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**ABUSED, ABANDONED, OR
NEGLECTED: LEGAL OPTIONS FOR
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Meaghan Fitzpatrick and Leslye E. Orloff

I. INTRODUCTION

The number of immigrants living in the U.S. has steadily increased in the last fifteen years. In 2014, over 42 million immigrants lived in the U.S. with women (51%) and children under the age of 18 (25%) representing a substantial proportion of the U.S. immigrant population.¹ Of that population, 2.1 million children are foreign-born and 17.5 million children are living with at least one foreign-born parent.² Many women and girls who have immigrated to the U.S. will have experienced gender based violence in their home countries and/or during their journey immigrating to the U.S.. Recently arriving immigrant women and girls are highly susceptible to gender based crime victimization in the U.S. including child abuse, child sexual exploitation, incest, dating violence, domestic violence sexual assault, and human trafficking.³ U.S. immigration laws offer

¹ Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the U.S.*, Migration Policy Institute (April 14, 2016), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Demographic, Educational, Linguistic>.

² *Id.*

³ *Review of the President's Emergency Supplemental Request for Unaccompanied Children and Related Matters: Hearing on S. 272 DHS Appropriations Bill before the S. Comm. on Appropriations*, 113th Cong. (2014) (statements of Jeh Johnson, Sec. of Dept. of Homeland Security, and Sen. Dick Durbin).

specific forms of immigration relief designed to offer humanitarian protections for immigrant children and youth who are victims of child abuse, abandonment, child neglect, sexual assault, or human trafficking perpetrated either in the U.S. or abroad. As greater numbers of immigrant children and youth arrive in the U.S., state family courts are seeing an increase in the numbers of immigrant children coming before the court in custody, protection from abuse, child support, children in need of supervision, and child abuse and neglect proceedings.

Special Immigrant Juvenile Status (SIJ) was created to benefit and protect children who had been abused, abandoned, or neglected, and ensures their continued safety in the U.S.. This article provides an overview of immigration relief available to help immigrant women and girls living in the U.S. and discusses how the process of applying for SIJ, in particular, requires involvement of both state family courts and the U.S. Department of Homeland Security's Citizenship and Immigration Services (USCIS). State courts play a vital role in SIJ applications. To petition for SIJ status, eligible immigrant children must obtain state court orders containing specified findings about the custody and best interests of the juvenile.⁴

This article discusses the legislative history and the social science research that supported both the creation of Special Immigrant Juvenile Status (SIJ) and the expansion of SIJ protections through the Violence Against Women Act of 2005 (VAWA) and the Trafficking Victim's Protection and Reauthorization Act of 2008 (TVPRA). The 2008 amendments to the Special Immigrant Juvenile Status program required that all children seeking SIJ obtain a court order from a state court containing statutorily required findings. SIJ applicants must submit state court orders as a mandatory part of the child's SIJ application. This article provides direction and analysis on the procedural and substantive legal questions arising in state family courts in cases involving SIJ eligible children. Common issues that arise at the intersection of state court and immigration law, such as "ageing out," and jurisdiction in state court will be discussed. The

⁴ IMMIGRATION AND NATIONALITY ACT § 101(a)(27)(J) defines "Special Immigrant Juveniles". This section was added by § 153 of the Immigration Act of 1990 and amended most recently by the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) in 2008.

article will also chronicle the broad range of state family court cases that involve custody, placement, care and/or best interests of children in which courts should be asked to issue SIJ findings. An overview of the forms of immigration relief offering protection from deportation and work authorization for immigrant children and youth will also be provided. Finally, the article will highlight the need for continuous screening of immigrant youth for SIJ, U visa, T visa, and VAWA eligibility from arrival in the U.S., through placement with a family, and the need for monitoring of the child's placement to screen for abuse that may occur in the U.S. following placement.

Women and children seeking safe haven in the U.S. are often fleeing severe forms of violence that they have suffered in their home countries.⁵ In recent years, the increase of gang violence, gender based violence, and poverty in some Central American countries has caused an influx of immigrant victims crossing the border into the U.S.⁶ The geographical region known as the "Northern Triangle," consisting of Guatemala, El Salvador, and Honduras, in particular has extremely high rates of violence against women and girls.⁷ El Salvador has the highest rate of femicide in the world, Guatemala the third highest, and Honduras the seventh.⁸ Women and girls living in countries with high levels of violence against women are more frequently attacked in public, including gang and intimate partner violence.⁹ Women and girls in these countries are also victims of physical and sexual assaults, child abuse, trafficking, economic crimes, and emotional violence, often with the local government unwilling or unable to help.¹⁰ This severe gender based violence has caused many women and children to flee their countries of origin seeking safe haven in the U.S.. The number of unaccompanied girls younger than 18 years old caught at the Mexican-American border

⁵ U.N. High Comm. for Refugees Report, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014) [hereinafter UNHCR Report].

⁶ *Id.* at 45.

⁷ *Id.* at 5.

⁸ Mathias Nowak, *Femicide: A Global Problem*, SMALL ARMS SURVEY 3 Figure 2 (2012).

⁹ *Id.* at 4.

¹⁰ UNHCR Report, *supra* note 3, at 30-38.

without documentation increased by 77% in 2014.¹¹ Women and girls face disproportionate risks of sexual assault and trafficking during the course of their journey. At least 60% of Central American women and girls crossing Mexico to get to the U.S. border are raped along the way.¹² The assaults are so rampant many girls take contraceptives as a preventative measure.¹³

Women and girls who survive the journey across the border and enter the U.S. without inspection are uniquely vulnerable. They remain at an increased risk for crime victimization in the U.S. due to previous victimization, undocumented immigration status, language, cultural, and economic barriers. Undocumented immigrants living in the U.S. can be very vulnerable to become victims of sexual assault, domestic violence, child abuse, and trafficking. Many immigrant women and girls suffer widespread sexual assault in route to the border and many are also likely to have suffered previous victimization in their country of origin. Additionally, many are particularly vulnerable to be targeted for crime victimization as women and girls living undocumented in the U.S.. Immigrants who have been victims of domestic violence, sexual assault, child abuse, child abandonment or child neglect or human trafficking in the U.S. and/or abroad may be eligible for Violence Against Women Act (VAWA), Trafficking Victims Protection Act and other humanitarian forms of immigration relief, including Special Immigrant Juvenile Status (SIJ).

It is important for government agencies, attorneys, advocates, and law enforcement to be aware of and understand the rates of victimization among recent immigrants and be knowledgeable about

¹¹ Jens Manuel Krogstad et al., *At the Border, a Sharp Rise in Unaccompanied Girls Fleeing Honduras*, PEW RESEARCH CENTER (2014).

¹² *Invisible Victims: Migrants on the Move in Mexico*, AMNESTY INTERNATIONAL PUBLICATIONS 15 (2010) [hereinafter Amnesty International Report]; Erin Siegal McIntyre & Deborah Bonello, *Is Rape the Price to Pay for Migrant Women Chasing the American Dream?*, FUSION (Sept. 10, 2014, 5:51 PM), <http://fusion.net/story/17321/is-rape-the-price-to-pay-for-migrant-women-chasing-the-american-dream/>; Jude Joffe Block, Fronteras, *Women Crossing the U.S. Border Face Sexual Assault with Little Protection*, PBS (Mar. 31, 2014, 1:49 PM), <http://www.pbs.org/newshour/updates/facing-risk-rape-migrant-women-prepare-birth-control/>.

¹³ See Amnesty International Report, *supra* note 12, at 17.

immigrant victims' legal rights in the U.S.. Advocates and attorneys play a crucial role in informing abused immigrants about their legal rights, supporting them through the legal process, safety planning, and encouraging those at greatest risk to turn to the justice system for help.¹⁴ Research has found that establishing real working relationships between advocates, police, and prosecutors working collaboratively on cases is the most effective approach in encouraging immigrant victims to come forward to seek immigration relief and pursue justice system protection.¹⁵ A significant proportion of the immigrant and undocumented crime victims who, with support from advocates and attorneys, file immigration cases and seek protection orders embark on a path in which they develop trust of the justice system that greatly increases their willingness to call police and turn to the justice system for help.¹⁶

II. IMMIGRATION RELIEF FOR VICTIMS OF CRIME AND CHILDREN

Women and girls who have been a victim of crime may be eligible for special forms of immigration relief designed to help vulnerable immigrant crime victims and immigrant children.

¹⁴ Mary Ann Dutton et al., *Cosmos Corp., Use and Outcomes of Protection Orders by Battered Immigrant Women: REVISED FINAL TECHNICAL REPORT*, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (2006); Nawal H. Ammar et al., *Battered Immigrant Women in the U.S. and Protection Orders: An Exploratory Research*, 37 CRIM. JUST. REV. 337 (2012); Praxis International, *Law Enforcement—Patrol Response*, in *THE BLUEPRINT FOR SAFETY* 43 (2007).

¹⁵ Giselle Hass et al., *Barriers and Successes in U Visas for Immigrant Victims: The Experiences of Legal Assistance for Victims Grantees*, ARTS SOC.SOCIAL SCI. J. 14 (2014); Giselle Hass et al., *U-Visa Legal Advocacy: Overview of Effective Policies and Practices*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013); Rachel Rodriguez, *Community Partnership Models Addressing Violence Against Migrant and Seasonal Farmworker Women*, Rockville, MD: National Criminal Justice Reference Service.

¹⁶ Leslye Orloff et al., *U-Visa Victims and Lawful Permanent Residency*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2012); Krisztina E. Szabo et al., *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants*, NATIONAL WOMEN'S ADVOCACY PROJECT (2014); Krisztina E. Szabo & Leslye E. Orloff, *The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending*, National Women's Advocacy Project (2014); Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, INT'L J. POLICE SCI. & MGMT 230, 240 (2005).

Immigration laws in the U.S. provide several specific protections for victims of domestic violence, sexual assault, child abuse, child abandonment, child neglect, human trafficking, and other criminal activities.¹⁷ The main forms of relief that women and girls crossing the border should be screened for eligibility for are Special Immigrant Juvenile Status (SIJ), the U visa, the T visa, and eligibility for Violence Against Women Act (VAWA) Self Petitioning. In addition, Deferred Action for Childhood Arrivals (DACA) provides protection from deportation for immigrants who came to the U.S. as children. DACA is a form of temporary immigration relief not related to crime victimization.

A. Immigration Relief for Victims of Crime

1. *VAWA Self Petitions.* - Immigrant children who have been victims of child abuse, incest, or sexual assault perpetrated by the child's U.S. citizen or lawful permanent resident natural parent, adoptive parent or step-parent are eligible to VAWA self-petitions.¹⁸ The approved self-petition allows the immigrant victim and any children the immigrant included in the self-petition to apply for lawful permanent residency.¹⁹

To file for a self-petition, the abuse, defined as battering or extreme cruelty,²⁰ must have been perpetrated by a U.S. citizen or

¹⁷ See Section III (b).

¹⁸ Immigration and Nationality Act § 101(a), 8 U.S.C. § 1101(a).

¹⁹ Spouses and children under 21 years of age of U.S. Citizens can adjust to LPR immediately and can file the application concurrently with the VAWA self-petition. See IMMIGRATION AND NATIONALITY ACT § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i); Spouses and children under 21 years of age of LPRs and must wait for an immigrant visa to become available under the current wait list, the wait as of September 25, 2015 is 7 months. See *Visa Bulletin: Immigrant Numbers For October 2015*, U.S. DEPARTMENT OF STATE: BUREAU OF CONSULAR AFFAIRS (Sept. 25, 2015), http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_October2015.pdf.

²⁰ See generally Leslye E. Orloff et al., *Battering and Extreme Cruelty: Drawing Examples from Civil Protection Order and Family Law Cases*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

lawful permanent resident parent or step-parent.²¹ When filing the VAWA self-petition, the abused immigrant child must be under 21 years of age²² and unmarried.²³ Married immigrant youth who are battered or subjected to extreme cruelty by their U.S. citizen or lawful permanent resident spouses or former spouses also qualify for VAWA self-petitioning.²⁴ Formerly married immigrant youth must file marriage based self-petitions within two years of the termination of the marriage.²⁵ The survivor must reside or have resided at some time in the past (including periods of visitation) with the abusive U.S. citizen or lawful permanent resident. The applicant must also prove that they have good moral character which includes evidence about any criminal history the victim might have.²⁶

The self-petition allows spouses, parents, children, and step-children abused by a U.S. citizen or lawful permanent resident parents to apply for permanent residence confidentially without needing the abuser to file an immigration petition on their behalf. Within three months of filing a VAWA self-petition, victims will receive a prima facie determination making the applicant and any children included in the victim's application eligible for post-secondary educational grants and loans, public and assisted housing, health care insurance and some other state and federal public

²¹ *Policy Memorandum: Eligibility to Self-Petition as a Battered or Abused Parent of a U.S. Citizen; Revisions to Adjudicator's Field Manual (AFM) Chapter 21.15 (AFM Update AD 06-32)*, U.S. DEPARTMENT OF HOMELAND SECURITY: U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Aug. 30, 2001), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/August/VAWA-Elder-Abuse.pdf>.

