</sup> 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

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<sup>52</sup> 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 is not included in the statute.

<sup>53</sup> 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.

<sup>54</sup> 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].

<sup>55</sup> 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]. 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.

<sup>56</sup> 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].

<sup>57</sup> 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.

- requirements may be sufficient to demonstrate a connection between the divorce and the battering or extreme mental cruelty.”<sup>58</sup>
- 2) If the marriage was terminated for any reason *after the self-petition was filed*, that termination will not affect the self-petition.<sup>59</sup>
  - 3) If the abusive spouse is a USC and dies, the self-petition can be filed within two years of his death.<sup>60</sup> This provision does NOT apply to the spouses of abusive permanent residents.
  - 4) If the marriage was not valid because a prior or concurrent marriage of the abuser's 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.”<sup>61</sup>
  - 5) If the self-petitioner remarries after the approval of the self-petition, the self-petition will not be revoked.<sup>62</sup>

## **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.<sup>63</sup> 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.<sup>64</sup> A self-petition will not be denied just because the spouses are no longer living together and the marriage is no longer viable.<sup>65</sup>

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-

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<sup>58</sup> *Id.*

<sup>59</sup> 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].

<sup>60</sup> 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(CC)(aaa).

<sup>61</sup> 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].

<sup>62</sup> 8 USC § 1154(a)(1)(h).

<sup>63</sup> 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).

<sup>64</sup> *Lutwak v. U.S.*, 344 U.S. 604, 611 (1953); *Bark v. INS*, 511 F.2d 1200 (9<sup>th</sup> 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).

<sup>65</sup> 8 CFR § 204.2(c)(1)(ix).

petitioner will have the additional burden of showing that the abuser's prior marriage was a good faith marriage.<sup>66</sup>

### § 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. (Note that SIJS, discussed in **Chapter 2**, was not an option here because Marc was reunified with a parent.)

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

- 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<sup>67</sup> (see § 3.2);
- The LPR or USC abused the self-petitioning child<sup>68</sup> (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)<sup>69</sup>.

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;

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<sup>66</sup> 8 USC § 1154(a)(2)(A)(ii).

<sup>67</sup> 8 USC § 1154(a)(1)(A)(iv) [children of U.S. citizens]; 8 USC § 1154(a)(1)(B)(iii) [children of lawful permanent residents].

<sup>68</sup> *Id.*

<sup>69</sup> 8 USC § 1154(a)(1)(A)(iv) [children of U.S. citizens]; 8 USC § 1154(a)(1)(B)(iii) [children of lawful permanent residents].

- 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.<sup>70</sup>

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.<sup>71</sup> The child must be under the age of 21 and unmarried at the time of filing.

**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 21<sup>st</sup> birthday. She will be automatically switched into a different visa category, which can lead to a longer delay in becoming a permanent resident.<sup>72</sup> However, she will continue to have employment authorization and protection against deportation during this extended waiting period.<sup>73</sup>

**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.<sup>74</sup>

## **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.<sup>75</sup> The derivative child does not have to show that he 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.<sup>76</sup> 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 if committed within a certain time period (the previous three years for VAWA applicants).

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<sup>70</sup> 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.

<sup>71</sup> 8 CFR § 204.2(e)(1)(ii).

<sup>72</sup> 8 USC § 1154(a)(1)(D).

<sup>73</sup> *Id.*

<sup>74</sup> 8 USC § 1154(a)(1)(h).

<sup>75</sup> 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].

<sup>76</sup> 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].

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.<sup>77</sup> 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.<sup>78</sup> 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**

The self-petition is filed with the CIS Vermont Service Center. The application includes CIS Form I-360 (available from [www.cis.gov](http://www.cis.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.

If the self-petition is apparently approvable, CIS will send the self-petitioner or her representative a Notice of Prima Facie Eligibility within one to three 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.

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<sup>77</sup> See, e.g., 8 USC §§ 1154(a)(1)(C), 1182(h), 1227(a)(7)(A).

<sup>78</sup> 8 CFR § 204.2(e)(2)(v).

## 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.<sup>79</sup> Some forms of family abuse might be held to constitute such circumstances.<sup>80</sup> See § 4.4. 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

- 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.

<sup>79</sup> 8 USC § 1158(a)(2)(B); 8 CFR § 208.4.

<sup>80</sup> 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).

- 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, Central Americans, and nationals of former Soviet Bloc countries. See § 4.10

#### **§ 4.1 United States Citizens born abroad: inherited or derived U.S. citizenship**

Some people who were born outside the United States **inherited U.S. citizenship** from their U.S. citizen parents without knowing it. A person born abroad who believes that his or her parent or grandparent might have been a U.S. citizen should obtain immigration counsel to analyze the laws governing “acquisition of citizenship.”<sup>81</sup>

A second way that many persons are citizens without knowing it is through “derivation of citizenship.” A child automatically becomes a U.S. citizen if, before he reaches the age of 18, the following three events happen in any order: (1) he becomes a permanent resident, (2) at least one of his parents is a U.S. citizen, and (3) he lives in the United States in that parent’s legal and physical custody.

This rule 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

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<sup>81</sup> A chart outlining eligibility for derivation and acquisition of U.S. citizenship appears at **Appendix H**.

of 16, and has resided at any time in the legal custody of the U.S. citizen for two years;<sup>82</sup> and (3) is residing in the legal and physical custody of the U.S. citizen parent.<sup>83</sup>

Once a person believes that she can establish that she is a U.S. citizen, she should go to a U.S. passport office to obtain a passport to use as proof of citizenship. This is a far faster and safer method than going to the CIS to request a “certificate of citizenship.”

## § 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. Some people are able to immigrate very soon after the visa petition is approved. Others may have to wait up to ten or twelve years or more. How long the person must wait to immigrate depends upon what country the person was born in and on the kind of visa petition that was submitted. For example, a spouse or unmarried child of a U.S. citizen may immigrate quite quickly, whereas the spouse or child of a permanent resident will have to wait some years.

***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).

- 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.<sup>84</sup>

***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 or more may file a petition for a parent; a permanent resident cannot file for a parent. There is no requirement that the

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<sup>82</sup> There are different rules for someone who was adopted as an orphan. See 8 USC § 1101(b)(1)(F).

<sup>83</sup> See 8 USC § 1431, further discussion in **Chapter 5**, and the ILRC’s manual entitled Naturalization: A Guide for Legal Practitioners and Other Community Advocates.

<sup>84</sup> See *Matter of McKee*, 17 I&N 332 (BIA 1980).

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<sup>85</sup>); adopted children (if the adoption was complete by age 16 for at least one adopted sibling<sup>86</sup>); and children born out of wedlock.<sup>87</sup>

***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 one of two visas designed to protect victims and provide them with temporary or permanent lawful status.<sup>88</sup>

The “T” visa is available to victims of severe forms of trafficking in persons.<sup>89</sup> 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.<sup>90</sup>

#### A. “T” Visas for Victims of Alien Trafficking

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.

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<sup>85</sup> 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)

<sup>86</sup> Eligibility for immigration can be established through adoption if the adoption was completed by the child’s 16<sup>th</sup> 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**.

<sup>87</sup> 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).

<sup>88</sup> The Victims of Trafficking and Violence Prevention Act. Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000) [VTVPA].

<sup>89</sup> 8 USC §§ 1101(a)(15)(T), 1184(o), 1255(l).

<sup>90</sup> 8 USC §§ 1101(a)(15)(U), 1184(p), 1255(m).

To be eligible for a T visa, the applicant must have been a victim of a “severe form of trafficking in persons.”<sup>91</sup> 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;<sup>92</sup>
- Is not inadmissible (see **Chapter 10**). There are extensive possible waivers of inadmissibility grounds for T visa applicants, however, including potential waiver of any criminal conviction.

### **Important Deadlines for T Visa Filing**

There is a filing deadline for cases in which victimization occurred prior to October 28, 2000. Persons in this situation must have applied for T-1 status before January 31, 2003. There is an exception for children, who may apply within one year of their 21<sup>st</sup> birthday or January 31, 2003, whichever is later. If the applicant misses the deadline, he or she may still apply if he or she can show exceptional circumstances that prevented filing in a timely manner. Exceptional circumstances may include severe physical or mental trauma.<sup>94</sup> There is no filing deadline for cases in which victimization occurred after October 28, 2000. However, there is an annual limit of 5000 T visas which can be granted annually.<sup>95</sup>

<sup>91</sup> 8 USC § 1101(a)(15)(T)(i)(I).

<sup>92</sup> 8 USC §§ 1184(o)(1), 1184(o)(1).

<sup>94</sup> 8 CFR § 214.11(d)(4).

<sup>95</sup> 8 USC § 1184(o)(2).

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.<sup>96</sup>

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.<sup>97</sup>

## **B. “U” Visas for Victims of Serious Crimes Who Are Cooperating with Law Enforcement**

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.<sup>98</sup>

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 being helpful, or is likely to be helpful” in the investigation or prosecution of the criminal activity.<sup>99</sup>

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<sup>96</sup> 8 CFR § 214.11(k)(4).

<sup>97</sup> 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.

<sup>98</sup> 8 USC § 1255(m) [*sic*].

<sup>99</sup> See 8 USC § 1101(a)(15)(U)(i) - (iii). See also 8 USC § 1184(p) (*sic*).

Note that 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.<sup>100</sup>

Because regulations have not yet been promulgated, actual U visas are not being issued yet. However, the CIS has issued interim guidance stating that persons who may be eligible for U visas should not be removed from the United States until they have had the opportunity to avail themselves of the law and may be granted employment authorization and other assistance.<sup>101</sup> For more information about obtaining U visa interim relief, see **Chapter 11** for more resources and the ILRC manual entitled, "How to Obtain U Interim Relief: A Brief Manual for Advocates Assisting Immigrant Victims of Crime."

#### § 4.4 Asylum and withholding based on fear of persecution

People who fear returning to their home country can apply for **asylum or withholding of removal**.<sup>102</sup> 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 bar eligibility for asylum and withholding.

Applicants *must* obtain expert representation before applying for asylum. The test for asylum is complex: the person must fear persecution from the government or a group that it is unwilling or unable to control, based on the person's race, religion, political opinion, nationality, or social group. If the asylum application is denied the person will not even receive temporary employment authorization.

**One year application deadline.** Current law requires applicants to apply for asylum within one year of entering the United States, unless they were prevented from applying by extreme circumstances or conditions that affect their eligibility for asylum

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<sup>100</sup> 8 USC § 1101(a)(15)(U)(ii).

<sup>101</sup> Cronin, Act'g. Exec. Assoc. Comm'r., Office of Programs, INS Memo entitled: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum # 2 - "T" and "U" Nonimmigrant Visas (August 30, 2001), reprinted at 78 *Interpreter Releases* 44, pp.1758-1771, Appendix II (November 12, 2001).

<sup>102</sup> 8 USC §§ 1158, 1231(b).

have changed.<sup>103</sup> A child's detention by CIS can constitute an extreme circumstance justifying tolling of the one year filing requirement for asylum.<sup>104</sup> Presumably situations involving domestic violence also could justify tolling that requirement. Proposed legislation would remove the one-year requirement; parties should keep abreast of developments.

