

Special Immigrant Juvenile Visas: A Neglected Visa for Neglected Children

by Amy Erlbacher-Anderson



I first discovered the special immigrant juvenile visa by pure chance. It was mentioned as an afterthought in an article about visas for battered women—buried at the end and given little importance. When I tried to find more information about this visa, I discovered that the immigration community rarely discussed the visa and that most juvenile courts, social workers, and state agencies were unaware that it existed. I also discovered that there are a surprising number of children with no legal status to be present in the United States in our child welfare system.

If a child is eligible for this visa, it is a powerful tool to gain that child legal authority to be present in the United States and, eventually, to become a citizen because the visa allows juveniles who have been essentially abandoned in the United States to obtain permanent resident status.

A special immigrant juvenile visa (SIJV) is defined at 8 USC section 1101(a)(27)(J), which is supplemented by

regulations at 8 CFR 204.11. The federal agency governing the adjudication and issuance of these visas is the United States Citizenship and Immigration Service (CIS).

Eligibility

There are statutory and agency requirements for an SIJV. If, at any point during the process, the juvenile ceases to meet one of these requirements, the CIS will cancel the process and revoke any status the juvenile has been given up until the juvenile becomes a permanent resident. The statutory requirements are that the petitioner must be a foreign person present in the United States:

1. who has been declared dependent on a US juvenile court or whom a court has committed to or placed under the custody of a state agency or department;
2. who has been deemed eligible for long-term foster care;
3. who is so eligible due to abuse, neglect or abandonment; and
4. for whom it is determined in judicial or administrative proceedings that it is not in their best interest to be returned to their (or their parents') country of nationality or last habitual residence.

In addition, the CIS requires that the individual must be:

1. under the jurisdiction of a juvenile court,
2. unmarried, and
3. under age 21.

Each of these requirements is discussed in greater detail below.

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Dependency. The individual must be under the jurisdiction of a juvenile court and declared a dependent on the court or otherwise committed to or placed under the custody of a state agency. Although the CIS has no written policy on this, it appears that this would include not only individuals in dependency proceedings but also in delinquency proceedings because delinquent juveniles have generally been legally committed to or placed in the custody of a state agency. However, since this position has not been clearly adopted by the CIS, it may be safer to secure placement for the juvenile as a dependent or to have concurrent delinquency/dependency status if permitted by state law. Keep in mind that meeting this requirement is solely dependent on state law and its definition for a dependent or delinquent child.

Deemed Eligible for Long-Term Foster Care. A court must find that family reunification is not a viable option and the child should be placed permanently in foster care, guardianship or adoption. The juvenile is expected to remain in foster care until the age of majority, unless adopted or placed with a guardian. (However, if the child is adopted, the juvenile court will generally terminate jurisdiction once an adoption is completed—rendering the child ineligible for an SIJV but eligible for immigration through the adoptive parents). It is imperative that the court issue an order ruling on the child's eligibility for long-term foster care.

Abuse, Abandonment, or Neglect. The petition must show the CIS that the reason the court has made a dependency determination is because the juvenile has actually been abused, abandoned or neglected and not to help the child obtain legal status. Some states use other terms, but the order must state one of the three listed in the law.

Abuse does not need to have occurred in the US, but must meet the definition under applicable state law. However, both neglect and abandonment are generally expected to have occurred in the US.

Evidence of abuse, abandonment and neglect must be provided to the court, but the statute does not require that it be provided to the CIS since most agents do not have the training necessary to evaluate or interpret whether a juvenile has been abused or neglected. In addition, to the extent that the evidence is confidential, an attorney may not violate legal and ethical rules; and, the court may also have privacy rules concerning its files that would prohibit an attorney from providing a copy of the file to the CIS. The best solution is for the order to clearly provide the grounds on which the decision was made.

Juvenile's Best Interests. A court or administrative body must find that it is not in the juvenile's best interests to return to the home country or country of most recent residence or the parent's home country or country of last habitual residence. The court's order must specifically state that it is not in the child's best interest to be returned. It will be the attorney's responsibility to provide this evidence to the court,

which will base its decision on applicable state law. For evidence, a report should be prepared for the court discussing the effort made to determine the conditions for the juvenile in the home country and conditions for the juvenile in the US and the basis of the author's conclusion that the juvenile should not return. This report could be completed by a social worker, counselor or state agency.

Under the Jurisdiction of the Juvenile Court. The juvenile must remain under the jurisdiction of the court until the juvenile has become a permanent resident. Therefore, the judge must be asked to retain jurisdiction until the process has been completed and a copy of the minutes from the most recent court hearing should be brought to the juvenile's permanent residence interview.

This requirement is complicated by the fact that state law often requires that a person be under the age of 18 (19 in Nebraska) to be declared dependent on a juvenile court. Most juvenile court judges will want (or are required under court rules) to terminate dependency proceedings when the juvenile reaches a certain age. In addition, some state laws simply end a dependency finding at age 18, while others will extend it to age 19 or 21 or to the completion of high school. An attorney will need to request expedited treatment from the CIS for a petition filed for a child nearing any of these mandated ages because if the juvenile court does not retain jurisdiction over the juvenile until the adjustment process is completed, CIS may revoke special immigrant juvenile status.