²² Leslye Orloff et al., *Battered Immigrants and Immigration Relief, in Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

²³ Immigration and Nationality Act § 204(a)(1)(D)(i)(I), 8 U.S.C. § 1154.

²⁴ Immigration and Nationality Act § 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc), 8 U.S.C. § 1154.

²⁵ Immigration and Nationality Act § 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc), 8 U.S.C. § 1154; Michael A. Pearson, *Memorandum for Regional Directors: Eligibility to Self-Petition as a Battered Spouse of a U.S. Citizen or Lawful Permanent Resident Within Two Years of Divorce*, U.S. Department of Justice: Immigration and Naturalization Service (Jan. 2, 2002), https://www.uscis.gov/sites/default/files/files/pressrelease/VAWADv_pub.pdf.

²⁶ 8 C.F.R. § 204.2(c)(1)(i)(F)(2007)

benefits.²⁷ If granted, VAWA Self-Petitioners receive legal immigration status, access to certain public benefits, and work authorization.²⁸

The VAWA self-petition primarily helps immigrant children abused in the U.S.. However, immigrant children abused abroad by a parent, step-parent, spouse or former spouse who is a U.S. citizen or lawful permanent resident employee of the U.S. government or member of the uniformed services also qualify to file VAWA self-petitions.²⁹

2. *The U Visa*. - The U visa is available to victims of qualifying criminal activity who have suffered substantial physical or mental abuse as a result of the criminal activity and who are willing to be helpful to law enforcement, prosecutors, courts, child abuse investigators, labor enforcement agencies or other government agencies³⁰ in detection, reporting, investigation, prosecution, conviction or sentencing.³¹

Criminal activities perpetrated against immigrant children and adult victims that qualify for U visa protection include the following: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, hostage, incest, involuntary

²⁸ See Moira Fisher Preda et al., *Preparing the VAWA Self-petition and Applying for Residence*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

²⁹ Immigration and Nationality Act §§ 204(a)(1)(A)(v), 204(a)(1)(B)(iv).

³⁰ The government agencies eligible to sign certifications include agencies with investigative authority that in the course of their work uncover or detect facts about criminal activities perpetrated against the survivor. See *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53019 (Sept. 17, 2007), <http://apps.americanbar.org/domviol/tip/trainings/Immigration%20Remedies%20for%20Trafficking%20Victims%20Workshop/U%20Visa%20Regs%20-%20Fed.%20Register%209.17.2007.pdf>.

³¹ For a full discussion on the U Visa see Leslye Orloff et al., *U Visas: Victims of Criminal Activity*, in *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, and other related crimes, and include attempts, conspiracy, or solicitation to commit any of the above and other related criminal activities.³² The U visa qualifying criminal activity must have occurred in the U.S. or violate U.S. law.³³ Once the U visa case is approved, the applicant receives legal work authorization and access to health care insurance and may apply for legal permanent residence after four years.

Immigrant youth who are victims of U visa listed criminal activities committed against them in the U.S. may be eligible for a U visa.³⁴ When the criminal activity the child suffered would under state law be defined as abuse, abandonment or neglect the child may also qualify for SJIS.³⁵ The U visa may be an important avenue to attain legal immigration status for children and youth suffering dating violence, extortion, felonious assault and other U visa listed criminal activities that would not make the child SIJ eligible.

3. *The T Visa and Continued Presence.* - The T visa and Continued Presence are two separate forms of immigration relief available to protect victims of severe forms of human trafficking perpetrated in or being prosecuted in the U.S. Government officials investigating or prosecuting a human trafficking case may file requests asking DHS to grant the trafficking victims they are working with continued presence. Continued presence allows immigrant

³² U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies, DEPARTMENT OF HOMELAND SECURITY (2015). available at <https://www.dhs.gov/publication/u-visa-law-enforcement-certification-resource-guide>

³³ In some cases, crimes committed outside of the U.S. may qualify under extraterritorial application of American Criminal Law; see generally Charles Doyle, *Extraterritorial Application of American Criminal Law*, CONG. RESEARCH SERV. (2012).

³⁴ Joanne Lin and Colleen O'Brien, *Immigration Relief for Child Sexual Assault Survivors, in Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT 4 (2013).

³⁵ *Id.*

trafficking victims to stay temporarily in the U.S. with work authorization and access to federal and state public benefits.³⁶

The T visa allows immigrant victims who have suffered severe forms of human trafficking to remain in the U.S. for four years.³⁷ Trafficking victims can file for a T visa whether or not a government official sought continued presence for that victim.³⁸ Victims awarded T visa status receive protection from deportation, work authorization, and access to state and federal public benefits.³⁹ Both continued presence and the T visa are available to victims of severe forms of human trafficking who are physically present in the U.S. on account of the trafficking. Victims applying for and receiving T visas are required to comply with reasonable requests for assistance from law enforcement and prosecution officials with an investigation or prosecution of the traffickers.⁴⁰ To be awarded a T visa a victim will also need to prove that they would suffer extreme hardship involving unusual and severe harm if removed from the U.S.⁴¹

Human trafficking, often referred to as “contemporary slavery,” may take the form of labor or sexual exploitation. Victims of severe forms of trafficking are eligible to receive either or both continued presence or T visas. Eligibility includes adults compelled to engage in “sex acts” through the use of force, fraud, or coercion. Children less than 18 years of age involved in the commercial sex trade or prostitution as a matter of law are victims of trafficking. For minors, no proof of force, fraud, or coercion is required. Additionally, both adult and child immigrants who are forced or fraudulently recruited, harbored, or transported for labor or services

³⁶ TVPA 2000 §107(c)(3), 22 U.S.C. §7105(c)(3).

³⁷ 8 U.S.C. § 1101(a)(15)(T).

³⁸ TVPA 2000 §107(c)(3), 22 U.S.C. §7105(c)(3); The award of continued presence does not guarantee an approval of a T-visa, there are separate statutory requirements for a T-visa. .

³⁹ TVPA 2000 §107(c)(3), 22 U.S.C. §7105(c)(3).

⁴⁰ Carol Angel and Leslye Orloff, *Human Trafficking and the T-Visa*, NATIONAL WOMEN’S ADVOCACY PROJECT 8 (2015).

⁴¹ *Id.* at 10.

that subject them to involuntary servitude, peonage, debt bondage, or slavery are also victims of severe forms of human trafficking.⁴²

Immigrant youth who are victims of human trafficking may qualify for several different types of immigration relief. These include the forms of relief discussed above: the T visa, continued presence, the U visa and, in a limited number of cases, VAWA self-petitioning. Immigrant child trafficking victims may also qualify for the two forms of immigration relief discussed below: Special Immigrant Juvenile Status and Deferred Action for Childhood Arrivals (DACA). Which remedy an immigrant child qualifies for and which they will be able to successfully pursue will depend on the facts of each individual child's case. Factors will include: whether the perpetrator was a parent or step-parent, whether the parent or step-parent is a U.S. citizen or a lawful permanent resident; how long the child has been in the U.S.; whether the child is a minor under state law; or whether an immigrant child is married or unmarried.⁴³ Additionally, some of these remedies can be pursued sequentially. A child who has been in the U.S. since 2007 may decide to first pursue DACA which will give the child protection from deportation and work authorization. Immigrant children who have been victims of human trafficking may also pursue either a U or T visa case depending on which evidentiary requirements the child can best meet. Which form of immigration relief is the best alternative for an immigrant child who has been a victim of trafficking will also be affected by the benefits a child can receive through the type of immigration case filed. T visa and continued presence have the most access to federal and state public benefits and the U visa has the least. Work authorization can be more quickly obtained through DACA and continued presence than other forms of immigration relief.

⁴² See Laura Simich, *Out of the Shadows: A Tool for the Identification of Victims of Human Trafficking*, THE VERA INSTITUTE (2014).

⁴³ See Leslye E. Orloff et al., *Comparing Forms of Immigration Relief for Immigrant Victims of Crime*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

B. Immigration Relief for Vulnerable Immigrant Children

1. Special Immigrant Juvenile *Status*. - Special Immigrant Juvenile Status (SIJ) is a unique form of immigration relief available for youth who have been abused, abandoned, or neglected. SIJ can be especially important for recent young immigrants because the abuse, abandonment, or neglect by at least one of the child's parents need not have taken place in the U.S.. It is available to immigrant youth who were abused, abandoned or neglected by the child's parent or parents in the child's home country. Abused, abandoned, and neglected immigrant children are among the most vulnerable individuals in the U.S. and as such, are very susceptible to domestic violence, sexual assault, and other crimes and victimization. For this reason, SIJ is also available to immigrant victims who experienced child abuse, incest, child exploitation, abandonment, or neglect by a parent, step-parent, or adopted parent in the U.S..

SIJ is only available to unmarried youths who have been abused, abandoned, or neglected by either one or both parents. Applicants for SIJ must reside in the U.S. at the time the SIJ application is filed. The SIJ application must include an order from a state court judge containing findings on abuse, abandonment or neglect, on the viability of reunification with the parent who committed the abuse, abandonment or neglect and on the best interests of the child to not be removed to the child's home country.⁴⁴ The state court issuing this order must have jurisdiction under state law to make judicial determinations about the care, custody, dependency, or placement of children.⁴⁵ It is important that advocates and attorneys working with immigrant women and children screen recent immigrants and all children involved in state family court proceedings for SIJ eligibility unless the child is a U.S. citizen or lawful permanent resident. Early and ongoing screening to identify abuse suffered after arrival in the U.S. is essential to ensuring that children eligible for SIJ are identified and provided the opportunity to obtain state court orders needed to apply for SIJ status before the child reaches the age of majority under state law.

⁴⁴ Immigration and Nationality Act § 101(a)(27)(J)(i)(ii), 8 U.S.C. § 1101

⁴⁵ *Id.*

This helps children gain lawful presence in the U.S. and avoid some of the dangers of re-victimization.

2. *Deferred Action for Childhood Arrivals* - Deferred Action for Childhood Arrivals (DACA) is a prosecutorial discretion program that provides temporary relief from deportation and work authorization for certain undocumented immigrants living in the U.S..⁴⁶ DACA may be available for women and girls physically present in the U.S. who have been continuously residing in the U.S. since June 15, 2007.⁴⁷ Deferred action provides qualifying individuals protection from deportation for a period of two years with the potential for renewal. DACA recipients are also authorized to work in the U.S., and will not accrue unlawful presence during the period deferred action is in effect. While it may be renewed after two years, deferred action is not immigration status, does not provide a path towards permanent residence or citizenship, and does not extend to family members.

Deferred action is a useful tool for immigrant women and girls who have been victims of a crime and may be eligible for longer term immigration relief. Individuals coming forward for DACA may also have been victims of domestic violence, sexual assault, human trafficking, and other crimes that would make them eligible for permanent legal immigration status as a result of having been crime victims. Survivors applying for DACA can apply prior to, concurrently with, or while waiting for approval of crime victim-related immigration remedies.⁴⁸ This benefits immigrant women and girls particularly, because it allows for faster access to work authorization so they can begin rebuilding their lives and allows them to feel secure and not fear deportation. Individuals can apply for longer term immigration relief and deferred action at the same time, as long as they are not currently in lawful status, and were under the

⁴⁶ USCIS guidelines can be found on their website. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#top> (last visited APR. 20, 2016).

⁴⁷ *Id.*

⁴⁸ Orloff et. al. *Deferred Action for Childhood Arrivals: How is it helpful for Immigrant Crime and Violence Survivors?*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2012).

age of thirty-one as of June 15, 2012. As soon as VAWA, U, T, or SIJ is granted, however, the individual no longer needs deferred action. Deferred action is also an important tool for undocumented immigrants who are ineligible for other forms of immigration relief or their eligibility has lapsed due to timing restraints.