In some cases asylum has been granted based on severe domestic violence or issues involving gender, even if the persecution and abuse was committed just by family members.<sup>105</sup> Special guidelines provide benefits to children applying for asylum.<sup>106</sup>

#### **§ 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.<sup>107</sup> 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.<sup>108</sup> The applicant must show that it is "more likely than not" that he would be tortured in the proposed country of removal.<sup>109</sup> The torture must be "acquiesced to" by a public official.<sup>110</sup>

#### **§ 4.6 Temporary Protected Status (TPS)**

People from certain countries that have experienced devastating natural disaster or civil strife may be able to obtain **Temporary Protected Status (TPS)**,<sup>111</sup> which provides temporary permission to be in the United States and temporary work authorization. In recent years the United States has designated countries such as Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Sudan, and Somalia for TPS or similar relief. The applicant need not prove that she will be singled out for persecution. She need only

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<sup>103</sup> INA §§ 208(a)(2)(B), 208 (a)(2)(D)

<sup>104</sup> *Matter of Y-C-*, 23 I&N 286 (BIA 2002).

<sup>105</sup> For more information, see "Seeking Asylum from Gender Persecution: Progress Amid Uncertainty," 79 Interpreter Releases 160 (May 13, 2002). An excellent resource for information on gender-based asylum is the Center for Gender & Refugee Studies (CGRS), a project of UC Hastings College of Law's Center for Human Rights and International Justice. Their website is [www.uchastings.edu/cgrs/](http://www.uchastings.edu/cgrs/). Resources available on their website include summaries of gender asylum cases, case law, a brief bank, and link to other, relevant online resources.

<sup>106</sup> 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](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.

<sup>107</sup> United States Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984).

<sup>108</sup> 8 CFR § 208.17.

<sup>109</sup> 8 CFR § 208.16(c)(2).

<sup>110</sup> 8 CFR § 208.18(a).

<sup>111</sup> 8 USC § 1254a.

prove that she is a national of a current TPS country and has been in the United States since a required date.

For updated information about what countries currently are designated TPS and what requirements nationals of those countries must meet to qualify, go to [http://uscis.gov/graphics/services/tps\\_inter.htm](http://uscis.gov/graphics/services/tps_inter.htm) or go to [www.cis.gov](http://www.cis.gov) and follow directions to get to information about temporary protected status.

#### § 4.7 Cancellation of removal for persons who are not permanent residents

Noncitizens who have lived in the United States illegally for ten years or more and who are put into deportation (“removal”) proceedings can apply to the immigration judge for **cancellation of removal**, if they have 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.<sup>112</sup>

**Example:** Marta is 17 years old and has a U.S. citizen baby with serious medical problems. She has lived undocumented in the U.S. since she was five years old. If she were placed in removal proceedings, Marta could apply for cancellation of removal by showing that her baby would suffer if they went back to Marta’s home country.

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

**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. The person only has to have resided in the U.S. for three years, but she must show that deportation would cause extreme hardship to her, her children, or her parents.<sup>113</sup>

#### § 4.8 Registry

People who have lived continuously in the United States since January 1, 1972 may apply for lawful permanent residency under **registry**.<sup>114</sup> To qualify, they must be admissible and must be able to establish good moral character.

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<sup>112</sup> 8 USC § 1229b(b).

<sup>113</sup> 8 USC § 1229b(b)(2).

<sup>114</sup> 8 USC § 1259.

#### § 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.<sup>115</sup> To be 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

Recent 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.<sup>116</sup>

***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).<sup>117</sup>

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<sup>115</sup> 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.

<sup>116</sup> 8 USC § 1152.

<sup>117</sup> 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

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#### **SUMMARY**

- For a child to get immigration benefits from an adoption, *the adoption must be legally completed before the child's 16<sup>th</sup> birthday*. There is an exception for adopted sibling groups. See § 5.1.
- The 16<sup>th</sup> 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 16<sup>th</sup> birthday deadline is important. See § 5.3.
- Generally an applicant for special immigrant juvenile status (SIJS, see **Chapter 2**) must remain under the jurisdiction of a juvenile court until the CIS finally grants the status, a process that can take months or a few years. However, if the plan is for the child to be adopted, the juvenile court should not need to retain jurisdiction over the child once the adoption is finalized. See § 5.4.

#### **§ 5.1 How adoption creates a parent/child relationship for immigration purposes: the 16<sup>th</sup> birthday and two-year custody requirements**

##### **A. The Requirements of a Completed Adoption Before the Child's 16<sup>th</sup> 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 only 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.<sup>118</sup>*

**Judicial and state authorities must understand the crucial nature of the 16<sup>th</sup> 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 16<sup>th</sup> birthday. Because the adoption did not occur before her 16<sup>th</sup> 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.<sup>119</sup> 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.

## **B. Exceptions: Sibling Adoption and Overseas Orphan Adoption**

There are two exceptions to these requirements, the most important 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 18<sup>th</sup> birthdays. The two-year lawful custody requirement still applies.<sup>120</sup> The siblings do not have to be adopted at the same time, and the younger

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<sup>118</sup> 8 USC § 1101(b)(1)(E)(i).

<sup>119</sup> 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

<sup>120</sup> 8 USC § 1101(b)(1)(E)(ii).

sibling does not have to have met the two-year requirement before the older sibling is adopted.<sup>121</sup>

**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 16<sup>th</sup> birthday.

The less important exception concerns adopted children who are classed as "orphans" under the INA. They are not subject to the two-year lawful custody requirement, although they do need to be adopted by age 16.<sup>122</sup> 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.

### **§ 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 for their adoption to be completed before their 16<sup>th</sup> 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;<sup>123</sup> and (3) the child currently resides in the legal and physical custody of the U.S. citizen parent.<sup>124</sup>

**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 15<sup>th</sup> birthday his foster parents, one of whom was a U.S. citizen, adopted him. On the

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<sup>121</sup> 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.

<sup>122</sup> 8 USC § 1101(b)(1)(F).

<sup>123</sup> 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.

<sup>124</sup> See 8 USC § 1431, INA § 320 and the ILRC's manual entitled Naturalization and U.S. Citizenship: The Essential Legal Guide.

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**

In California undocumented parents may adopt children despite the parents’ lack of lawful immigration status.<sup>125</sup>

Note that even where the parents have no lawful status, it is important where possible to complete the adoption before the 16<sup>th</sup> 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 16<sup>th</sup> 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 10 he was placed in foster care with his undocumented aunt, who adopted him before his 16<sup>th</sup> birthday. Upon his 21<sup>st</sup> birthday, as a U.S. citizen Esteban can file a visa petition for his adoptive mother to obtain permanent residency.

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<sup>125</sup> 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)

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 16<sup>th</sup> birthday, to establish the parent/child relationship. Upon his 18<sup>th</sup> 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: The juvenile court need not retain jurisdiction after adoption for the CIS to grant the SIJS application**

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). The SIJS regulation states that a child can apply for permanent residency through SIJS if a juvenile court has found that family reunification is not viable and the child proceeds to long-term foster care, guardianship, or adoption.<sup>126</sup> At the same time, however, the regulation requires that the child "continue[] to be dependent upon the juvenile court" until the CIS finally approves the SIJS application – a process that can take months or a few years.<sup>127</sup> See also **Chapter 2** of this benchbook for a general discussion of SIJS.

However, another part of the regulations provides that for purposes of maintaining eligibility for classification as an SIJ, a child who is adopted or placed in guardianship after having been found dependent upon the juvenile court is still considered eligible for long-term foster care.<sup>128</sup> In Memorandum #3 issued by the Citizenship and Immigration Services, it states that, "they necessarily remain considered a juvenile court dependent based on the prior dependency order."<sup>129</sup> This reading seems to coincide with the regulation referring to automatic revocation. That section provides that if an adoption or being placed in guardianship brings on the change in status for a SIJS applicant, they are not disqualified from obtaining their permanent residency through SIJS.<sup>130</sup>

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). Usually it is easier for a child to immigrate

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<sup>126</sup> 8 CFR 204.11(a). See **Chapter 2** for a discussion of SIJS.

<sup>127</sup> 8 CFR 204.11(c)(5).

<sup>128</sup> 8 CFR 204.11 (a).

<sup>129</sup> 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 B**.

<sup>130</sup> 8 CFR 205.1 (a)(iv).

<sup>134</sup> This issue mainly has arisen in evaluating foreign divorces. See, e.g., *Matter of San Juan*, 17 I. & N. Dec. 66 (BIA 1979).

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; 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.

## Chapter 6

### FAMILY COURT RULINGS: DIVORCE, PROTECTION ORDERS AND CUSTODY DECISIONS

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#### **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 certain portions of 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.<sup>134</sup> 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.<sup>135</sup>

##### **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 not possible – for example, if the marriage has ended in divorce, or the couple has not

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<sup>135</sup> IMFA § 2(c)(2), Pub. L. No. 99-639, 100 Stat. 3537 (Act of Nov. 29, 1986); INA § 204(a)(2)(A)(ii); 8 USCA § 1154(a)(2)(A)(ii); 8 CFR §§ 204.2(a)(1)(i)(A)(1) and (C).

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.<sup>136</sup>

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*<sup>137</sup>, 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.<sup>138</sup> The divorce decree need not specifically state that the termination of the marriage was due to domestic violence.<sup>139</sup> 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.”<sup>140</sup>

If the marriage was terminated for any reason *after the self-petition was filed*, that termination will not affect the self-petition.<sup>141</sup>

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<sup>136</sup> 8 USC § 1186a(c)(4).

<sup>137</sup> 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.

<sup>138</sup> 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].

<sup>139</sup> 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.

<sup>140</sup> Id.

<sup>141</sup> 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.<sup>142</sup>

#### **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.<sup>143</sup> However, if an emotional step relationship continues despite the divorce, the child remains a stepchild.<sup>144</sup>

### **§ 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 for whom the protection order was issued is deportable. For purposes of this

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<sup>142</sup> 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.

<sup>143</sup> *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 (9<sup>th</sup> Cir. 1980) (The INS and BIA may not add requirements not stated in the statute; INA § 101(b)(1)(B) requires only that the marriage occurred prior to the child reaching the age of eighteen).

<sup>144</sup> 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).

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.<sup>145</sup>

**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.<sup>146</sup>

Although many persons have been deported under the domestic violence ground, at this writing there are no published cases defining any of the elements. Important questions include:

**What type of violation triggers deportability?** 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 is not deportable.

To be a qualifying protection order, the violated order must have been “issued for the purposes of preventing violent or threatening *acts of domestic violence.*” 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 8 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. California state domestic violence laws protect persons who have a dating relationship but do not co-habitate, and certain roommates. See discussion of crimes of domestic violence in **Chapter 9**.

**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 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.

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<sup>145</sup> 8 USC § 1227(a)(2)(E)(ii).

<sup>146</sup> 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.

### § 6.3 Child custody decisions

#### A. Custody Where a Noncitizen Parent is Going to be Deported (“Removed”).

Occasionally a noncitizen parent involved in a custody fight will be in deportation (“removal”) proceedings facing imminent deportation from the United States. The fact that the person has a U.S. citizen child *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 divorcing 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.

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 18<sup>th</sup> 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 18<sup>th</sup> 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 18<sup>th</sup> 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 18<sup>th</sup> 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. 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, as amended in 2000.<sup>147</sup> 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.<sup>148</sup>

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.<sup>149</sup>

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<sup>147</sup> See 8 USC § 1431 and the ILRC's manual entitled Naturalization: A Guide for Legal Practitioners and Other Community Advocates.

<sup>148</sup> 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**.

<sup>149</sup> 8 USC § 1182(a)(10)(C)(ii).

## CHAPTER 7

### JUVENILE DELINQUENCY PROCEEDINGS

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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, the application must be filed and the CIS must approve it before juvenile court jurisdiction terminates. If an immigrant child is to benefit from adoption, the adoption must be completed before the child's 16<sup>th</sup> birthday except in the case of certain sibling groups. See § 7.3.