Age 21. Under federal law, any person under 21 who meets the requirements for an SIJV can apply. However, as noted above, state law or court age limits on the jurisdiction of juveniles may require the process to be completed long before the individual reaches age 21.

The juvenile must submit some documentary proof of age, but not proof of birth, to the CIS with the petition. Options include: a birth certificate, a passport, an official, government-issued foreign identity document, a baptismal certificate, early school records, an affidavit of someone personally aware of the birth, or a court order setting out an established age. To use documentation other than the birth certificate, an explanation must be included of the efforts made to obtain a birth certificate. The Foreign Affairs Manual issued by the US Department of State and/or the local consulate from the juvenile's home country are two resources on what type of documentation is available from a particular country. It is possible that the CIS would accept an official doctor's or psychologist's evaluation and/or a dental exam.

Unmarried. The juvenile must not be married, at all times, during the process. However, if the juvenile marries an American citizen, there may be other grounds for permanent resident status.

Obtaining a Special Immigrant Juvenile Visa

Three steps must be taken in most cases to obtain a special immigrant juvenile visa: obtaining a court order concerning the juvenile's dependency, submitting a petition for the special immigrant juvenile visa, and applying for adjustment of status to permanent resident.

Court Order/CIS Permission. If the juvenile is already in the actual or constructive custody of the CIS, a juvenile court judge may not make any custody decision on the juvenile without the permission of the CIS. Actual custody generally means that the juvenile has been placed and remains in a CIS detention facility. Constructive custody has not been specifically defined, but appears to mean that the juvenile is in a CIS-sponsored foster care setting (the CIS pays an entity to maintain a group home for unaccompanied immigrant children).

A request for CIS consent to a court's jurisdiction must be made in writing to the District Director with jurisdiction over the juvenile. The CIS has indicated that consent should be given if the juvenile appears to be eligible for the special immigrant juvenile visa and the District Director believes that dependency proceedings are in the child's best interests.

If the juvenile is not in CIS custody, the juvenile must be in or placed in dependency proceedings with the court having jurisdiction over the child. The process will vary in each state (and each county), but options include working with the county child protective services department, social workers, legal-aid offices, and non-profit organizations that work with juveniles. At a minimum, consult with an attorney that practices in dependency proceedings; however, often these juveniles are already in the system.

As discussed above, the court must make findings and issue an order on the juvenile's status, which must be submitted with the petition. Further, the court will need to terminate the parental rights over the juvenile and state law regarding termination of rights must be followed, including providing notice and making an effort to reunify the family. However, if a parent is dead or has clearly abandoned the juvenile, reunification efforts may not be required. If the juvenile has close family outside of the United States, an investigation of the situation will be necessary.

Petition for Visa. A Form I-360, Petition for Amerasian, Widow or Special Immigrant, is filed with the local district office with jurisdiction over the juvenile. When possible, the juvenile should sign the petition; however, if this is not possible, it may be signed by any person acting on the juvenile's behalf (including a social worker or foster parent).

Application for Adjustment of Status. A Form I-485, Application for Permanent Residence, and attendant forms are filed as a packet with the local district office with jurisdiction over the juvenile. Most district offices will accept the application filed concurrently with the visa petition; but,

this may not be possible if the juvenile is already in removal proceedings. If at all possible, file concurrently because special immigrant juvenile status may be revoked if the juvenile fails to file for permanent resident status within one year of being eligible for an immigrant visa.

It is also recommended to file a Form I-765, Application for Employment Authorization, as obtaining an Employment Authorization Card will, in turn, allow the juvenile to obtain a social security number.

Benefits and Risks

While there are a number of benefits that come with applying for and obtaining an SIJV, it also carries certain risks that everyone involved with the juvenile should be aware of and take into consideration before moving forward.

One of the benefits of an SIJV is that the juvenile becomes a permanent resident of the US for life, not just when the individual is a juvenile. Further, the individual will be able to apply for US citizenship after five years as a permanent resident. In the short term, the juvenile is protected, (at least temporary) from deportation while the petition and application remain pending. The juvenile may also obtain an Employment Authorization Document while the petition and application remain pending which, not only allows an older juvenile to work legally, it also enables any juvenile to obtain a social security number and provides the juvenile a picture ID months before a permanent residence card would be issued. The juvenile may also now be eligible for limited public benefits and for in-state tuition or student loans.

However, there are risks inherent in this process. First, if the petition or application is rejected, the CIS will remove/deport the juvenile; and, by filing with the CIS, the CIS is alerted to the fact that the child is in the US illegally. If the juvenile is in delinquency proceedings, several types of delinquency findings are grounds for inadmissibility which would make the juvenile ineligible for the special immigrant juvenile visa, including prostitution, sex offenses, and the sale or possession for sale of drugs. Lastly, the CIS can revoke special immigrant juvenile status at any point before the juvenile becomes a permanent resident, so the juvenile and the attorney must take precautions to avoid having the juvenile's position or circumstances change during the process.

This article is only the tip of the immigration process iceberg for an eligible juvenile and is only intended to raise awareness among the legal community of an option available to juveniles who have no legal immigrant status. I have not addressed a number of issues, including circumstances that may prevent a juvenile from becoming a permanent resident. I highly recommend contacting any of the following organizations with questions on the particulars of a situation or to obtain more detailed resources: the Immigrant Legal Resource Center (San Francisco, CA), the National Immigration Law Center, or the National Center for Youth Law. 