III. LEGISLATIVE HISTORY OF SPECIAL IMMIGRANT JUVENILE STATUS

Special Immigrant Juvenile Status was originally introduced as part of the Immigration Nationality Act (INA) of 1990.⁴⁹ SIJ was created to aid and provide stability for undocumented youth living in foster care.⁵⁰ Congress originally created SIJ to help undocumented youth gain lawful permanent residency when the state juvenile court system has taken jurisdiction over an immigrant child and is responsible for insuring their safety, without regard to the child's immigration status.⁵¹ Undocumented youth living in foster care in the U.S. had no parents they could rely upon, states bore the costs of the immigrant children's care, and the children had no path to self-sufficiency. In 1990, the federal government was exercising its prosecutorial discretion by not seeking to deport unaccompanied youths because "of their age and the impracticality of deportation" as well as the fact many of them were victims of child abuse.⁵² At its inception, to be granted SIJ only required proof that an undocumented child was living in the U.S., was in foster care, and

⁴⁹ See Immigration and Nationality Act § 203(b)(4), 8 U.S.C. § 1153 (allocating a certain number of immigrant visas for "special immigrants"); Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (defining Special Immigrant Juveniles).

⁵⁰ See Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children From Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 237-38 (2006).

⁵¹ *Special Immigrant Status for Alien Foster Children: Joint Hearings on S. 358, H.R. 672, H.R. 2448, H.R. 2646, and H.R. 4165 Before the Subcommittee on Immigration, Refugees and International Law of the House Committee of the Judiciary, and the Immigration Task Force of the House Education and Labor Committee*, 101st Cong. 614 (1990) (statement of Mark Tajima, Legislative Analyst, Chief Administrator Officer, County of Los Angeles, CA).

⁵² *Id.*

that reunification with the child's biological parents was not viable.⁵³ As the number of children eligible for SIJ grew, Congress made several amendments in furtherance of the law's original intent.

In response to a growing concern that the law as originally written might encourage immigrant parents to give up their parental rights so that their minor children could acquire Special Immigrant Juvenile Status, in 1997, Congress modified the INA's SIJ provisions to limit SIJ immigration relief to immigrant children who had been abused, abandoned, or neglected.⁵⁴ The 1997 amendments also added the stipulation that the state court orders containing the findings of dependency and abuse, abandonment, or neglect were not sought for the sole purpose receiving immigration relief through SIJ.⁵⁵ The court order needed to fulfill a state law purpose of remedying the abuse, abandonment, or neglect by providing for the care or needs of an immigrant child. Congress made these amendments to further the original intent of SIJ, which was to protect undocumented children from abuse, abandonment, and neglect.⁵⁶

The next significant amendment to SIJ was included in the 2005 Reauthorization of the Violence Against Women Act (VAWA).⁵⁷ Prior to VAWA 2005 when a child applied for Special Immigrant Juvenile Status, the government officials adjudicating the child's case would as part of their adjudication contact the child's abusive parent or parents directly as part of the investigation of the case.⁵⁸ The practice of government officials contacting or requiring

⁵³ Leslye Orloff et. al. *Comparison Chart of Violence Against Women Act (VAWA) Self-Petition, U Visa, and Special Immigrant Juvenile Status*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2015).

⁵⁴ See *House Committee on Appropriations, Making Appropriations for The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1998, and for Other Purposes*, H.R. REP. NO. 105-405, at 22-23, 130 (1997) (Conf. Rep.).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Violence Against Women Act, Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 826, 119 Stat. 2960, 3065-66. (Rule 12.4(a), (c), (e) pgs. 116-17).

⁵⁸ Immigration and Nationality Act Section 287(i) VAWA 2005 amendment reads as follows: "(i) An alien described in section 101(a)(27)(J) of the

the child to contact their abusive parent was not considered to pose grave danger for immigrant children applying for SIJ. The harm that this contact could cause to abused children was well understood in the domestic violence and child abuse fields and by members of Congress involved in drafting the Violence Against Women Act.⁵⁹ To bring an end to this dangerous practice, VAWA 2005 amended § 287 of the INA to bar government officials from contacting or compelling an immigrant child applicant for SIJ to contact the child's parent who is alleged to have abused, abandoned or neglected the child.⁶⁰ This no-contact requirement also barred contact with family members of the alleged abusive parent.⁶¹ These restrictions were an important part of the VAWA 2005 legislative package in which

Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers. . . These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement officers to pursue removal

Immigration and Nationality Act who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 101(a)(27)(I)(iii)(I) of such Act." In implementing these provisions DHS directed its officers "Under no circumstances can an SIJ petitioner, at any stage of the SIJ process, be required to contact the individual (or family members of the individual) who allegedly abused, abandoned or neglected the juvenile. This provision was added by the Violence Against Women Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2006) and is incorporated at section 287(h) of the INA." Donald Neufeld and Pearl Chang, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions* (March 24, 2009).

⁵⁹ Katrina Castillo et al., *Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2015).

⁶⁰ Immigration and Nationality Act § 287(h), 8 U.S.C. 1357(h)

⁶¹ *Id.*

actions against their victims. This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims. . .⁶²

In discussing how these immigration law protections were applied by VAWA 2005 to Special Immigrant Juvenile Statue immigration relief, Congress provided:

that in the case of an alien applying for relief as a special immigrant juvenile who has been abused, neglected, or abandoned, the government may not contact the alleged abuser.⁶³

In the DHS policies implementing this VAWA 2005 statutory amendment to SIJ, DHS directed its officers not to question SIJ applicant children applying for SIJ status about the details of the abuse because these matters have been addressed by state family courts experienced in working sensitively with traumatized children.⁶⁴

The most significant change to SIJ came in 2008 with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).⁶⁵ The TVPRA expanded eligibility for SIJ in significant ways. Until 2008, in order to qualify for SIJ the applicant must have been deemed eligible for long term foster care by a

⁶² 146 Cong. Rec. H9046 (2000), at 126, H.R. REP. NO. 109-233 (2000).

⁶³ *Id.*

⁶⁴ Memorandum from Donald Neufeld, Acting Associate Director of Domestic Operations, & Pearl Chang, Acting Chief of Office of Policy and Strategy, to Field Leadership, U.S. Dept. of Homeland Security (March 24, 2009) (“During an interview, an officer should focus on eligibility for adjustment of status and should avoid questioning a child about the details of the abuse, abandonment or neglect suffered, as those matters were handled by the juvenile court, applying state law.”).

⁶⁵ *See generally* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); *See generally* William Wilberforce Trafficking Victim’s Protection Act of 2007, H.R. REP. NO. 110-430, Pt. 1 (2007).

juvenile court and must therefore have been adjudicated dependent on the state.⁶⁶ This approach had the effect of barring access to SIJ for large numbers of immigrant children who had suffered abuse, abandonment, or neglect. These immigrant children needed and deserved to receive access to the SIJ immigration remedy which provides the stability and protection from deportation SIJ children need to be able to heal, to overcome the impact of the abuse, and to move beyond the abuse to become productive well-adjusted adults.

Congress recognized that many abused, abandoned, or neglected children whose lives could benefit dramatically from access to SIJ relief were living with one non-abusive protective parent.⁶⁷ In domestic violence cases the protective parent may have been a victim of domestic violence perpetrated by the parent who also abused, abandoned, or neglected the immigrant child. Prior to the TVPRA 2008 amendments to SIJ, abused immigrant children living with a protective parent in a family relationship in which the child was healing and thriving, could only qualify for SIJ if the child was taken from the protective parent and placed in long-term foster care. This placed immigrant children and their protective parents in the untenable position of having to choose between two outcomes neither of which furthered the immigrant child's best interests. The child would have to sever their relationship with their protective parent so that the child could receive legal immigration status through SIJ so the child could remain with their protective parent. Alternatively, the child would continue living with their protective parent and by doing so forfeit access to legal immigration status that would otherwise be available to the immigrant child victim.

This approach was inconsistent with best practices and research on the needs of abused children and children who had witnessed domestic violence in their homes. State family laws prohibit or discourage placement of a child in the custody of perpetrators of domestic violence and instead encourage courts to

⁶⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, §235 (d)(1)(A); 22 USC 7101. *available at* <http://library.niwap.org/wp-content/uploads/2015/IMM-Lghst-PublicLaw110.457TVPRA08-12.23.08.pdf>

⁶⁷ The expansion of SIJ eligibility to include "one or both parents" reflects the recognition of the strong relationship between domestic violence and child abuse.

award custody to the non-abusive protective parent.⁶⁸ As a result, judges in domestic violence cases issue court orders granting custody to the non-abusive parent in a broad range of family court proceedings. The types of family court proceedings in which custody or care of abused children and children witnessing domestic violence are addressed include: protection order, guardianship, juvenile, abuse, neglect, custody, divorce, paternity, child support, probate or other state court proceedings in which rulings concerning the placement, custody and care of children are determined. State family courts recognize that the best interests of children who have suffered or witnessed abuse in the home is best served by placing the child in the care of a protective non-abusive parent rather than placing the child in foster care.⁶⁹

⁶⁸ Men who perpetrate domestic violence against their intimate partners who are the mothers of their children parent differently from non-abusive men. Jeffrey L. Edelson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE, 839 (1999); *Behind Closed Doors: The Impact of Domestic Violence on Children*, U.N. CHILDREN'S FUND (2006); PETER G. JAFFE, DAVID A. WOLFE, & SUSAN KAYE WILSON, CHILDREN OF BATTERED WOMEN, (1990), cited with approval in Rashida Manjoo, *Violence Against Women in the U.S. and the State's Obligation to Protect: Civil Society briefing papers on community, military and custody submitted to the United Nations Special Rapporteur on Violence Against Women*, Rashida Manjoo in advance of her Mission to the U.S. of America January 24 – February 7, 2011 (2011), <https://www.gallaudet.edu/Documents/AF/EOP/vaw.pdf>. Perpetrators of domestic violence are less involved with their children and use parenting practices that are harmful to their children including spanking, shaming and displays of anger. George W. Holden & Kathy L. Ritchie, *Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women*, 62 CHILD DEVELOPMENT, 311, 321 (1991); George W. Holden, Joshua D. Stein, Kathy L. Ritchie, Susan D. Harris & Earnest N. Juries, *Parenting Behaviors and Beliefs of Battered Women*, CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES, 185 (George W. Holden, Robert Geffner & Earnest N. Juries eds., 1998), cited with approval in Manjoo. Abusive men do not serve as role models for healthy relationships and conflict resolution in relationships. R. LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002); Levendosky, A.A. & S.A. Graham-Bergmann, *Mothers' Perceptions of the Impact of Abuse on their Parenting*, 6 (3) VIOLENCE AGAINST WOMEN 247-271 (2000).

⁶⁹ H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence*, U.S. Department of Health and Human Services, Administration for Children and Families (2003), <https://www.childwelfare.gov/pubpdfs/domesticviolence.pdf> (issuing guiding

TVPRA 2008 made significant changes to Special Immigrant Juvenile Status eligibility designed to promote healing for abused, abandoned, or neglected immigrant children by allowing immigrant children to apply for SIJ immigration relief and to allow the child to continue living with a protective non-abusive parent.⁷⁰ The approach furthered the goal of keeping non-abusive one parent headed households together. After enactment of TVPRA 2008 a non-abusive battered immigrant mother whose child was also abused could leave the abuser and her child would be eligible to pursue SIJ protection while living in the care and custody of the child's non-abusive battered immigrant parent.⁷¹

principles for child protective services workers that recognize that offering protection to domestic violence victims, enhances protection for children and has the benefit in domestic violence cases of keeping children with their non-abusive parent. "The following guiding principles can serve as a foundation for child protection practice with families when domestic violence has been confirmed. The safety of abused children often is linked to the safety of the adult victims. By helping victims of domestic violence secure protection, the well-being of the children also is enhanced. Perpetrators of domestic violence who abuse their partner also emotionally or psychologically harm their children, even if the children are not physically or sexually harmed. Identifying and assessing domestic violence at all stages of the child protection process is critical in reducing risks to children. It is important to understand potential effects of domestic violence to children beyond those that are physical in nature. If the family's circumstances are clear and it is appropriate, every effort should be made to keep the children in the care of the non-offending parent. Supportive, non-coercive, and empowering interventions that promote the safety of victims and their children should be incorporated in child protection efforts. Once domestic violence has been substantiated, the perpetrators must be held solely responsible for the violence while receiving interventions that address their abusive behaviors. CPS must collaborate with domestic violence programs and other community service providers to establish a system that holds abusers accountable for their actions."