#### **SUMMARY OF CHAPTER**

- Because a delinquency disposition is not a criminal conviction for immigration purposes, many such dispositions have no bad immigration effects. Dispositions relating to prostitution, severe sexual crimes, and controlled substances may harm immigration status, however. 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 CIS is not a good way to get an immigration screening for eligibility for lawful status. Children often are unrepresented and the CIS focus is on deporting them, not on analyzing eligibility for relief. Such referrals are not required, and may be prohibited. See § 7.4.

## § 7.1 Overview of immigration consequences of delinquency findings

An adjudication in juvenile proceedings is not a “conviction” for any immigration purpose, regardless of the nature of the offense.<sup>150</sup> This means that in many cases a finding of juvenile delinquency will not 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 or HIV+ 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**.

A **juvenile delinquency finding** 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 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.

Arguably the child’s counsel in delinquency proceedings has a duty to research and advise the child on the immigration consequences of proposed dispositions.<sup>151</sup>

### A. Offenses that Have Harmful Immigration Consequences

**Prostitution.** If a court finds that a juvenile has provided sex for money in any ongoing manner, the juvenile is in danger of being found inadmissible for “engaging in”

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<sup>150</sup> *Matter of Devison*, Int. Dec. 3435 (BIA 2000), *Matter of Ramirez-Rivero*, 18 I&N 135 (BIA 1981).

<sup>151</sup> Courts have held repeatedly that in adult criminal proceedings it is ineffective assistance for counsel to fail to provide a noncitizen defendant with specific advice regarding the immigration consequences of a proposed plea. See, e.g., *In Re Resendiz* (2001) 25 Cal.4<sup>th</sup> 230, *People v. Soriano* (1987) 194 Cal.App.3d 1470, 240 Cal.Rptr. 328.

prostitution.<sup>152</sup> In many cases the person still may apply for a discretionary waiver to excuse this ground.<sup>153</sup>

**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).<sup>154</sup> 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.<sup>155</sup> 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.

The CIS must have “probative and substantial” evidence that the noncitizen was a knowing and conscious participant or conduit in the transfer, passage or delivery (including giving away for free) of controlled substances.<sup>156</sup> A finding in juvenile court of simple possession, being under the influence, transportation for personal use and similar offenses do not necessarily provide “reason to believe” trafficking. On the other hand, at least adult convictions or other evidence of sale, possession for sale, and the like have been held to supply “reason to believe.” While there are no published cases on point as to whether a delinquency finding would support “reason to believe,” and while immigration advocates at least can argue that a particular juvenile did not have the capacity to be a “knowing participant,” it is quite likely that a juvenile court disposition involving sale, possession for sale, etc. would cause inadmissibility under this ground.<sup>157</sup>

**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.<sup>158</sup> 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.<sup>159</sup> 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. This is a medical determination; the person may submit doctor’s reports stating that the abuse is not current. Some waivers are available.<sup>160</sup>

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<sup>152</sup> 8 USC § 1182(a)(2)(D).

<sup>153</sup> See 8 USC § 1182(h), plus see waivers for individual applications such as SIJS and VAWA.

<sup>154</sup> 8 USC § 1182(a)(2)(C).

<sup>155</sup> 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.

<sup>156</sup> 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)

<sup>157</sup> Cases resolved under youth offender statutes (for young persons tried as adults) have so held. See *Matter of McDonald and Brewster*, 15 I&N 203, 204 (BIA 1975); *Matter of Favela*, 16 I&N 753 (BIA 1979) (expungement under Federal Youth Corrections Act).

<sup>158</sup> 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.

<sup>159</sup> See discussion in *California Criminal Law and Immigration*, § 3.10, referenced in **Chapter 11**.

<sup>160</sup> See, e.g., specific waivers for SIJS and VAWA.

***Finding of Violation of a Protection Order.*** A person is deportable if a civil or criminal court finds that he or she has violated portions of a protection order that protect against violence, stalking, and the like.<sup>161</sup> Juveniles should understand that their age may not protect them if they are so found.

***False Documents.*** California has a state offense 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.<sup>162</sup>

***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.<sup>163</sup> 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.

## **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.<sup>164</sup> An admission of guilt by a juvenile – for example, a plea taken in delinquency proceedings – is not an admission for this purpose, because the person is admitting to an act of juvenile delinquency, which is not a “crime.”<sup>165</sup> (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.<sup>166</sup> 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.

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<sup>161</sup> 8 USC § 1227(a)(2)(E)(ii). See further discussion of the consequences of this finding in **Chapter 6, § 6.2.**

<sup>162</sup> 8 USC §§ 1182(a)(6)(F), 1227(a)(3)(C).

<sup>163</sup> 8 USC § 1182(a)(1)(A)(iii).

<sup>164</sup> 8 USC § 1182(a)(2)(A)(i).

<sup>165</sup> This follows the reasoning in cases such as *Matter of Ramirez-Rivero*, 18 I&N 135 (BIA 1981).

<sup>166</sup> See discussion in § 7.1 and cases such as *Matter of Devison*, Int. Dec. 3435 (BIA 2000) and *Matter of Ramirez-Rivero*, *supra*.

However, 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.<sup>167</sup> Juvenile court dispositions that involve sexual predator behavior or other behavior suggesting a mental pathology might show inadmissibility under that ground.

### **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.”<sup>168</sup> This is the only provision 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. See brief discussion at § 4.9 or the Family Unity manual cited in **Chapter 11**.

### **§ 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 – 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.

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<sup>167</sup> 8 USC § 1182(a)(1)(A)(iii).

<sup>168</sup> 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**.

### **A. Special Immigrant Juvenile Status (“SIJS”) for Children Under Juvenile Court Jurisdiction Who Won’t Reunite with Their Parents Due to Abuse, Neglect or Abandonment**

Federal law provides that an immigrant child who is under juvenile court jurisdiction and cannot be reunified with his or her parent due to abuse, neglect or abandonment may be eligible for lawful permanent residency (a “green card”) as a “special immigrant juvenile.”<sup>169</sup> A child who is in delinquency proceedings but who, due to abuse, neglect or abandonment, cannot be placed with the parents upon release from detention may qualify for special immigrant juvenile status. 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 the SIJS application must be made *while the child remains under juvenile court jurisdiction*, and jurisdiction must be retained until the CIS grants the application. See § 2.2, Part F. 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 cruelty” is broadly defined and encompasses 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. 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 remain under juvenile court jurisdiction, but an immigration practitioner should carefully

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<sup>169</sup> See 8 USC § 1101(a)(27)(J), 8 CFR § 204.11, and discussion in **Chapter 2**, *supra*.

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 into do sex work or (b) the person was coerced to do other kind of labor by the traffickers. 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 16<sup>th</sup> birthday*. There is an exception for adopted sibling groups. See **Chapter 4**, § 4.1 on adoption.

### **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 CIS for screening or deportation**

Referring a child to CIS, or permitting a probation officer to do so, is not a way to have the child “screened” to see if he or she qualifies for some lawful status. The CIS

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.<sup>170</sup>

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.

Juvenile courts have no obligation to refer undocumented children to the CIS. Whether they have the discretion to do so is not established. The California Supreme Court in *In re Victor F* recently vacated and remanded an appellate court decision upholding a delinquency court's referral of a juvenile to immigration authorities.<sup>171</sup>

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<sup>170</sup> See further discussion at § 8.1.

<sup>171</sup> *In re Victor F* (2001) 94 Cal.App.4<sup>th</sup> 308, 114 Cal.Rptr.2d 214 (vacated), *review granted, depublished, and transferred*, 43 P.3d 130 (Cal. 2002). The court directed the lower court to decide the opinion in accord with *In re Manuel P* (1989) 215 Cal.App.3d 48 and Calif. W&I §728.

## CHAPTER 8

### CHILDREN IN ICE DETENTION; ICE HOLDS AND DETAINERS

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#### **SUMMARY**

- The U.S. Immigration and Customs Enforcement (ICE) and Office of Refugee Resettlement (ORR) detain unaccompanied minors whom ICE is trying to deport. A juvenile court can take jurisdiction over an abused, neglected or abandoned child in ICE or ORR detention, with ICE'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 ICE detention; obtaining juvenile court jurisdiction for SIJS<sup>172</sup>**

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.

ICE detains more than 4,700 unaccompanied children annually at more than 90 facilities throughout the United States, the majority of which are secure state juvenile detention centers. 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 detained after crossing the border without inspection, sometimes years after entry. Others have been referred to ICE after coming into contact with state systems.

Once children are detained, they are placed in immigration removal (deportation) proceedings before an immigration judge.<sup>173</sup> These proceedings are administrative and

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<sup>172</sup> 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.

<sup>173</sup> 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

adversarial. 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 the majority of children in removal proceedings go unrepresented. Those children fortunate enough to find representation are far more likely to be granted the relief requested. For example, they are more than four times as likely to be granted asylum by an Immigration Judge.<sup>174</sup>

**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”). The court or the child’s advocate must obtain ICE’s “consent” to take jurisdiction. If the court encounters a child who was in immigration custody but already has been released, the court should not need this consent in order to take jurisdiction. 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.** The American Bar Association operates a project that provides technical assistance, information via a list serve, sample briefs, and in some cases obtains pro bono co-counsel for persons assisting unaccompanied minors.<sup>175</sup> See that and other resources in **Chapter 11**.

### § 8.2 Immigration “holds” on noncitizen children detained pursuant to delinquency court order

Once ICE becomes aware of a suspected deportable noncitizen, it may file an immigration “hold” or “detainer” with the local law enforcement agencies that have custody of the person. 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.<sup>177</sup>

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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.

<sup>174</sup> 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); Tulskey, “Asylum Seekers Face Lack of Legal Help,” *San Jose Mercury News*, Dec. 30, 2000, at A12.

<sup>175</sup> The American Bar Association Immigration Pro Bono Development and Bar Activation Project in Washington, D.C. has undertaken the Detained Immigrant and Refugee Emergency Pro Bono Representation Initiative for children. See **Chapter 11**, Resources, for more information about assistance available from the Project.

<sup>177</sup> 8 CFR § 287.7.

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.<sup>178</sup> If ICE has not arrived to claim the noncitizen by the 48-hour point, the agency must release the noncitizen. 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.<sup>179</sup>

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<sup>178</sup> 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.

<sup>179</sup> See material by Michael K. Mehr in Brady et al, *California Criminal Law and Immigration* (2004 edition), Chapter 12, § 12.5 and Appendices for more information and sample brief.

## CHAPTER 9

### ADULT CRIMINAL CONVICTIONS

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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 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<sup>180</sup> and expert advice. In particular, California practitioners see free on-line information at [www.ilrc.org/Cal\\_DIP\\_Chart\\_by\\_section.pdf](http://www.ilrc.org/Cal_DIP_Chart_by_section.pdf), and see *California Criminal Law and Immigration* (2004 edition), described in **Chapter 11**.

#### **§ 9.1 Conviction of any crime of violence with a one-year sentence imposed, of rape, and of sexual abuse of a minor – including misdemeanor statutory rape – 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.<sup>181</sup>

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<sup>180</sup> This chapter will include citations to Brady et al., *California Criminal Law and Immigration* (Immigrant Legal Resource Center 2004). For more information on this book see **Chapter 11** or the ILRC website at [www.ilrc.org](http://www.ilrc.org). Another excellent resource is the website of the Law Offices of Norton Tooby at [www.criminalandimmigrationlaw.com](http://www.criminalandimmigrationlaw.com), which includes text of articles as well as information about their publications.

<sup>181</sup> 8 USC § 1326(b)(2).

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.

### **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.<sup>182</sup> 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.<sup>183</sup>

The crime of violence analysis can become complex. If the elements of the offense include a failure to act, the offense may not be a crime of violence. Thus in a seminal 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.”<sup>184</sup> Child abuse, abandonment and neglect statutes in California should be individually analyzed. In some jurisdictions, including the Ninth Circuit, a simple battery is likely not to be held 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.<sup>185</sup>

**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.”<sup>186</sup>

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

**Rape** is an aggravated felony regardless of sentence imposed.<sup>187</sup>

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<sup>182</sup> See definition of aggravated felony at 8 USC § 1101(a)(43)(F), and definition of sentence at 8 USC § 1101(a)(48)(B).

<sup>183</sup> 18 USC § 16.

<sup>184</sup> *Matter of Sweetser*, Int. Dec. 3390 (BIA 1999).

<sup>185</sup> See *Singh v Ashcroft*, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. 10/21/04) and further discussion at *California Criminal Law and Immigration* §6.15. See also “Note: Domestic Violence” at [www.ilrc.org/Cal\\_DIP\\_Chart\\_by\\_section.pdf](http://www.ilrc.org/Cal_DIP_Chart_by_section.pdf).

<sup>186</sup> See definition of sentence at 8 USC § 1101(a)(48)(B), See also *Alberto-Gonzalez v. INS*, 215 F.3d 906 (9<sup>th</sup> Cir. 2000) and discussion in *California Criminal Law and Immigration* § 5.5.

<sup>187</sup> 8 USC § 1101(a)(43)(A), See, e.g., *Castro-Baez v. Reno*, 217 F.3d 1057 (9<sup>th</sup> Cir. 2000).

**Sexual abuse of a minor** is an aggravated felony conviction regardless of sentence imposed.<sup>188</sup>

- This includes offenses such as Calif. Penal Code § 288(a), lewd act with a child under the age of 14<sup>189</sup> and Penal Code § 269, and might well be held to include relatively less serious offenses such as molesting or annoying a child under P.C. § 647.6, even where no touching of the child occurs.

**Misdemeanor statutory rape** has been held to be an aggravated felony under the “sexual abuse of a minor” category.<sup>190</sup> 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 will 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 battery, misdemeanor false imprisonment, or nonviolent attempt to dissuade filing of a police report under P.C. §136.1(b). See discussion in *California Criminal Law and Immigration*, § 9.32(H), and discussion in “Note: Safer Pleas” at [www.ilrc.org/Cal\\_DIP\\_Chart\\_by\\_section.pdf](http://www.ilrc.org/Cal_DIP_Chart_by_section.pdf).

**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.

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<sup>188</sup> 8 USC § 1101(a)(43)(A).

<sup>189</sup> *United States v. Baron-Medina*, 187 F.3d 1144 (9<sup>th</sup> Cir 1999). See generally *Matter of Ruiz-Romero*, Int. Dec. 3376 (BIA 1999), showing the Board of Immigration Appeals’ confusion about how to define the term.

<sup>190</sup> 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 (11<sup>th</sup> Cir. 2001), *United States v. Gonzales-Vela*, 276 F.3d 763 (6<sup>th</sup> Cir. 2001). For further discussion see *California Criminal Law and Immigration* § 9.32.

**§ 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”:

- 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.<sup>191</sup>

**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, that

(b) is committed against a current or former spouse, co-habitor, co-parent of a child, or person protected under state law domestic violence statutes. For example, in California this would include a person in a dating relationship, which is protected under some state domestic violence laws.

- **The relationship must appear on the record. The Ninth Circuit has held that the required relationship with the victim must appear on the record of conviction.**<sup>192</sup> A statute that describes the relationship, such as traumatic injury to spouse under Cal. P.C. § 273.5, provides sufficient information. But where the elements of the offense do not include a domestic relationship – e.g., assault with intent to commit serious injury – the relationship must be established in the record of conviction. The requirement of domestic violence counseling as a condition of probation would be held part of the record of conviction, and a reference to a

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<sup>191</sup> 8 USC § 1227(a)(2)(E).

<sup>192</sup> *Tokalaty v Ashcroft*, 371 F.3d 613 (9<sup>th</sup> Cir. 2004).

specific domestic relationship would be likely to trigger deportation under this 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. Alternate pleas that would avoid deportation under this ground include misdemeanor false imprisonment (or felony through deceit) under Cal. P.C. §§ 236, 237, nonviolent attempt to dissuade someone from filing a police report under Cal. P.C. § 136.1(b), or other offenses such as theft or trespass: the key is not to constitute a “crime of violence.” Once a crime of violence is avoided, it is safe to include domestic violence counseling as a condition of probation. 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.

### **C. Stalking; Child Abuse, Neglect or Abandonment**

To date there are no published decisions as to which California offenses come within this definition. Decisions probably will be made based on the plain meaning of the definition. Counsel should assume that any conviction under Calif. P.C. §273a(a) will cause deportability under this ground.

### **D. Violation of Court Protection Order**

A person is deportable who is the subject of a civil or criminal court finding that the person “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 protected person.<sup>193</sup> No conviction is needed. The violation must occur on or after September 30, 1996.

### **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 is attempting to get status. Furthermore the ground does not apply to someone who entered the U.S. without inspection.

**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.

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<sup>193</sup> 8 USC § 1227(a)(2)(E)(ii).

**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. See 8 USC §1229b(b). 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 under Cal. P.C. § 273.5 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.

#### **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 form 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.

- To determine if an offense involves moral turpitude one looks to the elements of the offense as defined in the statute and under interpretive case law, rather than to the facts of the individual case.
- Offenses containing the elements of intent to commit great bodily harm, intent to harm close family members or children, lewd intent, theft, fraud and sometimes malice and recklessness have been classed as “crimes involving moral turpitude.” Simple battery or assault do not involve moral turpitude, but many types of aggravated assault and battery do because they involve intent to commit great bodily harm. Spousal abuse and child abuse involve moral turpitude, while drunk driving does not.<sup>194</sup>

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 crimes of moral turpitude at any time since admission, unless the two offenses are held to be a “single scheme of criminal misconduct.”<sup>195</sup>

**Example:** Franz became a lawful permanent resident (a form of admission) in 1993. He committed spousal abuse in 1999 and was convicted in 2000. He is not deportable because he did not commit the offense within five years after his last admission. Had he committed the offense in 1997, he would have been deportable.

In 2002 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.

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<sup>194</sup> See, e.g., discussion and annotated chart of Calif. Penal Code Sections in *California Criminal Law and Immigration*, Chapter 4 and Annotations.

<sup>195</sup> 8 USC § 1227(a)(2)(A)(i).

### 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 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;
- 2) The person received a sentence of six months or less; and
- 3) The maximum possible sentence for the offenses was one year or less.<sup>196</sup>

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.

**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.

For more information see California Criminal Law and Immigration, Chapter 4, and “Note: Crimes Involving Moral Turpitude” at [www.ilrc.org/Cal\\_DIP\\_Chart\\_by\\_section.pdf](http://www.ilrc.org/Cal_DIP_Chart_by_section.pdf).

### 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.<sup>197</sup> A

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<sup>196</sup> 8 USC § 1182(a)(2)(A)(II).

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.

**Example:** Ron is undocumented. He has been convicted of spousal abuse and statutory rape. 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.<sup>198</sup>

#### § 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.

***Almost any felony conviction of an offense relating to controlled substances is an aggravated felony,<sup>199</sup> and almost any conviction is a basis for deportability and inadmissibility under the controlled substance conviction grounds.<sup>200</sup>***

- A point of controversy has been whether a state *felony* conviction for simple possession of an illegal drug is an aggravated felony for immigration purposes. At this writing the Ninth Circuit has held that it is not, but a petition for rehearing has been filed.<sup>201</sup> A state misdemeanor simple possession is not an aggravated felony.<sup>202</sup> Many California possession offenses are felonies.

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<sup>197</sup> 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)).

<sup>198</sup> 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*, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. 2002). See extensive discussion of the § 212(h) waiver in *California Criminal Law and Immigration* § 11.10.

<sup>199</sup> See 8 USC § 1101(a)(43)(B).

<sup>200</sup> 8 USC §§ 1182(a)(2)(A)(i)(II) (inadmissibility), 1227(a)(2)(B)(I) (deportability).

<sup>201</sup> *Oliveria-Ferreira v. Ashcroft*, 382 F.3d 1045 (9<sup>th</sup> Cir. 2004)

<sup>202</sup> *Matter of Santos Lopez*, 23 I&N 419 (BIA 2002). The definition of whether the offense is a felony is not whether the state calls it a felony, but whether the state provides for a potential sentence of more than a year. *U.S. v. Robles*, 281 F.3d 900 (9<sup>th</sup> Cir. 2002).

- Only in immigration proceedings held in the Ninth Circuit, a first conviction for simple possession, 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, such as under Cal. P.C. §1203.4, deferred entry of judgment provisions, or Proposition 36.<sup>203</sup> Otherwise, once a plea of guilt or no lo 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.<sup>204</sup>
- Sale, possession for sale, and manufacture are aggravated felonies. An exception under California law is conviction under certain sale/transportation statutes where the official record of conviction does not reveal whether the offense involved sale or offer to sell.<sup>205</sup> Then the offense is not an aggravated felony and arguably does not even make the person inadmissible or deportable.
- State offenses that are not *aggravated felonies* include being under the influence, transportation for personal use, possession of paraphernalia, and other state offenses that do not have analogues in the federal drug statutes. However, *conviction of any offense relating to controlled substances* makes the person deportable or inadmissible.<sup>206</sup>
- If the record of conviction of a California drug offense is blank as to which controlled substance was involved, the offense does not carry immigration penalties.<sup>207</sup>
- A person is inadmissible if the CIS has “reason to believe” that the person ever was or assisted a drug trafficker.<sup>208</sup> 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.<sup>209</sup> A conviction is not required for these grounds.

***In contrast, offenses involved 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).

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<sup>203</sup> *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2000) (paraphernalia possession).

<sup>204</sup> 8 USC § 1101(a)(48)(A), and see discussion in *Lujan-Armendariz*, *supra*.

<sup>205</sup> *United States v. Rivera-Sanchez*, 247 F.3d 905 (9<sup>th</sup> Cir. 2001)(en banc) (statutes such as H&S §§ 11352(a), 11360(a), 11379(a) are divisible). The record of conviction includes the charging papers, plea or judgment, and sentence.

<sup>206</sup> 8 USC § 1182(a)(2)(A)(i)(II)

<sup>207</sup> *Matter of Paulus*, 11 I&N 274 (BIA 1965).

<sup>208</sup> 8 USC § 1182(a)(2)(C).

<sup>209</sup> 8 USC § 1182(a)(1)(A)(iii).

- Driving under the influence is not a crime of violence, and a one-year sentence imposed does not make the offense an aggravated felony.<sup>210</sup>

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.<sup>211</sup>

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<sup>210</sup> See, e.g., *Montiel-Barraza v. INS*, 275 F.3d 1178 (9<sup>th</sup> Cir. 2002). The BIA had enforced the opposite rule for some years, but abandoned the rule after being overturned by most federal courts.

<sup>211</sup> 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

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- 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<sup>212</sup> and the grounds of deportability.<sup>213</sup> 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 HIV positive, a drug addict or abuser, or dangerous 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

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<sup>212</sup> 8 USC § 1182(a), INA § 212(a).

<sup>213</sup> 8 USC § 1227(a), INA § 237(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. For example, a person who is HIV positive is inadmissible but not deportable.

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. To get a waiver of the HIV ground, that person must show that she has a qualifying relative.

In contrast, a person applying to immigrate through special immigrant juvenile status does not have to meet the public charge inadmissibility ground at all, and if HIV positive does not have to have a qualifying relative in order to apply for a waiver.

The immigration authorities base the decision whether to grant the waiver on factors such as 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 obtaining 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 is HIV positive. Fortunately there is a discretionary **waiver** of this ground of inadmissibility for SIJS applicants. The CIS almost always approves HIV waivers for SIJS applicants.