⁷⁰ See Memorandum from Donald Neufeld, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICE, (March 25, 2009). (stating that "previously, the juvenile court needed to deem a juvenile eligible for long term foster care due to abuse, neglect or abandonment. . ." while ". . .under the TVPRA 2008 modifications, the juvenile court must find that the juvenile's reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law") *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf.

⁷¹ *Id.*

TVPRA 2008 made two significant changes to Special Immigrant Juvenile Status. First, it opened up SIJ eligibility to include immigrant children receiving state court orders placing them in the custody of an individual or an agency which includes the child's other non-abusive parent. Secondly, the amendments broadened SIJ eligibility to include immigrant children who suffered abuse, abandonment or neglect by one parent ending the requirement that both parents have been involved in the child's abuse, abandonment or neglect.

The TVPRA of 2008 included amendments of SIJ to include any child who has been placed under the *custody of an individual or entity appointed by a State or juvenile court* as eligible to apply for SIJ.⁷² This allowed children in the custody of a protective parent, relative or appointed a guardian by the court the opportunity to apply for SIJ. This change illustrated a Congressional recognition of the important role played in state family court proceedings of kinship care. The amendments reinforce the importance child placements based on a child's best interests by removing obstacles in immigration law that punished immigrant children whom courts had not placed in foster care.

Placement with an individual, as opposed to placement with an agency, allows for the child to remain in a familiar, stable environment with a non-abusive parent, another family member, guardian or other state court ordered kinship care arrangement. This TVPRA 2008 change removes the requirements in SIJ immigration laws that were directly contrary to social science research, state laws, and court rulings. The 2008 amendments follow best practices in the field that aim to promote placement with of children family members or other care providers who could provide the best care for children and youth traumatized by their experiences of abuse, abandonment or neglect perpetrated by one or both of their parents.⁷³ Children who are able to remain with family members and familiar custodians are better able to adjust to their settings and are less likely to face

⁷² *Id.*

⁷³ See *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families*, THE ANNIE E. CASEY FOUNDATION (2012) (reporting that "extended family members and close family friends care for more than 2.7 million children in this country, an increase of almost 18% over the past decade").

behavioral problems.⁷⁴ This amendment was intended to allow children the stability and safety of custody and guardianship placements with protective parents, guardians or other family members while retaining the opportunity to gain legal immigration status through SIJ. By deleting the long-term foster care requirement, an undocumented immigrant child now has the option to remain with kin including the protective, non-abusive parent and still receive SIJ benefits.

The second major amendment in the TVPRA 2008 altered the requisite findings a state court with jurisdiction over a minor must make as part of the SIJ application. The state family court is no longer required to find the child eligible for long term foster care based on abuse, abandonment, or neglect, but instead must find that the juvenile's *reunification with one or both of his or her parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.*⁷⁵ In amending SIJ, TVPRA 2008 explicitly deleted the long term foster care requirement from the law, and replaced it with a statutory provision that authorizes SIJ eligibility for immigrant children who were abused, abandoned, or neglected by one parent and who reside with a non-offending parent.⁷⁶ As a result of the TVPRA 2008 amendments, if a child has one abusive parent and one protective parent, the court may find that reunification of the abusive parent and the child is not viable due to abuse. The state court order placing the child with the child's protective battered immigrant or other non-

⁷⁴ *Id.*

⁷⁵ In light of the Violence Against Women Act of 2005 amendments, which directs that neither immigration officials nor the SIJ child applicant communicate with the parent who has battered, abused, neglected or abandoned (Immigration and Nationality Act § 287(h)), and the statutory language under Immigration and Nationality Act § 101(a)(27)(J)(i) "or similar basis found under State law," "extreme cruelty" may be the basis for SIJ findings in state court. Extreme cruelty has been defined by the Department of Homeland Security in other contexts and is among the behaviors that would constitute abuse or neglect for the purposes of SIJ status. The term has a long history in state court family law, and the final regulations should clarify that "extreme cruelty" can form a basis for SIJ status. Leslye Orloff et al., *supra* note 20, (describing behaviors of power and control and coercive control that constitutes battering or extreme cruelty).

⁷⁶ See Special Immigrant Juvenile Petitions, 76 Fed Reg. 54978 (proposed Sept. 6, 2011).

abusive parent would no longer cut off vulnerable immigrant children from SIJ eligibility.

These changes in SIJ eligibility updated immigration law to be consistent with changes occurring in the family courts and child protective services systems, which had been moving in recent years away from the foster care system and toward alternate placement for children designed to be less harmful and more nurturing, stable, and healing for children who had suffered trauma. Under the new approach, immigrant children who have experienced abuse, neglect, abandonment or other harm that under state law can receive the protection they need under state law and obtain the findings they need from state courts to qualify for SIJ. Examples of children who were to benefit from the TVPRA 2008 amendments include:

- children living with parents who have also been abused;
- children being returned from state custody to live with an abused protective parent; and
- children who benefit from the family court equivalent of “alternatives to detention” where courts and child protective services agencies placed an abused, abandoned or neglected child with a family member, school teacher, kinship care or other placement designed to be better for the child and more in line with the child’s best interests than foster care.

A cornerstone of recent evolution of the U.S. child abuse and neglect system has been family reunification. As state courts and state child protection agencies have gained experience on the intersection of child abuse and intimate partner violence, they have come to understand the impact that protecting the abused parent has on protecting the child from ongoing child abuse. Research among immigrant domestic violence victims found that protecting immigrant mothers through protection orders and access to legal immigration status had the effect of reducing the co-occurrence of child abuse and

domestic violence in immigrant families.⁷⁷ Offering protection for the child's non-abusive parent, results in less child abuse and neglect of children in immigrant families that experience domestic violence.

The strong relationship between child abuse and domestic violence is well documented,⁷⁸ with co-occurrence rates ranging from 30 to 60%.⁷⁹ Children living in houses where there was battering are twice as likely to be abused compared to those where there was no battering.⁸⁰ Further, 45-75% of women in shelters report that their children experienced one or more forms of maltreatment.⁸¹ Research among immigrant women has found similar domestic violence and child abuse co-occurrence rates among immigrants (40-44%).⁸² However, among immigrant women there was a significant difference in child abuse co-occurrence rates between battered immigrant women who had sought help from a service provider (e.g. shelter, protection orders, immigration relief) with a co-occurrence rate of 23%⁸³ compared to battered immigrants

⁷⁷ See generally Nawal Ammar et al., *Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status*, Presentation before the International Family Violence Conference (Sept. 19-25, 2004).

⁷⁸ Joy D. Osofsky, *Prevalence of Children's Exposure to Domestic Violence and Child Maltreatment: Implications for Prevention and Intervention*, CLINICAL CHILD & FAMILY PSYCHOLOGY REVIEW 161-170 (2003); Christine E. Cox et al., *A longitudinal Study of Modifying Influences in the Relationship Between Domestic Violence and Child Maltreatment*, JOURNAL OF FAMILY VIOLENCE 5-17 (2003); Alissa C. Huth-Bocks et al., *The Direct and Indirect Effects of Domestic Violence on Young Children's Intellectual Functioning*, JOURNAL OF FAMILY VIOLENCE 269-90 (2001); Bonnie E. Carlson, *Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention*, TRAUMA, VIOLENCE & ABUSE 321-42 (2000); Melissa Jonson-Reid, *Youth Violence and Exposure to Violence in Childhood: An Ecological Review*, AGGRESSION AND VIOLENT BEHAVIOR, 159-79 (1998).

⁷⁹ Jeffrey Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, VIOLENCE AGAINST WOMEN (1999).

⁸⁰ MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES* (Christine Smith ed. 1989).

⁸¹ Mary M. McKay, *The Link Between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, CHILD WELFARE, 29-29 (1994).

⁸² Nawal Ammar et al., Presentation at the International Family Violence Conference, *Children of Battered Immigrant Women: An Assessment of the Cumulative Effects of Violence, Access to Services and Immigrant Status* (Sept. 19-25, 2004).

⁸³ *Id.*

who had never sought help regarding domestic violence where co-occurrence rates rose to 77%.⁸⁴ Children of help-seeking battered women were 20% less likely to have the abuser threaten the child and were one third less likely that the abuser would threaten to take the child away from his or her mother.⁸⁵

Historically many states had practices of removing children from abused parents and placing them in foster care. After years of litigation, advocates for battered women secured court rulings that removals of children from the non-abusive battered parent's care was unconstitutional.⁸⁶ As a result of these decisions, the failures of the foster care system, and the benefits for children of remaining in the care and custody of their non-abusive parent, courts today generally place children with the non-abusive parent including when she has been a victim of domestic violence. Courts issue protection orders and other orders in custody, child abuse and neglect and other family court cases that offer protection to abused mothers, abused children, and other children in families in which domestic violence is occurring. The changes in SIJ immigration laws removing the requirement that a child have been placed in foster care, broadening the types of family court matters in which SIJ orders can be issued, and providing access to SIJ for children who suffered abuse, abandonment, or neglect by one parent are a federal SIJ parallel to this evolution in the law. Congress, in amending INA Section 101(a)(27)(J), accomplished several changes in Special Immigrant Juvenile law with the goal of improving consistency with state family laws and state court procedures regarding jurisdiction under state law to make determinations about the custody and care of children.⁸⁷

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See generally *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002); *Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003); *Nicholson v. Scopetta*, 820 N.E.2d 840 (N.Y. 2004). See also David Lansner, *The Nicholson Decisions New York's Response to 'Failure to Protect' Allegations*, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, (2008), https://www.americanbar.org/newsletter/publications/cdv_enewsletter_home/vo112_expert1.html.

⁸⁷ Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(27)(j), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101(a)(27)(j)), (*amended by* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,

Additionally, TVPRA of 2008 amended SIJ laws to clarify “age out” protections for SIJ applicants. For applications filed on or after December 23, 2008, if an SIJ petitioner was a “child” on the date on which an SIJ petition was properly filed, USCIS will not deny SIJ based on the petitioner’s age at the time of adjudication, so long as the petitioner was under 21 years of age on the date their SIJ application was filed.⁸⁸ Congress created this “age out” protection to provide immigration relief that includes protection from deportation, work authorization and a path to lawful permanent residency that are essential to promoting the best interests and long term stability to immigrant children who have been victims of abuse, abandonment or neglect by one or both of their parents.⁸⁹ Through the creation of SIJ and the amendments added in VAWA and the TVPRA Congress has demonstrated a clear intent to protect not only children dependent on the state, but all immigrant children who have been abused, abandoned, or neglected as well as victims of domestic violence who are mothers of immigrant children experiencing child abuse or witnessing domestic violence.

IV. SCREENING FOR IMMIGRATION RELIEF ELIGIBILITY: FACILITATING ACCESS TO HEALING FOR CHILD TRAUMA SURVIVORS AND REDUCING VULNERABILITY TO ABUSE

Immigrant women and girls who immigrate to the U.S. are very likely to have suffered crime victimization in their home countries, to have been abused or sexually assaulted during their

Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified as amended at 8 U.S.C. §1232 (2008))).

⁸⁸ Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(6), 122 Stat. 5044 (2008); *see also* Memorandum from Dept. of Homeland Security on Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (May 2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf.

⁸⁹ *Policy Memorandum: Updated Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement*, U.S. CITIZEN AND IMMIGRATION SERVICES (June 25, 2015), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0625_Perez-Olano_Settlement_Agreement_PM_APPROVED.pdf.

journey to the U.S. and are very vulnerable to crime victimization following their arrival in the U.S.. Every immigrant's experience will be different. Some will arrive in the U.S. already meeting the criteria of eligibility for the special forms of immigration relief designed to help immigrant children who have been abused, abandoned or neglected, because they came to the U.S. fleeing domestic violence, sexual assault, persecution, or because they are victims of human trafficking. Others may arrive not having suffered traumas that would make them eligible upon entry for immigration relief and during their time in the U.S. become eligible for crime victim or child related immigration remedies because of harms they suffer here. Many immigrants who suffer these traumatic life experiences will be eligible for humanitarian forms of immigration relief including relief designed specifically to help immigrant children and immigrant crime victims, but most children and victims do not know that they qualify for protections under U.S. immigration laws.