**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.”<sup>214</sup> 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)<sup>215</sup>, 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.<sup>216</sup> 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.

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<sup>214</sup> 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.

<sup>215</sup> 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).

<sup>216</sup> See 8 USC § 1101(a)(13).

**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 he leaves the U.S., when he attempts to return he will be barred from re-entering and stripped of his status, unless a waiver is available for the particular ground.

### § 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). An admission occurs even if the person used fake documents or committed fraud to get admitted. In addition, 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.<sup>217</sup>

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.” 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

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<sup>217</sup> 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 *Shivaraman v Ashcroft*, 360 F.3d 1142 (9<sup>th</sup> Cir. 2004),

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.

#### **§ 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.<sup>218</sup>

##### **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.

**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.

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<sup>218</sup> 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).

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 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 several factors for when the permanent resident must meet this test.<sup>219</sup> 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,<sup>220</sup> the person will lose their permanent residency just by the fact of traveling.

### § 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.<sup>221</sup>

**Delinquency proceedings.** An adjudication in juvenile proceedings is not a “conviction” for any immigration purpose, regardless of the nature of the offense.<sup>222</sup> 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

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<sup>219</sup> 8 USC § 1101(a)(13)(A).

<sup>220</sup> See 8 USC § 1182(h).

<sup>221</sup> The website of the Law Offices of Norton Tooby contains a host of material, at [www.criminalandimmigrationlaw.com](http://www.criminalandimmigrationlaw.com). It also contains information about their excellent publications. For California offenses, the best resource is *California Criminal Law and Immigration* published by the Immigrant Legal Resource Center. Go to [www.ilrc.org](http://www.ilrc.org) or see **Chapter 11** for ordering information.

<sup>222</sup> *Matter of Devison*, Int. Dec. 3435 (BIA 2000), *Matter of Ramirez-Rivero*, 18 I&N 135 (BIA 1981).

mental condition that poses a threat to self or others, such as sexual predator, alcoholic, having suicidal tendencies, etc. See further discussion at **Chapter 7**, § 7.2.

### § 10.6 Medical grounds<sup>223</sup>

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 private physician who has been approved by CIS to give the test, 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 envelop. 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/ncidod/dq/panel.htm>.

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.<sup>224</sup> Also some grounds can be cured: the person may take the medication for tuberculosis or get the required vaccinations.

***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.<sup>225</sup> The definition of abuser is not settled, and might even include more than one-time experimentation within the last three years. 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. (An adult conviction of a such offenses in most cases also will make the person deportable and inadmissible; see **Chapter 10**.)

***Current Mental Condition Posing Risk to Self and Others.*** Suicidal tendencies, pathological or sexual predator tendencies, and alcoholism 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, or apply for a waiver where available.

***HIV Positive.*** An HIV test will be administered at the exam. The CIS examination is not confidential and doctors often are not well-trained in HIV counseling. A person at risk for HIV would do well to first go through a qualified anonymous test site.

***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

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<sup>223</sup> 8 USC § 1182(a)(1).

<sup>224</sup> 8 USC § 1182(g). Special waivers that do not require qualified relatives are available for SIJS and VAWA.

<sup>225</sup> 8 USC §§ 1182(a)(1)(A)(iii) (inadmissibility), 1227(a)(2)(B)(ii) (deportability).

public health significance (including active tuberculosis, infectious leprosy, HIV and five venereal diseases)<sup>226</sup> and for persons who have not been vaccinated against certain diseases (including mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B).<sup>227</sup> Treating treatable diseases or obtaining required vaccinations cures the medical ground. There is a waiver for failure to obtain the vaccination based on certain medical or religious reasons.<sup>228</sup>

**§ 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.<sup>229</sup> (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.<sup>230</sup> 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 status.<sup>231</sup> 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**. The CIS must have "probative and substantive" evidence that the noncitizen was a knowing and conscious participant or conduit in the transfer, passage or delivery (including giving away for free) of controlled substances.<sup>232</sup> A conviction or juvenile court finding of simple possession, being under the influence, transportation for personal use and similar offenses do not necessarily provide "reason to believe" trafficking. On the other hand, at least adult convictions or other evidence of sale, possession for sale, and the like supply "reason to believe."

**Violation of a Protective Order.** A person is deportable if, on or after September 30, 1996, a criminal or civil court judge has found that the person violated portions of a protective order that involved serious threats and harassment. See further discussion in **Chapter 6**, § 6.2.

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<sup>226</sup> 8 USC § 1182(a)(1)(A)(i).

<sup>227</sup> 8 USC § 1182(a)(1)(A)(ii).

<sup>228</sup> 8 USC § 1182(g)(2).

<sup>229</sup> 8 USC § 1182(a)(2)(D).

<sup>230</sup> 8 USC § 1182(a)(2)(C).

<sup>231</sup> 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.

<sup>232</sup> 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).

**§ 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.** California has a state offense concerning use of false documents (e.g., a fake passport) and immigration status. A conviction or 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.<sup>233</sup>

**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.<sup>234</sup>

**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.<sup>235</sup> 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 and the noncitizen will be removed (deported) without being permitted to apply for any immigration relief.<sup>236</sup> 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 any other noncitizen to enter the United States illegally will also be found inadmissible.<sup>237</sup>

**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.<sup>238</sup>

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<sup>233</sup> 8 USC §§ 1182(a)(6)(F), 1227(a)(3)(B)(iii).

<sup>234</sup> 8 USC § 1229(a)(6)(C).

<sup>235</sup> 8 USC § 1182(a)(9).

<sup>236</sup> 8 USC § 1231(a)(5).

<sup>237</sup> 8 USC § 1182(a)(6)(E).

<sup>238</sup> 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

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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, listserves and websites available for the different areas of immigration law discussed in this bench book. The list represents resources as they exist in November 2004.

This list of resources is by no means exhaustive but provides some services available in California as well as national organizations willing to provide technical assistance and materials.

#### § 11.1 Technical assistance and direct service providers

##### A. Special Immigrant Juvenile Status

**American Bar Association**  
**Commission on Immigration Policy, Practice and Pro Bono**  
Irena Lieberman, Staff Director  
740 15th Street, N.W. 9th Floor  
Washington, DC 20005-1022  
Tel. (202) 662-1008  
Fax (202) 638-3844  
liebermi@staff.abanet.org  
www.abanet.org/immigprobono

The ABA Commission on Immigration Policy, Practice and Pro Bono provides grants, technical assistance and support for pro bono programs and lawyers working with detained and released children in immigration proceedings and in immigration matters. The Commission works on policy-related issues vis-a-vis children in immigration matters and has developed model ethical standards for the legal representation, adjudication and detention of children in immigration matters in a publication entitled, “Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States.”

**Catholic Charities of Santa Clara County**

2625 Zanker Road  
Suite 201  
San Jose, CA 95134  
Tel. (408) 944-0691  
Fax. (408) 944-0347  
[www.ccsj.org](http://www.ccsj.org)

Catholic Charities of Santa Clara County provides immigration services to immigrant children in foster care in Santa Clara County with SIJS petitions as well as other immigration services for low-income and middle-income residents of Santa Clara County.

**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.immigrantchildren.org](http://www.immigrantchildren.org)

The Immigrant Children Project seeks to address both policy issues relating to the treatment of unaccompanied migrant children, as well as mechanisms for the delivery of direct non-governmental community-based services to such children. The site also includes a handbook for obtaining SIJS through probate proceedings.

**Florida Immigrant Advocacy Center (FIAC)**

3000 Biscayne Blvd., Suite 400  
Miami, FL 33137  
Tel. (305) 573-1106  
Fax (305) 576-6273

FIAC represents dependent children in foster care who can obtain lawful permanent residence as special immigrant juveniles, as well as Cuban-Haitian entrants, refugees and asylees in obtaining lawful permanent residency.

**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](mailto:aod@ilrc.org)  
[www.ilrc.org](http://www.ilrc.org)

IOLTA-funded legal services providers in California and any San Francisco Bay Area nonprofit organization assisting children in juvenile court proceedings can contact the ILRC to get free advice and technical assistance on individual cases or policy issues by phone, 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 in juvenile court proceedings. Some trainings are also available.

**Legal Services for Children**

1254 Market Street, 3rd Floor  
San Francisco, CA 94102  
Tel. (415) 863-3762  
[www.lsc-sf.org](http://www.lsc-sf.org)

Legal Services for Children provides representation of children in San Francisco County and has extensive experience with SIJS cases.

**Public Counsel**

601 South Ardmore Avenue  
Los Angeles, CA 90005  
Tel. (213) 385-2977  
Fax (213) 385-9089  
[www.publiccounsel.org](http://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.

**Volunteer Lawyers Program Legal Services**

625 Broadway, Suite 925  
San Diego, CA 92101  
Tel. (619) 235-5656

San Diego's Volunteer Lawyers Program can help eligible children with SIJS applications.

## **B. Violence Against Women Act**

### **National Immigration Project of the National Lawyers Guild**

Gail Pendleton  
14 Beacon Street, Suite 602  
Boston, MA 02108  
Tel. (617) 227-9727  
[www.nationalimmigrationproject.org](http://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.scu.edu/SCU/Programs/Diversity/asianla.html](http://www.scu.edu/SCU/Programs/Diversity/asianla.html)

Asian Law Alliance provides VAWA immigration and domestic violence legal services to low-income Asian 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](http://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**

1188 Franklin Street, Suite 202  
San Francisco, CA 94109  
Tel. (415) 567-6255

or

1212 Broadway, Suite 400  
Oakland, CA 94612

[www.apilegaloutreach.org](http://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](http://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**

2210 K Street, Suite 201  
Sacramento, CA 95816  
Tel. (916) 446-7901  
Hotline (800) 477-7901

CRLAF provides advice, counsel and direct representation on naturalization, domestic violence and VAWA self-petitions.

**Catholic Charities**

Refugee & Immigrant Services  
241 Third Avenue, Suite A  
Chula Vista, CA 91910  
Tel. (619) 498-0722  
<http://www.ccdsd.org>

or

Refugee & Immigrant Services  
241-D West Vista Way  
Vista, CA 92083  
Tel. (760) 631-5890

Catholic Charities provides free or low cost immigration services to VAWA and asylum clients.

**Catholic Charities Diocese of Fresno**

149 N. Fulton Street  
Fresno, CA 93701  
Tel. (559) 237-0851  
Fax (559) 237-7144  
[www.ccdof.org](http://www.ccdof.org)

Catholic Charities provides a variety of legal immigration services including free assistance with VAWA cases.

**Catholic Charities Diocese of Stockton**

Immigrant & Refugee Program  
1106 N. El Dorado Street  
Stockton, CA 95202  
Tel. (209) 444-5910  
Fax (209) 460-1624

Catholic Charities Immigrant & Refugee Program (CCIRP) provides free legal immigration services to VAWA self-petitioners and SIJS applicants.

**Catholic Social Services Solano County**

745 Georgia Street  
Vallejo, CA 94590  
Tel. (707) 644-8909  
Fax (707) 644-6314  
[www.csssolano.org](http://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)**

1999 Tuolumne Street, Suite 700  
Fresno, CA 93721  
Tel. (559) 570-1200  
(800)675-8001  
[www.centralcallegal.org](http://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

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

CCLF in Merced will help low-income clients with restraining orders and VAWA immigration applications.