Throughout their journey of resettlement, acculturation, and adaptation to their new life in the U.S., immigrant children, women and crime victims will encounter many professionals along the way who can play a key role in their healing. Healthcare providers, teachers, counselors, therapists, social workers, attorneys, advocates, police, prosecutors, judges, child abuse agency staff, foster care workers and staff at community based, immigrant and faith based organizations all encounter immigrant women and children in their work. These professionals can play a crucial role in screening for trauma history, identifying immigration relief eligibility, and supporting victims and children in the process of applying for immigration relief and seeking other justice and social services assistance available to assist them in overcoming trauma and crime victimization. It is crucial to screen immigrant women and children for immigration relief at every encounter possible. As their stories develop over time, because of abuse or crime victimization they suffer while in the U.S., immigrants may become eligible for immigration relief and child abuse or crime victim related services they were not previously able to apply for.

A. Vulnerability of Immigrant Girls and Need for Facilitating Access to Protection and Humanitarian Relief

Growing numbers of immigrant women and girls who immigrate to the U.S. have experienced domestic violence, sexual assault, or human trafficking in their home countries or in the process of their immigration to the U.S..⁹⁰ In addition, immigrant women and girls are at a significant risk of crime victimization after their arrival in the U.S., particularly as victims of domestic violence, sexual assault, and human trafficking.⁹¹

Rates of domestic violence among immigrant women are high due in part to the perpetrators' ability to use immigration related abuse and threats of deportation as an effective coercive control tool that locks victims in abusive relationships and cuts them off from available help.⁹² As a result, immigrant domestic violence victims stay longer in abusive relationships, have fewer resources and options, and sustain more severe physical and emotional consequences of abuse.⁹³

When immigrant women and girls immigrate to the U.S. they often reconnect with parents and other extended family members. This reunification results in a restructuring of immigrant families and introduction of young immigrant children into families that include step-parents, step-siblings and extended family members who are relatives of either the child's original family or the child's new step parent's family. Recently arriving immigrant children living in homes with step-fathers, step brothers, grandfathers, uncles, cousins, and/or the child's mother's new boyfriend or in-laws are at greater risk of

⁹⁰ *Review of the President's Emergency Supplemental Funding Request for Unaccompanied Children and Related Matters: Hearing Before the Senate Appropriations Comm. on Dept. of Homeland Security Appropriations Bill, 113th Cong.* (2014) (statements of Jeh Johnson, Sec'y of Dept. of Homeland Security, and Sen. Dick Durbin).

⁹¹ *Id.*

⁹² Leslye E. Orloff & Olivia Garcia, *Dynamics of Domestic Violence Experienced by Immigrant Victims, in Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

⁹³ Giselle Aguila Hass et al., *Battered Immigrants and U.S. Citizen Spouses*, Washington, DC: *Legal Momentum, Immigrant Women Program*, LEGAL MOMENTUM, (2006).

child abuse, sexual assault and incest.⁹⁴ Undocumented, limited English proficient, girls may also be targeted for sexual assault by predators in their life outside of their new families at school, church, or in the new community in which they settle.

For newly arrived immigrant women and children, limited English proficiency, undocumented immigration status, the process of acculturation and the lack of knowledge about laws and services available to offer protection from family violence and sexual assault result in vulnerability to being targeted by abusers and sexual predators.⁹⁵ This explains, in part, why research has found that foreign born girls are twice as likely as U.S. born girls to have suffered multiple incidents of sexual assault by the time they reach high school.⁹⁶

Special Immigrant Juvenile Status was created to offer help and an opportunity for healing for immigrant children harmed by child abuse, child sexual assault, abandonment, or neglect. Many state laws recognize that witnessing domestic violence in the home falls within the behaviors that under state law constitute child abuse or neglect.⁹⁷ These state laws were developed based on recognition about the effect that experiences of child abuse, sexual abuse and witnessing domestic violence perpetrated against a parent have on children are significant. Children in homes where domestic violence is present are impacted by the trauma in a number of ways, leading to obesity, heart disease, bed-wetting or nightmares, headaches, flu, as well as long term psychological effects that include depression, post-traumatic stress disorder, substance abuse and an increased likelihood to become victims of family violence themselves.”⁹⁸

⁹⁴ Michele R. Decker et al., *Sexual Violence Against Adolescent Girls: Influences of Immigration and Acculturation*, 13 VIOLENCE AGAINST WOMEN 498, 503 (2007).

⁹⁵ Jessica Mindlin et al., *Dynamics of Sexual Assault and the Implications for Immigrant Women*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

⁹⁶ See Decker et al.

⁹⁷ Varies by state, check local statute.

⁹⁸ *The Facts on Children and Domestic Violence*, FUTURES WITHOUT VIOLENCE (2008).

It is important to note that best practices in cases of children witnessing domestic violence is for the state to bring charges of child abuse or neglect against the parent perpetrating the abuse. Best practices promote placement of the children with the battered non-abusive parent with protection orders, custody and child support and other supports in place to help the battered mother and her children heal from the effects of the abuse. Cases have overturned court findings of abuse against battered mothers for failure to protect their children from the perpetrator's abuse.⁹⁹ U.S. immigration laws contain waivers for battered immigrant mothers charged with or convicted of failure to protect in states that continue to bring such cases against battered mothers, despite best practices and research findings to the contrary.¹⁰⁰

For immigrant women and girls, the domestic violence or sexual assault they experience in the U.S. may trigger memories of prior victimization or dislocation occurring in their home country or on their journey to the U.S..¹⁰¹ Many immigrant children who immigrate to the U.S. have been the direct victims of violence including child abuse and sexual abuse in the child's home country. An estimated 21% of the children from Mexico, El Salvador, Guatemala, and Honduras who have crossed the border and are living in the U.S. reported direct victimization in their homes as a reason for immigrating to the U.S..¹⁰² In each country, these reports were primarily made by girls who reported sexual assaults by step-fathers, boyfriends, and physical abuse from other relatives if they attempted to get help.¹⁰³ Young girls immigrating to the U.S. from the four most common countries of origin, Mexico, El Salvador, Guatemala, and Honduras, all reported an express fear of sexual violence at the hands of gangs in their home country.¹⁰⁴ El Salvadorian youth reported the highest percentage of gang related criminal activity, with 63% of the children self-reporting gang

⁹⁹ See *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002); *Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003); *Nicholson v. Scopetta*, 3 N.Y.3d 357, 820 N.E.2d 840 (N.Y. 2004).

¹⁰⁰ Immigration and Nationality Act § 237(a)(7), 8 U.S.C. 1227.

¹⁰¹ Decker, *supra* note 68 at 2.

¹⁰² UNHCR Report, *supra* note 3, at 28-29.

¹⁰³ *Id.* at 35.

¹⁰⁴ *Id.*

violence as the direct reason for immigrating to the U.S..¹⁰⁵ Girls reported death threats against themselves and their families if they refused gang members sexual advances.¹⁰⁶ These high rates of violence in their home counties drive immigrant women and children to flee and risk the dangerous journey to the U.S..

The journey from the home country to the U.S. exposes young girls and women to rampant sexual assault. Traveling alone, relying on guides for direction and sustenance, with no access to government authorities to report crimes, immigrant women and girls fall prey to sexual assault perpetrated by fellow travelers, by coyotes, and by other men they encounter along their route to the U.S..¹⁰⁷ Many women and girls have report being instructed to purchase birth control before they begin their journey to the U.S., engaging in the journey to help protect them against pregnancy as a result of rape.¹⁰⁸

Immigrant girls and women who suffered domestic violence, sexual assault, human trafficking, child abuse, child abandonment, or child neglect either in their home country or in the U.S. may qualify for Special Immigrant Juvenile Status and/or other forms of immigration relief designed to offer humanitarian protection for immigrant victims of crime. Some children will qualify for several forms of immigration relief due to abuse, abandonment, neglect or other forms of crime victimization. Some immigrant children may not qualify for immigration relief when they first enter the U.S. because they may not have suffered harm in their home country that would make them eligible for SIJ or other immigration relief. However, these children may suffer harms subsequent to their arrival in the U.S. that make them eligible for SIJ, the U visa, the T visa, VAWA self-petitioning or VAWA cancellation of removal. Some of the most common circumstances or experiences occurring to children after their arrival in the U.S. that would make them eligible for immigration relief include, but are not limited to:

¹⁰⁵ *Id.* at 32.

¹⁰⁶ *Id.*

¹⁰⁷ Steve Inskip, *The Rarely Told Stories of Sexual Assault Among Female Migrants*, NPR (Mar. 23, 2014), <http://www.npr.org/2014/03/23/293449153/the-rarely-told-stories-of-sexual-assault-against-female-migrants>.

¹⁰⁸ *Id.*

- Being held hostage by coyotes after crossing the border
- Being raped in the U.S. when the child is in the process of immigration to the U.S.
- Being subjected to human trafficking in the U.S.
- Experiencing child abuse, sexual assault, or incest perpetrated by a parent or extended family members in the household in which the child is living in the U.S.
- Becoming a victim of sexual assault at school, university, or at work in the U.S.
- Becoming a victim of dating violence in the U.S.

Depending on which side of the border a child's victimization occurred, children may qualify for different forms of immigration relief. Screening and the dissemination of information about legal rights in the U.S. is essential so that victims who may be eligible for immigration relief learn about their eligibility. Too often, cases go unreported due to threats, fear, and the high number of victims detained at the border, who are not fully screened for the full range of immigration relief children may qualify to receive. As a result children and young women can be deported before they are able to learn of their eligibility. Courts, advocates, and attorneys should distribute DHS produced brochures on immigration relief for crime victims and on Special Immigrant Juvenile Status at courthouses and other locations that immigrant children and women frequent in the community.¹⁰⁹

Advocates and attorneys should screen immigrant girls and young women for crime victimization early in their relationship with

¹⁰⁹ See *Special Immigrant Juveniles (SIJ) Status*, DEPARTMENT OF HOMELAND SECURITY, <https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status> (last visited March 22, 2016); see also Emily McCabe & Leslye E. Orloff, *Pathways to Immigration Relief for Students*, IMMIGRANT WOMEN'S ADVOCACY PROJECT (2014).

the client. Screening could include screening for trauma history through which the advocate or attorney may detect additional crime victimization, abuse, abandonment or neglect that may not have initially been apparent. Knowing the full history of trauma, abuse, and crime victimization may help attorneys and advocates identify the full range of forms of immigration relief the immigrant child is eligible to receive. The forms of immigration relief available for immigrant crime victims and immigrant children vary with regard to a variety of factors. All immigration case types developed to offer help for immigrant children and crime victims offer protection from deportation. The remedies vary however in some significant ways¹¹⁰ that include:

- The length of time an applicant must wait to receive legal work authorization;
- Whether the form of immigration relief the child qualifies for includes a path to lawful permanent residency
- When a child can receive a driver's license or a state issued ID;
- Whether the applicant is eligible for federal or state public benefits;
- Whether the child can receive health care through the federal or state funded exchanges and whether the child qualifies for state or federal subsidies for health care
- If the child can qualify for food stamps, and

¹¹⁰ The National Immigrant Women's Advocacy Project, under a grant from the Department of Justice, Office on Violence Against Women, developed several comparison charts illustrating the different eligibility factors, benefits, processes, and access to state and federal services and public benefits for various victim based immigration relief. *See generally* Krisztina E. Szabo & Leslye E. Orloff, *Comparison Chart of U visa, Special Immigrant Juvenile Status (SIJ), and Deferred Action for Childhood Arrivals*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2014).

- Whether the child qualifies for post-secondary educational grants or loans through FAFSA (spell out) or through state funded educational grants or loan programs.

Since immigrant children may have suffered abuse in their home countries and others may at a later time suffer abuse in the U.S., it is important that advocates, attorneys, school teachers, counselors, community programs working with immigrant youth and faith based programs be cognizant of signs of abuse and screen children at regular intervals for abuse. Ongoing screening for domestic violence, child abuse, witnessing domestic violence in the home, sexual assault, human trafficking and other U visa listed crimes is important to ensure that children eligible for relief are identified as early as possible.

This helps assure that children receive the help they need as soon as possible. More importantly, ongoing screening is critical, because it assures the immigrant children meet filing deadlines and do not “age out” of immigration protections that they are eligible to receive. There are age deadlines by which children must file applications for SJIS,¹¹¹ VAWA self-petitions,¹¹² and DACA.¹¹³ Age limitations also apply to a child’s ability to benefit from their

¹¹¹ 8 CFR § 204.11(c)(1).

¹¹² Children who suffer battery or extreme cruelty before the age of 21 that is perpetrated by a U.S. citizen or lawful permanent resident parent or step-parent are able to file a VAWA self-petition up until the date of which they turn age 25. *See* Immigration and Nationality Act § 204 (a)(1)(A)(iv), 204 (a)(1)(B)(iii), 8 U.S.C. 1154; *see also* USCIS Policy Memorandum PM-602-0048, on Continued Eligibility to File for Child VAWA Self-Petitioners After Attaining Age 21; Revisions to Adjudicator’s Field Manual (AFM) Chapter 21.14 (AFM Update AD07-02), U.S. Citizenship and Immigration Services (Sep. 6, 2011), <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/VAWA-SP-Child-Attains-Age-21-PM-comment-06-xx-10-v3.pdf>.

¹¹³ The current DACA eligibility criteria require that applicants were under 31 years of age on June 15, 2012, however, under the new guidelines in President Obama’s Executive Action of November 14, 2014 this age restriction was lifted. *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Apr. 20, 2016).

immigrant parent's immigration case. Children who are under the age of 21 can be included in the immigration applications of their immigrant parents who are victims of domestic violence, human trafficking, or crime victims filing for VAWA, or T or U visa immigration benefits.

In order for immigrant crime victims to be able to access the immigration and justice system relief available under VAWA and state laws access to help from lawyers and advocates is essential. Research has found that when advocates and attorneys offer immigrant victims safety planning, legal rights information, and support, greater numbers of undocumented immigrant victims are willing to come forward and seek help offered by state civil protection order laws¹¹⁴ and U.S. immigration laws.¹¹⁵ Furthermore, immigrant women receive the support they need to file a crime victim based immigration case and become more willing to call the police for help and avail themselves of justice system protections including protection orders, custody and participation in criminal cases.¹¹⁶ Access to legal services plays an important role in the ability of immigrant victims of domestic violence and child abuse to file for immigration relief and access justice system help. Based on this understanding, Congress in VAWA 2005 amended the immigration restrictions on Legal Services Corporation (LSC) funded agencies to represent immigrant victims of domestic violence, sexual assault, human trafficking, or U visa qualifying crimes on a wide range of legal matters related to the abuse or crime victimization.¹¹⁷

In 2006, LSC issued program guidance to LSC funded legal services agencies directing that under VAWA 2005 immigrant victims could be represented by LSC funded agencies.¹¹⁸ LSC in 2014

¹¹⁴ Dutton et al., *supra* note 14.

¹¹⁵ Ammar et al., *supra* note 14.

¹¹⁶ Szabo, *supra* note 16.

¹¹⁷ VAWA 2005: LSC Statute with VAWA 2005 Amendments, *available at* <http://iwp.legalmomentum.org/reference/additional-materials/access-to-legal-services-for-immigrant-victims/statutes/vawa-2005-legal-services-corporation-representation-for-immigrant-crime-victims/violence-against-women%20LSC%20Statute.pdf/view>.

¹¹⁸ *Letter from Helaine M. Barnett, President of Legal Services Corporation on Violence Against Women Act 2006 Amendments* (Feb. 21, 2006) [hereinafter LSC Program Letter], <http://niwaplibrary.wcl.american.edu/cultural->

amended its regulations¹¹⁹ and issued a program letter¹²⁰ creating a new path to legal representation by LSC funded agencies for immigrant victims covered by the Violence Against Women Act's (VAWA) and the Trafficking Victim Protection Act's (TVPA) anti-abuse laws. These new regulations and policies offer protection for vulnerable immigrant women and children expanding the scope of representation at LSC funded agencies to include immigrant women and girls fleeing violence including when the abuse happened in the victim's home country or in the process of the immigration to the U.S..¹²¹ The representation can be offered for in any case that is directly related to escaping abuse, ameliorating the effects of the abuse, or preventing future abuse.¹²² Abused children and other victims of domestic violence, sexual assault, human trafficking or other U visa listed criminal activities occurring inside or outside of the U.S. can receive assistance from LSC funded attorneys without regard to whether the victim qualifies for or will be pursuing immigration relief.¹²³ These LSC regulations, implementing that change, create two avenues an immigrant can pursue to attain assistance from any LSC funded program. These two paths to representation are representation under anti-abuse laws or representation based on immigration status. Children who have been abused in their home countries or in the U.S. qualify for LSC representation.¹²⁴ LSC funded agencies may also be able to represent immigrant children whose abandonment or neglect by a parent was tantamount to child abuse in the facts of the specific case considering

competency/access-to-legal-services/CULTCOMP_LSCPgmLetter_2.21.06.pdf/view.

¹¹⁹ Restrictions on Legal Assistance to Aliens, 79 Fed. Reg. 21861 (Apr. 18, 2014), codified at 45 C.F.R. 1626 [hereinafter 45 C.F.R. 1626].

¹²⁰ LSC Program Letter, *supra* note 118.

¹²¹ *Id.*

¹²² 45 C.F.R. 1626, *supra* note 119.

¹²³ See generally Leslye E. Orloff & Benish Anver, *And Legal Services Access for All: Implementing the Violence Against Women Act of 2005's New Path to Legal Services Corporation Funded Representation for Immigrant Survivors of Domestic Violence, Sexual Assault, Human Trafficking, and Other Crimes*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2014) [hereinafter Access for All].

¹²⁴ LSC Program Letter, *supra* note 118.

the parent's actions and the impact of the abandonment or neglect on the child.¹²⁵

B. Need For Screening of Children in Immigration Enforcement and Detention for All Forms of Immigration Relief Including U Visa and SIJ

For these reasons, it is also extremely important that immigration officials be required to screen immigrant women and children they encounter for the full range of humanitarian immigration relief that immigrant women and children might be eligible to receive. Screening should not be limited to the very important credible fear interviews conducted to screen new immigrants for asylum eligibility. Over the past two decades, numerous additional forms of humanitarian immigration relief have been created by Congress specifically designed for immigrant children and crime victims. DHS officials working for Immigration and Customs Enforcement (ICE), Customs and Border Patrol (CBP), Department of Health and Human Services, and Office of Refugee Resettlement (ORR) should be required to routinely screen immigrants who are detained and immigrants who become the subjects of enforcement actions to identify immigrants who may qualify for:

- T visas, continued presence or U visas as victims of human trafficking;
- Violence Against Women Act self-petitioning or cancellation of removal as victims of spouse abuse or child abuse (battering or extreme cruelty) perpetrated by the immigrant's U.S. citizen or lawful permanent resident family member;
- U visas as crime victims who suffered criminal activities committed in the U.S. including domestic

¹²⁵ *Id.*; see also, *Access for All*, *supra* note 123.

violence, sexual assault, kidnapping, felonious assault, and other crimes listed in the U visa,¹²⁶ and

- Special Immigrant Juvenile Status for children who have suffered abuse, abandonment, or neglect by at least one of their parents.

Screening for VAWA, T and U visas, and SIJ is appropriate and necessary at each new interaction and after every change in location or custody.¹²⁷ Federal agency officials, such as CBP and ICE, are often the first encounter for undocumented women and girls who either turn themselves in or are apprehended in the process of crossing the border. The Department of Homeland Security issued a brochure that briefly describes crime victim based forms of immigration relief under the VAWA, T visa, and U visa programs.¹²⁸ This brochure should be distributed and be available on display in multiple languages next to customs forms at ports of entry into the U.S. and should be distributed to all immigrants who are detained or subject to immigration enforcement. Additionally, DHS brochures on SIJ and DACA should be distributed to immigrant children and the organizations and professionals who work with and encounter immigrant children.¹²⁹ The DHS issued a specific brochure on SIJ which gives victims, law enforcement and advocates detailed information on the eligibility requirements for SIJ.¹³⁰ These tools can be used at every level of interaction with immigrant crime victims.

¹²⁶ See *U visas: Victims of Criminal Activity*, *supra* note 30.

¹²⁷ Leslye E. Orloff et al., *Comparing Forms of Immigrant Relief for Immigrant Victims of Crime*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2015).

¹²⁸ *Immigration Options for Victims of Crimes*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.dhs.gov/immigration-options-victims-crimes> (Sep. 12, 2015).

¹²⁹ See generally *Special Immigrant Juveniles (SIJ) Status*, *supra* note 109; *Consideration of Deferre Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Apr. 20, 2016).

¹³⁰ U.S. Citizenship and Immigration Services, *Immigration Relief for Abused Children* (Apr. 2014), https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Immigration_Relief_for_Abused_Children-FINAL.pdf.

In addition to the change of fact and circumstance necessitating continuous screening as immigrant women and girls move from the country of origin through the immigration system, continuous screening is important because of the cultural, psychological, and emotional factors involved in disclosing personal and traumatic information particularly information about child abuse, rape, sexual assault and domestic violence. Individuals will feel more comfortable with different screening agents; healthcare professionals, health outreach workers, and immigrant women community based victim advocates are particularly trusted by victims and are often well versed in screening immigrant women for crime victimization.¹³¹

C. How Trauma Informed Screening Can Help Advocates and Attorneys Best Serve Clients Surviving Trauma

Advocates and attorneys should engage in comprehensive screening for immigration relief while being conscious of and sensitive to the trauma a victim may have suffered. It is crucial for attorneys and advocates to build a relationship that will help their clients feel safe enough to divulge traumatic information. As trust builds victims who have suffered trauma will be more willing and able to respond to questions that elicit the information necessary to build the victim's immigration case. In order to achieve this, attorneys and advocates have found it useful to use a trauma informed approach to interviewing clients.

A team of family and immigration attorneys and national experts on trauma informed care developed an approach to developing a victim's immigration case that simultaneously helps immigrant victims heal from trauma. What has been learned from evidence based research on healing from trauma is that the process working with a trauma survivor to write her own story is an effective approach to healing and overcoming the impact that trauma has had

¹³¹ To find programs with expertise working with immigrant crime victims and children who are knowledgeable about the forms of immigration relief discussed in this article see the National Immigrant Women's Advocacy Project's national service provider directory. *Directory of Service Providers*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, <http://www.niwap.org/directory> (last visited Apr. 20, 2016).

on a victim's life. This approach uses an evidence based, research tested, story writing intervention approach that therapists and psychologists have been using with trauma survivors to identify trauma experienced over a lifetime that helps victims heal.

In immigration cases all victims applying for immigration relief are required to write an affidavit. This affidavit tells the victim's story and is one of the key pieces of evidence a victim submits to DHS as part of their SIJ, VAWA, U, and T visa applications. Victim's affidavit provides an opportunity for Department of Homeland Security (DHS) adjudicators to hear directly from the survivor, in her or his own voice. When reading the survivor's story, the reader – ultimately, the DHS adjudicator – should be able to know and feel what the survivor felt after being subjected to abuse or crime victimization. The fact that the victim has to write their story for their immigration case provides an opportunity for the victim to go through the story writing process in a manner that parallel's the approach therapists use to treat trauma survivors.¹³²

The story writing intervention includes the following components. First the advocate, attorney, or therapist invites the survivor to write her story, uninterrupted. The person working with the victim's role during the story writing is to empathically listen, be aware of trigger points, and be ready to help should a survivor have difficulty during the process.¹³³ During the second stage of the story writing intervention process there will be an opportunity during the structured interview session to ask follow-up questions in order to gather more details. Some survivors may be comfortable with

¹³² Krisztina Szabo et al., *Advocate's and Attorneys Tool for Developing a Survivor's Story: Trauma Informed Approach*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013); see also Leslye E Orloff & Meaghan Fitzpatrick, *How to Prepare Your Case Through a Trauma Informed Approach: Tips on Using the Trauma Informed Structured Interview Questionnaire for Family Court Cases*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2015).

¹³³ The story writing process can be emotionally difficult and the advocate, attorney or other professional should not send the client to write the story on their own. Sometimes the process of writing and retelling the story can trigger the client to relive the trauma and go into crisis. When this occurs, the advocate or attorney should intervene using crisis intervention techniques. See *Training for Advocates and Attorneys on Trauma-Informed Work with Immigrant women*, YouTube (Apr. 23, 2014), <https://www.youtube.com/watch?v=05Z95q1bkG4>.

speaking freely about their experiences and others may not. For those that are not, we may want to guide them along this process by asking open-ended questions that prompt an open dialogue. The second stage of the trauma informed approach is an interview in which the advocate or attorney leads the victim through a second interview using a Structured Interview Questionnaire (SIQI) which obtains greater detail about the survivor's trauma history. The third part of the trauma informed story writing intervention involves the survivor reading back her final story to the advocate/attorney. This assists attorneys and advocates working with survivors of trauma to facilitate meaningful information gathering with your client and to help prepare her for interactions with the justice system. This approach produces stronger more quickly approvable immigration cases and better more robust evidence for any family law case that will be filed on the child or immigrant victim's behalf. At the same time this approach helps survivors heal.