**International Institute of the East Bay (IIEB)**

449 15<sup>th</sup> Street, Suite 201

Oakland, CA 94612

Tel. (510) 451-2846

Fax (510) 465-3392

[www.iieb.org](http://www.iieb.org)

IIEB's Legal Department provides immigration legal services in the following areas: family-based immigration, including K visas and V visas; 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/](http://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 Society of San Diego**

110 South Euclid Avenue  
San Diego, CA 92114  
Tel. (619) 262-0896  
(877) LEGAL AID  
<http://www.lasds.org>

Legal Aid Society of San Diego provides free VAWA immigration services to low-income clients.

**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](http://www.nilc.org)

NILC provides advice over the telephone and some training in Los Angeles area. Special expertise in public benefits law.

**Volunteer Legal Services Program of the Bar Association of San Francisco**

465 California Street, Suite 1100  
San Francisco, CA 94104-1826  
Tel. (415) 782-8965  
Fax (415) 477-2390  
<http://sfbar.org/vlsp/general.html>

VLSP does intake for potential VAWA cases and will match eligible clients from anywhere in the San Francisco Bay Area with pro bono advocates to help with the VAWA self-petitioning process.

**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) 565-4791  
Fax (415) 565-4865  
<http://www.uchastings.edu/cgrs/>

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](http://www.lccr.com)

[info@lccr.com](mailto: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 by phone at 1-800-954-0254 or on the web at [www.aila.org](http://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, please call (415) 255-9499 ext. 782, or visit the ILRC website at [www.ilrc.org](http://www.ilrc.org).

The VAWA Manual: Immigration Relief for Battered Immigrants is a comprehensive guide for advocates working with immigrant survivors of domestic violence. This manual includes in-depth information on the VAWA self-petitioning requirements and process, adjustment of status, inadmissibility and waivers, consular processing, conditional permanent residency, VAWA cancellation of removal, special immigrant juvenile status, the new T and U visas, gender-related asylum, and public benefits.

Special Immigrant Juvenile Status for Children Under Juvenile Court Jurisdiction. This practical manual includes a clear explanation of the law and a discussion of problem cases, a sample completed application form, sample juvenile court judge's order, and a summary both of immigration adjustment of status applications and other types of immigration relief for children. *Also available as a free download at [www.ilrc.org](http://www.ilrc.org).*

How to Obtain U Interim Relief: A Brief Manual for Advocates Assisting Immigrant Victims of Crime includes sample materials and summary information for assisting immigrant crime victims with the U interim relief application process. *Available as a free download at [www.ilrc.org](http://www.ilrc.org).*

A Guide for Immigration Advocates is a large and comprehensive book about immigration law, written for paralegals. It includes clearly written material discussing forms of relief that would apply to children such as family visa petitions, suspension and asylum.

Family Unity: A Guide for Practitioners and Community Organizers discusses the Family Unity program which could benefit children whose parents became permanent residents through one of the amnesty programs.

California Criminal Law and Immigration. This is a comprehensive manual on the representation of non-citizens who have been accused or convicted of crimes. Using California law as a model, it discusses all the grounds of inadmissibility and deportability related to criminal offenses. Topics include drug convictions, admissions, addiction and abuse, aggravated felon status, crimes involving moral turpitude, and firearms offenses, as well as recent legislation. The manual includes an annotated chart analyzing 70 offenses under California law. It also features a comprehensive chapter on how to obtain post-conviction relief, including a discussion of legal requirements, practice tips, and sample briefs and papers, as well as a chapter on immigration holds and detainers.

Quick-Reference Chart and Notes on Immigration Consequences of California Convictions. This free on-line service offered by the ILRC is for public defenders and others representing noncitizens in criminal

proceedings. It provides a chart outlining the immigration consequences of 100 selected offenses, and several short articles or “Notes” on topics such as aggravated felonies, domestic violence, etc. Go to [www.ilrc.org/Cal DIP Chart by section.pdf](http://www.ilrc.org/Cal_DIP_Chart_by_section.pdf).

### **American Bar Association**

The ABA’s Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States can be downloaded for free at [www.abanet.org/immigration/home.html](http://www.abanet.org/immigration/home.html).

### **Center for Human Rights and Constitutional Law (CHRCL) Unaccompanied Minors Project**

SIJS Manual. The CHRCL 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 [www.immigrantchildren.org/](http://www.immigrantchildren.org/).

### **General Immigration Publications**

Handling Immigration Cases (Wiley Law Publications) by Bill Ong Hing is a clearly written and well-organized one-volume treatise on immigration law.

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.

## **B. Videos**

Special Immigrant Juvenile Status 40-minute Training Video, 2002: This 40-minute training is designed for social workers, probation officers, bench staff, attorneys, CASA volunteers and others who work with non-citizen children who are in dependency or delinquency proceedings. It covers Special Immigrant Juvenile Status (SIJS) and other options for non-citizen children to gain lawful permanent residency (a greencard). A note-taking guide is included to outline the topics and major points discussed in the video. (Please see general ordering information under “Immigrant Legal Resource Center Publications” on page 90.)

## **C. Listserves**

### **ILRC’s Special Immigrant Juvenile Status listserv**

The ILRC SIJS listserv provides periodic legal and policy updates on Special Immigrant Juvenile Status. To join the listserv, go to:  
<http://ilrc.org/listserv.html>.

### **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](mailto:ana@nationalimmigrationproject.org).

## **D. Websites**

### **American Immigration Lawyers Association**

[www.aila.org](http://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](http://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 & Naturalization Service**

[www.cis.gov](http://www.cis.gov)

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](http://www.nilc.org)

NILC staff specialize 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](http://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** Special Immigrant Juvenile Status Statutes and Regulations
- Appendix B** May 27, 2004 “Memorandum #3” issued by William R. Yates, Associate Director for Operations
- Appendix C** July 9, 1999 “Memorandum #2” issued by Thomas E. Cook, Acting Assistant Commissioner
- Appendix D** Sample SIJS Court Order
- Appendix E** SIJS Risks and Benefits Flyer (English and Spanish)
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## Appendix A

### Federal Statutes and Regulations

#### **I. Federal Statutes (Laws Passed by Congress)**

##### **Definition of Special Immigrant Juvenile**

##### **8 U.S.C. § 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 and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;

(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 Attorney General expressly consents to the dependency order serving as a precondition 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 actual or constructive custody of the Attorney General unless the Attorney General 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;

##### **Special Immigrant Juveniles' Adjustment of Status, Waivers of Inadmissibility**

##### **8 U.S.C. § 1255(h), INA § 245(h)**

(h) Application with respect to special immigrants.

In applying this section to a special immigrant described in section 101(a)(27)(J)-

(1) such an immigrant shall be deemed, for purposes of subsection (a) to have been paroled into the United States; and

(2) in determining the alien's admissibility as an immigrant -

(A) paragraphs (4), (5)(A), and (7)(A) of section 212(a) shall not apply, and

(B) the Attorney General may waive other paragraphs of section 212(a) (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 101(a)(27)(J) 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)**

### **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—

(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.

[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)**

*(For those wishing to apply for a waiver of the government fees for the special immigrant juvenile petition (I-360), application for adjustment of status (I-485), and application for employment authorization (I-765.), see **Appendix xx.**)*

(c)(1) Except as otherwise provided in this paragraph (c) and in Sec. 3.3(b) of this chapter, any of the fees prescribed in paragraph (b) of this section relating to applications, petitions, appeals, motions, or requests may be waived by the Immigration Judge in any case under his/her 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 Service having jurisdiction to render a decision on the application, petition, appeal, motion, or request may, in his 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 payment of the additional \$500 fee prescribed by section 214(c)(9) of the Act when applying for petition for nonimmigrant worker under section 101(a)(15)(H)(i)(b) of the Act may not be waived. The fee for Form I-907, Request for Premium Processing Services, may not be waived.

(2) Fees under the Freedom of Information Act, as amended, may be waived or reduced where the Service 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 Service 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 Service representative on or before the date the fee is required to be paid, a notice prepared on Service 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 § 240.20.

**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. Citizenship  
and Immigration  
Services

HQADN 70/23

## Interoffice Memorandum

To: Regional Directors  
District Directors

From: William R. Yates (Janis Sposato /s/)  
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.<sup>1</sup>

### 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 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.

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<sup>1</sup> 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.

Memorandum #3 -- Field Guidance on Special Immigrant Juvenile Status Petitions

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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.<sup>2</sup> 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.]”<sup>3</sup> In other words, express consent is an acknowledgement that the request for SIJ classification is bona fide.

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.

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<sup>2</sup> 8 CFR 27.12(c)(9)

<sup>3</sup> See H.R. Rep. No. 105-405, at 130 (1997).

## 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.<sup>4</sup>
- 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")<sup>5</sup>; and
- Proof of the juvenile's age<sup>6</sup>.

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<sup>7</sup>);
- 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.).

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<sup>4</sup> 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).

<sup>5</sup> 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*.

<sup>6</sup> 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).

<sup>7</sup> 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.

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<sup>8</sup>

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 court may make such a determination<sup>9</sup>. 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

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<sup>8</sup> 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.  
<sup>9</sup> 8 C.F.R. §204.11(c)(6).

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.<sup>10</sup>

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.

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.

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<sup>10</sup> H.R. Rep. No. 105-405, at 130 (1997)

## 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,<sup>11</sup> including provisions prohibiting entry of those likely to become a public charge,<sup>12</sup> those without proper labor certification,<sup>13</sup> and those without a proper immigrant visa.<sup>14</sup> 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)<sup>15</sup> 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.<sup>16</sup> 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 21<sup>st</sup> 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).
- 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 21<sup>st</sup> 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.<sup>17</sup>

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<sup>11</sup> See INA§245(h)(2)(A). In addition, the corresponding grounds of removal under INA §237(c) are also waived for juveniles granted SIJ.

<sup>12</sup> INA§212(a)(4)

<sup>13</sup> INA§212(a)(5)(A)

<sup>14</sup> INA§212(a)(7)(A)

<sup>15</sup> Except for a single instance of simple possession of 30 grams or less of marijuana.

<sup>16</sup> 8 CFR§205.1(a)(3)(iv)(A).

<sup>17</sup> 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.

**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**

Questions relating to this memorandum should be directed through appropriate channels by phone or e-mail to Steven D. Heller (Operation and Regulations Developments, (202) 616-7435) or Leah Torino (Field Operations, (202) 514-2982).

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HQADN 70/6.1.7-P

JUL 9 1999

MEMORANDUM FOR REGIONAL DIRECTORS  
DISTRICT DIRECTORS  
OFFICERS IN CHARGE  
SERVICE CENTER DIRECTORS  
REGIONAL COUNSEL  
DISTRICT COUNSEL

FROM: Thomas E. Cook /s/  
Acting Assistant Commissioner  
Adjudications Division

SUBJECT: Special Immigrant Juveniles - Memorandum #2: Clarification of  
Interim Field Guidance

On August 7, 1998, the Office of Adjudications issued a memorandum providing interim field guidance on section 113 of Public Law 105-119, amending the special immigrant juvenile (SI J) provisions of section 101(a)(27)(J) of the Immigration and Nationality Act (INA). The purpose of this memorandum is to provide clarification of the interim field guidance relating to the Attorney General's consent and on the documentation required to support a special immigrant juvenile petition. The clarification that is provided in this memorandum supercedes the previous guidance on these subjects.

### **Attorney General's Consent**

New section 101(a)(27)(J) contains two provisions that require the Attorney General to consent in SIJ cases. One provision requires the Attorney General to consent to a juvenile court's jurisdiction over dependency proceedings for a child in the custody of the Immigration and Naturalization Service (INS). The other provision requires the Attorney General to consent to a juvenile court dependency order serving as a precondition to the grant of SIJ status. As an interim measure, district directors, in consultation with their district counsel, should continue to act as the consenting official in these cases.

### *Juveniles in INS Custody*

In the case of juveniles in INS custody, the Attorney General's consent to the juvenile court's jurisdiction must be obtained before proceedings on issuing a dependency order for the juvenile are begun. Therefore, if a juvenile court issues a dependency order for a juvenile in INS custody without first obtaining the Attorney General's consent to the jurisdiction, the order is not valid.

Requests for the Attorney General to consent to a juveniles court's jurisdiction over a juvenile in INS custody must be made in writing and directed to the district director with jurisdiction over

the juvenile's place of residence. The district director, in consultation with the district counsel, should consent to the juvenile court's jurisdiction if: 1) it appears that the juvenile would be eligible for SIJ status if a dependency order is issued; and 2) in the judgement of the district director, the dependency proceeding would be in the best interest of the juvenile.

### *Juveniles not in INS Custody*

In the case of juveniles not in INS custody, the Attorney General's consent to the dependency order must be obtained as a precondition to the grant of SIJ status. Juvenile courts do not need the Attorney General's consent to take jurisdiction to issue dependency orders for these juveniles. Therefore, in the case of juveniles not in INS custody, INS officials should not become involved in juvenile court proceedings in order to consent to dependency orders. Rather, the Attorney General's consent to the dependency order should be reflected in a grant or denial of the petition for SIJ status.

A dependency order issued for a juvenile not in INS custody may serve as a precondition to a grant of SIJ status only if two elements are established. First, a juvenile court must have deemed the juvenile eligible for long-term foster care due to abuse neglect and abandonment. Second, it must have been determined in administrative or judicial proceedings that it would not be in the juvenile's best interest to be returned to the juvenile's or parent's previous country of nationality or country of last habitual residence. If both elements are established, consent to the order serving as a precondition must be granted. If either element is not established, consent must be refused.

If a dependency order or other supporting documentation submitted with an SIJ petition establish the above-mentioned elements for consent, the district director must consent to the order. After the consent is granted, the office should proceed to determine if the juvenile is otherwise eligible for SIJ status. While the record of the proceeding must reflect that the consent elements were established and that consent was granted, a separate notice of consent need not be issued to the petitioner. If SIJ status is ultimately granted, the Attorney General's consent may be implied from the grant. If SIJ status is ultimately denied for other eligibility reasons, the notice of denial should note that consent was granted in addition to the grounds for denial.

If a dependency order or other supporting documentation submitted with an SIJ petition do not establish the consent elements, the district director must refuse to consent to the order and eligibility for SIJ status need not be considered. A notice of denial stating that SIJ status is denied because the Attorney General's consent to the dependency order is a precondition to the grant of status and that the petition failed to establish the requirements for consent must be issued.

### **Supporting Documentation for SIJ Petitions**

SIJ petitions should be filed with INS supported by a juvenile court dependency order. Additional documentation submitted with the petition should include:

- Evidence of the juvenile's date and place of birth;
- Evidence of the juvenile's date and manner of entry into the United States;
- Evidence of the juvenile's current immigration status;
- Evidence that the juvenile court deemed the juvenile eligible for long-term foster care due to abuse, neglect, or abandonment;
- Evidence that it would not be in the juvenile's best interest to be returned to the juvenile's or the parents' previous country of nationality or country of last habitual residence: and
- Evidence of the type of proceeding before the juvenile court that resulted in the dependency order.

Evidence that a dependency order was issued on account of abuse, neglect, or abandonment, and that it would not be in the juvenile's best interest to be removed from the United States is crucial to obtaining the Attorney General's consent to the dependency order. Documents filed with the juvenile court would be the most reliable evidence of these elements of consent. However, in many States documents submitted to or issued by the juvenile court in dependency proceedings may be subject to privacy restrictions. Therefore, if a dependency order does not include information establishing these crucial elements and State laws prevent court documents from being submitted to INS, a statement summarizing the evidence presented to the juvenile court during the dependency proceeding and the court's findings should be sufficient to establish the elements. In order for a statement to serve as acceptable evidence of these elements, the statement should be in the form of an affidavit or other signed, sworn statement, and be prepared by the court or the State agency or department in whose custody the juvenile has been placed. All other evidence the petitioner submits to establish the consent elements must also be considered in determining whether or not to consent to the dependency order.

**Appendix D**

**Sample Juvenile Court Judge’s Order Supporting  
Special Immigrant Juvenile Status Application**

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN FRANCISCO  
JUVENILE COURT

In the Matter of	)	No.
	)	ORDER REGARDING
	)	MINOR’S ELIGIBILITY FOR
	)	SPECIAL IMMIGRANT
a Minor	)	JUVENILE STATUS

The court has reviewed the supporting material on file, heard the arguments of counsel and found the following:

( ) The minor was declared dependent on the Juvenile Court of the County of San Francisco [or brought under the jurisdiction of the Juvenile Court of the County of San Francisco and committed to the custody of a State Agency] on \_\_\_\_\_. The minor remains under this Court’s jurisdiction.

( ) The minor was deemed eligible by this Court for long term foster care on \_\_\_\_\_.

( ) This Court finds that it is not in the best interest of the minor to be returned to his/her or his/her parents’ previous country of nationality or country of last habitual residence, \_\_\_\_\_. It is in the minor’s best interest to remain in the United States.

( ) The above findings and actions were made due to [abuse, neglect or abandonment] of the minor. [Or, the above findings were made due to abuse of the minor under Calif. Welfare & Inst. Code § 300(a) (physical abuse).]

DATED: \_\_\_\_\_

\_\_\_\_\_  
Judge/Commissioner/Referee of the Juvenile Court

## **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. Several months or even a few years 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. Unos meses después o tal vez en unos años 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 or child 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).
  
- 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 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)

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### 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:

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- 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.

<p><b>IF THE NONCITIZEN CHECKS ANY OF THE ABOVE BOXES, S/HE MUST TALK WITH AN IMMIGRATION EXPERT ABOUT IT!</b></p>
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**Appendix G**  
**Nine Questions To Determine**  
**Potential Eligibility for Lawful Immigration Status**

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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. Is the noncitizen afraid to return to his or her home country?**

- Noncitizens from areas of war or human rights abuses 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. Recently nationals of Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Somalia, Sudan have had TPS. See **Chapter 4**, § 4.6.

**2. 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?**

- 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 16<sup>th</sup> birthday, with an exception for adopted sibling groups. See **Chapter 5**.

**3. Was the noncitizen's parent or grandparent born in the United States or granted U.S. citizenship?**

- 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. Is the noncitizen under the jurisdiction of a dependency, delinquency or probate court and not going to be reunified with any parent?**

- If the noncitizen child is under the jurisdiction of a court that can make decisions regarding care and custody of juveniles, and cannot be reunified with his or her parents due to abuse, abandonment, or neglect, or the death of a parent, 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. Has the noncitizen been abused by a U.S. citizen or lawful permanent resident spouse or parent?**

- 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. Has the noncitizen been the victim of a crime that led or might lead to a criminal investigation or prosecution?**

- 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. Has the noncitizen been the victim of human trafficking?**

- 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. Has the noncitizen lived in the United States since January 1, 1972?**

- If so, he or she may qualify lawful permanent residency under **registry**. See **Chapter 4**, § 4.8.

**9. Is the noncitizen in immigration removal proceedings?**

- 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 illegally 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 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.

**Chart A:** Determining Whether Children Born Outside the U.S. Acquired Citizenship at Birth (if child born out of wedlock see Chart B)

<b>STEP 1</b>	<b>STEP 2</b>	<b>STEP 3</b>	<b>STEP 4</b>
Select period in which child was born	Select applicable Parentage	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 met applicable residence requirements.)	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.

<b>PERIOD</b>	<b>PARENTS</b>	<b>RESIDENCE REQUIRED OF USC PARENT</b>	<b>RESIDENCE REQUIRED OF CHILD</b>
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 <sup>1</sup> between ages 14 and 28 if begun before 10/27/72. <sup>2</sup> 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.] <sup>3</sup>
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. <sup>4</sup> 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. <sup>5</sup>	2 years continuous physical presence between ages 14 and 28, or 5 years continuous physical presence <sup>6</sup> between ages 14 and 28 if begun before 10/27/72. <sup>7</sup> 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. <sup>8</sup>
	Both parents citizens; or one citizen and one national <sup>9</sup>	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 <sup>10</sup>	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. <sup>11</sup>	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 <sup>12</sup>	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. <sup>13</sup>	None

Produced by the ILRC (September 2003) -- 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.**

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Footnotes for Chart A:

<sup>1</sup> For a discussion of continuous physical presence related to these provisions of the law, please see INS Interpretations 301.1(b)(6).

<sup>2</sup> 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).

<sup>3</sup> 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 18<sup>th</sup> birthday" or "prior to the 21<sup>st</sup> 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); *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 18<sup>th</sup> birthday" or "prior to the 21<sup>st</sup> birthday" means "prior to or on the 18<sup>th</sup> birthday" or "prior to or on the 21<sup>st</sup> birthday."

<sup>4</sup> *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.

<sup>5</sup> *See*, *U.S. Citizenship and Naturalization Handbook*, Chapter 4, Page 102 (Daniel Levy, 2001 Edition) citing INS Interpretations 301.1(b)(4)(iii) & (iv) and the Act of March 16, 1956, Public Law 84-430, 70 Stat. 50.

<sup>6</sup> For a discussion of continuous physical presence related to these provisions of the law, please see INS Interpretations 301.1(b)(6).

<sup>7</sup> *See* footnote 2.

<sup>8</sup> 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 18<sup>th</sup> birthday" or "prior to the 21<sup>st</sup> birthday" means 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 18<sup>th</sup> birthday" or "prior to the 21<sup>st</sup> birthday" means "prior to or on the 18<sup>th</sup> birthday" or "prior to or on the 21<sup>st</sup> birthday."

<sup>9</sup> 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*.

<sup>10</sup> *See* footnote 9.

<sup>11</sup> *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.

<sup>12</sup> *See* footnote 9.

<sup>13</sup> *See* footnote 11.

**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.

**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:	<p>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:</p> <ol style="list-style-type: none"> <li>1. The child was born before 5/24/34;</li> <li>2. The child was legitimated before turning 21; <u>AND</u></li> <li>3. The legitimation occurred before 1/13/41.</li> </ol> <p><b>NOTE:</b> 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.</p>
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<sup>1</sup>**

Date of Child's Birth:	Requirements:
Prior to 1/13/41:	<ol style="list-style-type: none"> <li>1. Child legitimated at any time after birth, including adulthood, under law of father's domicile.</li> <li>2. Use CHART A to determine if child acquired citizenship at birth.</li> </ol>
On/after 1/13/41 and prior to 12/24/52:	<ol style="list-style-type: none"> <li>1. Child legitimated before age 21 under law of father's domicile, or paternity established through court proceedings before 12/24/52.<sup>2</sup></li> <li>2. Use CHART A to determine if child acquired citizenship at birth.</li> </ol>
On/after 12/24/52 and prior to 11/15/68:	<ol style="list-style-type: none"> <li>1. Child legitimated before age 21 under law of father or child's domicile.</li> <li>2. Use CHART A to determine if child acquired citizenship at birth.</li> </ol>
On/after 11/15/68 and prior to 11/15/71:	<ol style="list-style-type: none"> <li>1. Child legitimated before age 21 under law of father or child's domicile.</li> <li>2. Use CHART A to determine if child acquired citizenship at birth.</li> </ol> <p style="text-align: center;"><b>-- OR --</b></p> <ol style="list-style-type: none"> <li>1. Child/father blood relationship established by clear and convincing evidence;<sup>3</sup></li> <li>2. Father must have been a U.S. citizen at the time of child's birth;</li> <li>3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and</li> <li>4. While child is under age 18, child must be legitimated under law of child's residence or domicile, <u>or</u> father must acknowledge paternity of child in writing under oath, <u>or</u> paternity must be established by competent court.</li> <li>5. Use CHART A to determine if child acquired citizenship at birth.</li> </ol>
On/after 11/15/71: <sup>4</sup>	<ol style="list-style-type: none"> <li>1. Child/father blood relationship established by clear and convincing evidence;<sup>5</sup></li> <li>2. Father must have been a U.S. citizen at the time of child's birth;</li> <li>3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and</li> <li>4. While child is under age 18, child must be legitimated under law of child's residence or domicile, <u>or</u> father must acknowledge paternity of child in writing under oath, <u>or</u> paternity must be established by competent court.</li> <li>5. Use CHART A to determine if child acquired citizenship at birth.</li> </ol>

Produced by the ILRC (July 2002)

**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 FOOTNOTES ON NEXT PAGE.**

## Footnotes for Chart B

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<sup>1</sup> 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 Tran Anh Nguyen v INS*, 121 S. Ct. (2001).