The SIQI is designed to encourage trauma survivors to disclose in-depth information. Some of the questions prompt responses that will help build a stronger case, while others may be helpful details to include as evidence. The SIQI establishes a series of questions to ask that are designed to facilitate the client's healing and to strengthen the client's immigration application or family law case by uncovering important details of the story. The SIQI helps advocates and attorneys working with immigrant women and children who have suffered trauma uncover additional incidents of abuse. The SIQI also identifies experiences and emotional harms that contribute to extreme cruelty, provide evidence of substantial mental or physical abuse, contribute evidence that will support a court in rulings regarding the best interests of a child and the viability of reunification with their abuser.¹³⁴ The more detail an application for immigration relief can provide the more likely it is to be approved and the approval is likely to come more swiftly reducing the need for requests that the attorney representing the immigrant child or victim submit to additional evidence to support the immigration case. Similarly, the more the detailed evidence provided in the family court

¹³⁴ Mary Ann Dutton et al., *Trauma Informed Structured Interview Questionnaires for Immigration Cases (SIQI)*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2013).

case about the trauma and abuse the more likely a victim will be to win custody of her children or a protection order and the more detailed the court orders and findings will be supporting a child's application for SIJ.

V. SPECIAL ROLE OF STATE COURTS IN SPECIAL IMMIGRANT JUVENILE CASES¹³⁵

SIJ was created to protect a class of especially vulnerable immigrant children from further upheaval in their lives and offer them a path forward with greater stability that attaining lawful permanent residency provides. SIJ offers abused, abandoned, or neglected immigrant children a path to lawful permanent residency and protection from deportation. SIJ involves a bifurcated system with proscribed roles for the Department of Homeland Security's Office of U.S. Citizenship and Immigration Services (USCIS) and state courts with jurisdiction over the immigrant children.¹³⁶ USCIS relies on the state court, as experts on child welfare issues, children's best interests, and state law. State courts issue findings applying state laws to the facts of the SIJ child applicant's case. The state court findings are not an adjudication of the child's immigration case. They provide evidence as to some of the factors that an immigrant child must prove if their SIJ case is to be approved. USCIS receives these findings as required evidence to prove abuse, abandonment or neglect in the SIJ case together with the totality of evidence in the case and adjudicates whether to grant an immigrant child applicant SIJ status or lawful permanent residency.

Congress chose to statutorily rely on state court adjudications relying on the expertise of state courts that are responsible for insuring children's safety and well-being regardless of the child's immigration status. The TVPRA 2008 amendments recognized the

¹³⁵ State courts also have a role in U visa certification and T visa endorsement. See Leslye E. Orloff et al., *U Visa Certification Toolkit for Federal, State, and Local Judges and Magistrates*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT (2014).

¹³⁶ 8 C.F.R. § 204.11(a).

“presumptive competence”¹³⁷ of the state court in child welfare matters. Federal immigration law does not define abuse, abandonment, or neglect.¹³⁸ Instead, federal law relies on state courts to make factual findings describing in each case how the treatment the child has suffered meets the statutory definitions of abuse, abandonment, or neglect under the laws of the state in which the court is presiding. Federal law requires this finding be made in a court proceeding in which the court is exercising its jurisdiction under state law to issue orders involving care, custody or placement of the child.¹³⁹

State family law courts have deep expertise and experience in assessing the needs of children and issuing court orders that promote the healing, well-being, and best interests of children. State court judges issue orders involving children on a daily basis in a wide variety of cases. Congress chose to rely on state courts’ expertise in crafting court orders that promote child development, best interests and child welfare in making amendments to SIJ statutes. Congress required that state court judges be the finders of fact as to the abuse, abandonment, or neglect the child suffered, the viability of reunification with the abusive parent and the child’s best interests. Receiving specific types of state court findings are a prerequisite to an immigrant child’s ability to file an application for SIJ immigration benefits. Children applying for SIJ must prove to USCIS that they:¹⁴⁰

- Are under the age of majority as set by state law at the time the SIJ findings are issued by the court and on the date the SIJ application is filed (the maximum allowable age is 21);
- Are unmarried both at time of filing and at time of adjudication;

¹³⁷ *Gao v. Jenifer*, 185 F.3d 548 (1999) at 556, citing *Holmes Fin. Assocs. v. Resolution Trust Corp.*, 33 F.3d 561, 565 (6th Cir. 1994).

¹³⁸ TVPRA 2008 § 235(d).

¹³⁹ See *Special Immigrant Juvenile Status: Information for Juvenile Courts*, U.S. CITIZEN AND IMMIGRATION SERVICES, https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information_for_Juvenile_Courts_-FINAL.pdf.

¹⁴⁰ 8 U.S.C. § 1101(a)(27)(J).

- Present in the U.S.; and
- Have a state court order finding that:
 - The court has declared the juvenile dependent on the court, *or* has legally committed the juvenile to, or placed the juvenile under the custody of, an agency or dept. of a state *or an individual* or entity appointment by the state or a juvenile court located in the U.S.;
 - Reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis found *under state law*;
 - It is not in the best interest of the juvenile to be returned to the juvenile's or parent's previous country of nationality or country of last habitual origin.

The child must receive the state court order from a state court that under state law has jurisdiction over the child's care, custody or placement at the time the order is issued.¹⁴¹ State court jurisdiction is determined under the jurisdictional rules that apply to the type of proceeding the court is being asked to issue SIJ findings in. For example, in a custody case it may be difficult for a child who recently crossed the border to meet the traditional home state jurisdiction requirement that applies to interstate custody cases. For children who have recently crossed the border, family court custody jurisdiction can be difficult to establish. Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), mere presence in the state is not sufficient for a state court to have jurisdiction over child in custody a custody case. The child must be present in the state for six months for the court to be considered the child's home state under the UCCJEA. Until that time the previous

¹⁴¹ *Policy Memorandum: Updated Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement*, U.S. CITIZEN AND IMMIGRATION SERVICES (June 25, 2015), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0625_Perez-Olano_Settlement_Agreement_PM_APPROVED.pdf.

domicile in which the child lived for a period of six is considered the child's home state in which the custody action should be initiated. Under the UCCJEA foreign countries constitute and are treated like home states for custody jurisdiction purposes. If a child is living in a state and there are extenuating circumstances that require the court to exercise emergency jurisdiction the UCCJEA typically allows temporary emergency jurisdiction of that child which can ripen into continuous jurisdiction in some states. Cases that involve child abuse or neglect or domestic violence are the most common examples of when state courts will exercise emergency jurisdiction under the UCCJEA.

The child must receive state court orders before the child reaches the age at which the state court loses jurisdiction over the child. Under many state laws the point at which the state court loses jurisdiction over the child will be the age of majority in the state. There are some family law matters in which the court could continue to have jurisdiction over a child after the child reaches the age of majority under state law including, for example, cases involving child support obligations and enforcement and care for older disabled children.¹⁴² For example, some states allow child support to extend beyond the age of majority if the child is in college. In this scenario, a court may have the power to adjudicate the child support and simultaneously recognize the placement or responsibility of the care of the child in order to make the requisite SIJ findings.

Under USCIS policies once a child receives an order from a court with jurisdiction over the child under state statutes, the child is no longer required to file their SIJ application before turning the age of majority under state law.¹⁴³ The fact that the child aged out of the state court's jurisdiction after receiving the state court order will not

¹⁴² *E.g.*, child support, over 18 year olds who have not yet graduated high school, children with disabilities; varies by state, be sure to consult local statutes.

¹⁴³ *See* *Perez-Olano, et al. v. Holder, et al.*, 2:05-cv-03604-DDP (C.D. Cal.); *see also* *Settlement Agreement in Perez-Olano, et al. v. Holder, et al.*, Case No. CV 05-3604, in U.S. District Court for the Central District of California, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/laws/legal-settlement-notices/settlement-agreement-perez-olano-et-al-v-holder-et-al-case-no-cv-05-3604-us-district-court-central-district-california>.

preclude the child from filing for SIJ status.¹⁴⁴ The policies issued by USCIS in June of 2015 offer important clarification they state that an SIJ “applicant who is otherwise eligible will remain eligible will remain eligible even if he or she:

- Turns 21 years of age after filing the SIJ petition. . . but prior to USCIS’ decision on the SIJ petition.
- Ages out of the juvenile’s court jurisdiction prior to filing the SIJ petition. . .”¹⁴⁵

The SIJ policies issued in June 2015 confirm that applicants for SIJ face two important age related deadlines:¹⁴⁶

- They must obtain a state court order containing SIJ findings before the child turns the age of majority under state law or before the state court otherwise loses jurisdiction over the child; and
- The child must file for SIJ status before the child turns 21 years of age.

Finally, once a child has filed an application for SIJ that meets these age related filing requirements, the fact that the child turns 21 before their SIJ case has been adjudicated by USCIS will not affect the approval of their SIJ application. It will also not preclude the child from filing for and receiving lawful permanent residency based on the child’s timely filed SIJ application.¹⁴⁷ Similarly, if the state court’s jurisdiction over a child issued SIJ findings comes to a natural conclusion prior to the child aging out of state court jurisdiction and USCIS adjudication of the child’s SIJ case or lawful permanent residency based on an approved SIJ application, USCIS will not

¹⁴⁴ *Id.*

¹⁴⁵ USCIS Policy Memorandum PM-602-0117, Updated Implementation of the Special Immigrant Juvenile *Perez-Olano* Settlement Agreement at 3 (June 25, 2015), *reprinted in* 92 Interpreter Releases 1165 (July 6, 2015) *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0625_Perez-Olano_Settlement_Agreement_PM_APPROVED.pdf.

¹⁴⁶ *Id.* at 3.

¹⁴⁷ *Id.* at 1.

penalize the child. For example, in an adoption proceeding, the case comes to its natural conclusion when the adoption is finalized and the child no longer needs the help of the state court. While USCIS prefers that the child be under the continuous jurisdiction of the court throughout the USCIS adjudication, USCIS will often accept orders in cases that have concluded if the placement for the child is permanent.

A. State Courts With Authority Under Federal Immigration Laws to Issue SIJ Required Findings

Prior to the TVPRA 2008 amendments only juvenile courts hearing foster care related child welfare cases could make SIJ findings. When it is said the state court must have jurisdiction over the juvenile, it does not mean that the only court that can make the necessary findings are traditionally “juvenile” courts that have jurisdiction. Although federal SIJ statute continues to use the term “juvenile” court, it is clear that the TVPRA 2008 statutory amendments contemplate broadly opening up the types of state court cases in which judges can issue SIJ findings. The amendments made by TVPRA 2008 authorize any state family or juvenile court located in the U.S. with jurisdiction over the care, custody, placement, or dependency of a child to make SIJ findings.¹⁴⁸ As a result of these amendments, an SIJ applicant must either be dependent on the state court or the court must have the jurisdiction to place the juvenile under the custody of an agency or department of state, or an individual or entity appointed by a state court.¹⁴⁹ Court awards of custody, guardianship, or placement¹⁵⁰ of a child with an individual

¹⁴⁸ 8 C.F.R. 204.11(a); *See also Special Immigrant Juveniles (SIJ) Status, supra* note 80.

¹⁴⁹ USCIS defines juvenile court as: a court in the U.S. that has jurisdiction under state law to make judicial determinations about the custody and care of children. Examples include: juvenile, family, orphans, dependency, guardianship, probate and delinquency courts. 8 U.S.C. § 1101(a)(27)(f); *See also Special Immigrant Juveniles (SIJ) Status, supra* note 109.

¹⁵⁰ Placement can include court orders recognizing or sanctioning an already existing placement. This could occur, for example, in the context of court issuing a declaratory judgment that recognizes the placement of a 17 year old child with an adult (e.g. parent, next friend, school teacher) who has been caring for the child with the recognition of the child’s resident with the caretaking adult providing

could include a parent, grandparent, aunt, uncle, other relative, next friend or other caretaker or guardian. A wide range of state courts hearing cases involving children that are authorized under federal immigration laws to make SIJ findings include:¹⁵¹

- Adoption
- Child abuse
- Child neglect
- Children in need of supervision
- Child Support
- Custody/visitation/modification
- Delinquency
- Dependency
- Divorce
- Guardianship
- Legal Separation
- Motions for declaratory judgement
- Protection order
- Paternity
- Termination of Parent Rights

documentation the child needs to maintain enrollment in school or gain access to health care or other benefits.