<sup>2</sup> 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).

<sup>3</sup> *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* (9<sup>th</sup> Circuit, November 21, 2000),

<sup>4</sup> *See* footnote 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.

<sup>5</sup> *See* footnote 4.

**CHART C: DERIVATIVE CITIZENSHIP - LAWFUL PERMANENT RESIDENT CHILDREN GAINING CITIZENSHIP THROUGH PARENTS' CITIZENSHIP**

<b>Date of Last Act</b>	<b>Requirements</b> - [Please note that it is the ILRC's position that all advocates should argue that the definition of "prior to the 18 <sup>th</sup> birthday" or "prior to the 21 <sup>st</sup> birthday" means prior to or on the date of the birthday. ( <i>See Matter of L-M- and C-Y-C-</i> , 4 I. &N. Dec. 617 (1952) which supports this proposition with respect to retention requirements for acquisition of citizenship; <i>however, see also</i> , INS Interpretations 320.2.) Yet, CIS officers may not agree with the ILRC's position that the definition of "prior to the 18 <sup>th</sup> birthday" or "prior to the 21 <sup>st</sup> birthday" means "prior to or on the 18 <sup>th</sup> birthday" or "prior to or on the 21 <sup>st</sup> 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 18 <sup>th</sup> 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 18 <sup>th</sup> birthday. <i>Rivas v Ashcroft</i> , ___ F. Supp. 2d ___, U.S. Dist. Lexis (16254) (S.D.N.Y. 2002). <i>See also Harriott v. Ashcroft</i> , 2003 U.S. Dist Lexis 12135 (E.D. Pa.).
Prior to 5/24/34: <sup>1</sup>	<ul style="list-style-type: none"> <li>a. Either one or both parents must have been naturalized prior to the child's 21<sup>st</sup> birthday;<sup>2</sup></li> <li>b. Child must be lawful permanent resident before the 21<sup>st</sup> birthday;<sup>3</sup></li> <li>c. Illegitimate child may derive through mother's naturalization only;</li> <li>d. A legitimated child must have been legitimated according to the laws of the father's domicile;<sup>4</sup></li> <li>e. Adopted child and stepchild cannot derive citizenship.</li> </ul>
5/24/34 to 1/12/41:	<ul style="list-style-type: none"> <li>a. Both parents must have been naturalized and begun lawful permanent residence in the U.S. prior to the child's 21<sup>st</sup> birthday;</li> <li>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;<sup>5</sup></li> <li>c. Child must be lawful permanent resident before the 21<sup>st</sup> birthday;</li> <li>d. Illegitimate child may derive through mother's naturalization only, in which case the status of the other parent is irrelevant;</li> <li>e. Legitimated child must have been legitimated according to the laws of the father's domicile;<sup>6</sup></li> <li>f. Adopted child and stepchild cannot derive citizenship.</li> </ul>
1/13/41 to 12/23/52:	<ul style="list-style-type: none"> <li>a. Both parents must naturalize, or if only one parent naturalizes, the other parent must have been either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,<sup>7</sup> or be deceased, or the parents must be legally separated<sup>8</sup> and the naturalizing parent must have custody;</li> <li>b. Parent or parents must have been naturalized prior to the child's 18<sup>th</sup> birthday;</li> <li>c. Child must have been lawfully admitted for permanent residence before the 18<sup>th</sup> birthday;</li> <li>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;<sup>9</sup></li> <li>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;<sup>10</sup></li> <li>f. Adopted child and stepchild cannot derive citizenship.<sup>11</sup></li> </ul>
12/24/52 to 10/5/78: <sup>12</sup>	<ul style="list-style-type: none"> <li>a. Both parents must naturalize, or if only one parent naturalizes, the other parent must have been either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,<sup>13</sup> or be deceased, or the parents must be legally separated<sup>14</sup> and the naturalizing parent must have custody.</li> <li>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.<sup>15</sup> If the child is legitimated, s/he can derive only if both parents naturalize, the non-naturalizing parent is dead, or if the other parent was a U.S. citizen at the time of the child's birth and remains a citizen.<sup>16</sup></li> <li>c. Parent or parents must have been naturalized prior to the child's 18<sup>th</sup> birthday;<sup>17</sup></li> <li>d. Child must have been lawfully admitted for permanent residence before the 18<sup>th</sup> birthday;<sup>18</sup></li> <li>e. Child must be unmarried;<sup>19</sup></li> <li>f. Adopted child and stepchild cannot derive citizenship.</li> </ul>
10/5/78 to 2/26/01: <sup>20</sup>	<ul style="list-style-type: none"> <li>a. Both parents must naturalize, or if only one parent naturalizes, the other parent must have been either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,<sup>21</sup> or be deceased, or the parents must be legally separated<sup>22</sup> and the naturalizing parent must have custody.</li> <li>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, or if the other parent was a U.S. citizen at the time of the child's birth and remains a citizen.<sup>23</sup></li> <li>c. Parent or parents must have been naturalized prior to the child's 18<sup>th</sup> birthday;<sup>24</sup></li> <li>d. Child must have been lawfully admitted for permanent residence before the 18<sup>th</sup> birthday;<sup>25</sup></li> <li>e. Child must be unmarried;<sup>26</sup></li> <li>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,<sup>27</sup> is in the legal custody of the adoptive parent(s), entered the U.S. as a lawful permanent resident and adoption occurred before s/he turned 18.<sup>28</sup> Stepchild cannot derive citizenship.</li> </ul>

Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen.<sup>29</sup>

- a. At least one parent is a U.S. citizen either by birth or naturalization.<sup>30</sup>
- 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 and the father must not have legitimated the child,<sup>31</sup> 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.<sup>32</sup>
- c. Child is under 18 years old.<sup>33</sup>
- d. Child must be unmarried.<sup>34</sup>
- e. Child is a lawful permanent resident.<sup>35</sup>
- f. Child is residing in the U.S. in the legal and physical custody of the citizen parent.<sup>36</sup>
- 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.<sup>37</sup> An adopted child who qualifies as an orphan under INA § 101(b)(1)(F) also will qualify for derivation.

Produced by ILRC (January 2005) - This Chart is intended as a general reference guide. ILRC recommends practitioners research the applicable law.

#### Footnotes for Chart C:

<sup>1</sup> Prior to 1907 a mother could transmit citizenship only if she was divorced or widowed. See Page 217 of *U.S. Citizenship and Naturalization Handbook* by Daniel Levy (2000 Edition, West Group).

<sup>2</sup> It is the ILRC's position, and the ILRC believes that all advocates should argue, that the definition of "prior to the 18<sup>th</sup> birthday" or "prior to the 21<sup>st</sup> 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 18<sup>th</sup> birthday" or "prior to the 21<sup>st</sup> birthday" means "prior to or on the 18<sup>th</sup> birthday" or "prior to or on the 21<sup>st</sup> birthday."

<sup>3</sup> Prior to 1907 the child could take up residence in the U.S. after turning 21 years of age. See Page 217 of *U.S. Citizenship and Naturalization Handbook* by Daniel Levy (2000 Edition, West Group), citing Sec. 5, Act of March 2, 1907.

<sup>4</sup> 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 Page 218 of *U.S. Citizenship and Naturalization Handbook* by Daniel Levy (2000 Edition, West Group), citing Sec. 4, Act of 1802 as supplemented by Sec. 5, Act of 1907. See also INS Interpretations 320.1.

<sup>5</sup> 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).

<sup>6</sup> See footnote 4 above.

<sup>7</sup> See Foreign Affairs Manual (FAM)1153.4-3.

<sup>8</sup> "Legal separation" of the parents as used in the 1940 statute means either a limited or an absolute divorce obtained through judicial proceedings. Generally, if the parents have a joint custody decree (legal document), then both parents have legal custody for purposes of derivative citizenship. 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 also, INS Interpretations 320.1(b). 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.

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).

<sup>9</sup> See INS Interpretations 320.1(c).

<sup>10</sup> 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 also INS Interpretations 320.1(b). **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.

<sup>11</sup> 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 the *U.S. Citizenship and Naturalization Handbook*]

<sup>12</sup> As long as all the conditions in this section are met before the child's 18<sup>th</sup> 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).

<sup>13</sup> See Foreign Affairs Manual (FAM) 1153.4-4.

<sup>14</sup> See footnote 7 above.

<sup>15</sup> 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.

<sup>16</sup> See FAM 1153.4-4 and footnote 10 above.

<sup>17</sup> 1952-1978 law stated prior to "16<sup>th</sup> birthday." The new law stating prior to the "18<sup>th</sup> 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.

<sup>18</sup> 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)]

<sup>19</sup> See INA § 101(c)(1).

<sup>20</sup> See footnote 12 above.

<sup>21</sup> See Foreign Affairs Manual (FAM) 1153.4-4.

<sup>22</sup> See FAM 1153.4-4 and footnote 8 above.

<sup>23</sup> See FAM 1153.4-4 and footnote 10 above.

<sup>24</sup> See footnote 17 above.

<sup>25</sup> See footnote 18 above.

<sup>26</sup> See footnote 19 above.

<sup>27</sup> 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 footnote 12.

<sup>28</sup> 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)]

<sup>29</sup> 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.

<sup>30</sup> INA section 320 as amended by the Child Citizenship Act of 2000.

<sup>31</sup> 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 Bureau of Citizenship and Immigration 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.”

<sup>32</sup> 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 16<sup>th</sup> birthday. Thus, some argue that such a legitimation could take place even between the 16<sup>th</sup> and 18<sup>th</sup> birthdays. This argument appears weak because of the definition of child found in INA §101©, 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.

<sup>33</sup> INA section 320 as amended by the Child Citizenship Act of 2000.

<sup>34</sup> INA section 320 as amended by the Child Citizenship Act of 2000.

<sup>35</sup> INA section 320 as amended by the Child Citizenship Act of 2000.

<sup>36</sup> 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.

<sup>37</sup> 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](http://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 an INS interview. This process is called “adjusting status.”

**Adoption:** See **Chapter 5** for a full discussion. See also [Orphan](#).

**Alien:** An INS 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 16<sup>th</sup> 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.

**Deferred Action Status:** A type of immigration status in which the INS knows that a person is in the U.S. unlawfully, but the INS 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.

**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 INS 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 INS 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 INS 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 INS 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 INS 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.

**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.

**INS:** The Immigration and Naturalization Service is the federal government agency in charge of carrying out the immigration laws and adjudicating VAWA, naturalization and other immigration applications.

**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 fiancées 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.

**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 INS. 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 INS 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/visa\\_bulletin.html](http://travel.state.gov/visa_bulletin.html).

**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 INS has “waived” the fee requirement.