¹⁵¹ See *Special Immigrant Juveniles (SIJ) Status*, *supra* note 109.

B. The Court Must Make a Determination Regarding the Care or Custody of the Juvenile

There are a wide range of circumstances in which a state court could, under state law, enter orders that address the custody, placement, or dependency or orders that provide for the care, well-being, and/or the best interests of children. State family courts regularly encounter children in a range of judicial proceedings and court dockets. Any proceeding involving a foreign born child who has not already become a citizen or lawful permanent resident could be a court case in which an immigrant could appropriately request and receive SIJ findings.

Many of the youth crossing the border are between the ages of 15 and 17.¹⁵² It can take many months for a recent immigrant child to make their way to family court. For children who are detained after crossing the border by immigration enforcement officials the process from that point forward is as follows. After the child is apprehended, immigration enforcement officials have 48 hours to screen the child for immigration relief eligibility that includes screening for political asylum eligibility and recently began including screening for human trafficking. As of this writing immigration enforcement officials at Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP) are not routinely screening children for eligibility for other forms of humanitarian relief including SIJ and the U visa. After 48 hours in immigration enforcement detention, the unaccompanied minor child is transferred to the custody of the U.S. Department of Health and Human Services' Office of Refugee Resettlement (ORR). ORR is responsible for seeking a safe placement for immigrant children placed in their custody. The length of a child's stay in ORR custody is usually one month. During that time ORR identifies a parent, a family member, or other person willing to take custody and responsibility for the child. Once a potential custodian is identified, ORR screens them to determine whether the placement is safe for the child. ORR seeks agreement from the persons in whom they place custody of the child

¹⁵² *Frequently Asked Questions: Unaccompanied Immigrant Children on the Southern U.S. Border*, NATIONAL IMMIGRANT JUSTICE CENTER, http://www.immigrantjustice.org/frequently-asked-questions-unaccompanied-immigrant-children-southern-us-border#.VgxVi_IVhBc (last visited Apr. 20, 2016).

to provide for care of the child and bring the child to immigration court proceedings. Placement with of the child with family members or other sponsors is accomplished without inquiry into and without regard to the immigration status of the adult family member in whose custody the child is placed. Through this process most unaccompanied minor children are released from government custody and placed with family members or other sponsors in the community while the child goes through the process applying for immigration relief the child qualifies to receive and appearing before the immigration court in removal proceedings.

Only after placement with a family member or other custodian would the child need to turn to the state court for orders regarding custody. In some states the adult in whose custody the child was placed would need to obtain a state court order in a guardianship case so that the adult custodian can enroll the child in school. Additionally, children for whom ORR is unable to locate a safe placement will remain in federal HHS custody. For children placed in ORR custody either the agency given custody of the child or the child with their own attorney may come to court seeking orders that include SIJ findings. Courts can issue family orders regarding the care and recognizing the custody of a children in ORR custody with consent of HHS only required if the state court would be modifying the custody placement. This process is largely responsible for why courts may see adolescents coming to state court to receive court orders mere days before immigrant child reaches the age of majority seeking a custody, confirmation of placement, or other court orders regarding the child's care and additionally requesting SIJ findings. While it may be unusual for courts to see custody matters involving children ages 16 or 17, so long as the state court has jurisdiction under state laws to issue orders that benefit children courts can sign SIJ orders.

The TVPRA 2008 also modified the “express consent” requirement to state that, “the Secretary of Homeland Security (Secretary) must consent to the grant of special immigrant juvenile status.”¹⁵³ Through policy memos, USCIS has interpreted this to mean that the SIJ petition must be “bona fide” and was not “sought

¹⁵³ Immigration and Nationality Act § 101(a)(27)(J)(iii)

primarily for the purpose of obtaining the status...rather than for the purpose of obtaining relief from abuse or neglect or abandonment.”¹⁵⁴ There are many ways in which state court orders regarding care or custody benefit older adolescent children serve legitimate purposes under state family laws. The following are examples of orders that have a legitimate purpose under state law beyond immigration relief. An adolescent may seek state court orders needed to ensure that the child can remain a dependent on their custodian’s health insurance. The adolescent may need the state court order to stay enrolled in high school, to enroll in a vocational school or to receive state funded post-secondary educational grants or loans. An older child may need a custody order that allows a child to continue living with their non-abusive battered immigrant parent. Providing an adolescent with stability as they enter adulthood is a valid purpose for a juvenile court order that goes beyond the need for immigration relief. Even if the order will only be valid for a short time, state family courts have seen the benefits for a child’s development and protection of issuing orders that implement, recognize and validate support systems for the child that as a practical matter will continue beyond the date a child turns the state law age of majority. Such court sanctioned arrangements do not in practice terminate on the date the child reaches the state law age of majority solely because the court’s jurisdiction over the juvenile does. The Department of Homeland Security CIS Ombudsman recognized the need for increased guidance on the current interpretation of the consent function, arguing “(r)ather than retain the elements of ‘express consent’ derived from the 1997 amendments, a proper implementation of the TVPRA language requires that USCIS verify whether State court orders contain the necessary factual findings and whether the State court has articulated the foundation for such findings.”¹⁵⁵ The Ombudsman further advises that securing relief from abuse and seeking immigration benefits are mutually beneficial rather than exclusive, noting the current interpretation of primary purpose “relies on a false dichotomy that suggests it is possible that a

¹⁵⁴ USCIS Memorandum, HQOPS 70/8.5 “Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions” (Mar. 24, 2009) *citing* H.R. Rep. No. 105-405, at 130 (1997).

¹⁵⁵ Recommendations from Maria Odom, *Ensuring Process Efficiency and Legal Sufficiency in Special Immigrant Juvenile Adjudications*, DEPT. OF HOMELAND SECURITY CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN 7 (December 11, 2015).

State court action may only focus on *either* protections against future harm *or* securing immigration benefits, when almost always, the court protections inevitably provide both in tandem.”¹⁵⁶

As state courts receive training on the important role of state family courts in Special Immigrant Juvenile Status courts will likely be able to identify immigrant children who may benefit from the SIJ program. In potential cases in which a child may be SIJ eligible, courts can ask counsel for the child to explore the issue directing counsel to USCIS produced materials on SIJ status. For example, if an immigrant minor is before the court without a parent or guardian present and child does not have a birth certificate, the court may take notice of potential SIJ eligibility and direct counsel to brief the court on SIJ. When courts issue SIJ orders for children at younger ages, this will reduce then number of children coming into court with urgent cases seeking court orders containing SIJ findings before the child turns the age of majority under state law.

C. Reunification Is Not Viable With At Least One Parent Based on the Abuse, Abandonment, or Neglect by That Parent As Defined by State Law

Once the court has exercised jurisdiction over an immigrant child and made rulings regarding the care or custody of the child, the court can include in its court order the findings SIJ statutorily requires as a prerequisite to a child filing an SIJ petition. These findings address two matters. The first finding articulates facts of the child’s case documenting that the child was abused, abandoned, or neglected by at least one of the child’s parents and that reunification with that parent is not viable. This finding will be discussed in detail in this section. The second finding discussing facts that demonstrate why the court finds it is not the child’s best interests to be returned to their home country will be discussed in the next section.

When SIJ was created, federal deportation priorities did not seek to deport unaccompanied youths because “of their age and the impracticality of deportation” as well as the fact many of them were

¹⁵⁶ *Id.* at 8

victims of child abuse, abandonment or neglect.¹⁵⁷ Congress decided that state courts were best suited to determine whether a child suffered abuse, abandonment, or neglect as defined by state family laws. Determinations as to whether a child has been abused, abandoned or neglected by a parent are made on a daily basis in child abuse and neglect, civil protection order, custody, adoption, delinquency, guardianship and other family court proceedings. State family courts are well versed in the state law definitions of “abuse,” “abandonment,” and “neglect” and are well positioned to make findings as to whether the facts of the case before the court involving a Special Immigrant Juvenile constitutes abuse, abandonment or neglect as defined by state law. Cases brought to court for SIJ findings will include acts of abuse, abandonment or neglect that were perpetrated by an immigrant child’s parent or parents either inside or outside of the U.S..

In determining whether the child has been subjected to abuse, abandonment, or neglect by one or both of their parents, state courts apply the state law definitions of abuse, abandonment, or neglect without regard to where the abuse, abandonment, or neglect occurred. If the actions or inactions regarding the child would be considered abuse, abandonment, or neglect under the laws of the state, the court is authorized to enter SIJ findings including in cases in which all of the abuse, abandonment, or neglect occurred outside of the U.S..

1. *Findings Must be Based on Relevant State Law Definitions of Abuse, Abandonment, or Neglect.* - In entering SIJ findings courts must apply the *state* law definitions of abuse, abandonment, neglect or another similar act against a child under state law to the facts of the immigrant child’s case that the court is adjudicating. There is no federal definition of abused, abandoned, or neglected in the Immigration and Nationality Act (INA). Therefore courts should include citations to the state law definitions of these offenses against a child in the court order and make findings that detail how the facts of the specific case before the court constitute abuse, abandonment,

¹⁵⁷ *Special Immigrant Status for Alien Foster Children: Joint Hearings on S. 358, H.R. 672, H.R. 2448, H.R. 2646, and H.R. 4165 Before the Subcommittee on Immigration, Refugees and International Law of the House Committee of the Judiciary, and the Immigration Task Force of the House Education and Labor Committee*, supra note 51.

neglect or other similar harm to a child under state law. It is legally incorrect for state court orders to find that abuse, abandonment, or neglect took place under the under the sections of the INA that define Special Immigrant Juvenile Status. If a court cites to the INA for the definitions of abuse, abandonment or neglect rather than state law the court order will likely be insufficient to support an award of SIJ to the immigrant child by USCIS. When seeking court orders to submit with an SIJ application attorneys and courts should avoid citing to the INA and cite instead to the relevant state code section that the court is relying upon to make its abuse, abandonment or neglect findings. Just as the court order needs to include factual details that are the basis for the court's the abuse, abandonment or neglect findings, court orders should include a factual basis for the findings that parental reunification is not viable. The order should state the child cannot be reunited with the offending parent discussing the evidence of abuse, abandonment, or neglect and that reunification is not viable. The SIJ statute only requires a state court to find reunification is not viable with the offending parent; the statute does not necessitate a termination of parental rights. Therefore, a child may have contact or visitation with the offending parent but formal reunification of the parent and child remains not viable. .

While the definitions of abuse, abandonment, and neglect vary by state, most state statutes recognize neglect, maltreatment, physical, sexual, and emotional abuse. Every state has a civil and criminal statute for child abuse and neglect. In delegating the determination that the child has suffered abuse, abandonment or neglect to state courts under state laws, the federal statute gave the state courts the flexibility to make SIJ findings under any definitions of abuse, abandonment or neglect contained in state law including but not limited to definitions contained in civil, criminal, protection order and jurisdictional statutes. This discussion will generally reference civil statutes, as USCIS does not require the state court to prosecute the party accused of abuse, abandonment, or neglect, and does not require the evidence meet the criminal standard or statutory definition. Most states either include abandonment in their definition of abuse or neglect. In other states abandonment is defined as a separate offense.

a. *State definitions*¹⁵⁸ of abuse will include emotional abuse, sexual abuse, physical abuse, and sometimes parental substance abuse and omission of parental responsibility. - The term “abuse” of a child can encompass a large array of abusive behaviors. Almost every state defines physical, emotional, and sexual abuse as part of their child abuse statutes.¹⁵⁹ The specific acts that constitute these types of abuse vary by statute. Generally “non-accidental” injuries to a child are considered physical child abuse. Common examples include intentional physical acts to induce pain, such as burning, kicking, or hitting. Other states include acts of omission that result in injury as part of their definition of physical abuse, such as a not bringing the child to the doctor. In 38 states behavior that threatens a child with harm or creates a substantial risk of harm is deemed physical abuse.¹⁶⁰ In Hawaii, Illinois, Louisiana, and North Carolina the definition of physical abuse includes human trafficking. This can be particularly important because in these states SIJ could provide an additional avenue for immigration protection for victims of trafficking who are young immigrant girls when one of the child’s parents was involved in the trafficking. Some child trafficking victims may seek SIJ relief because accessing continued presence or a T visa may be more difficult if the trafficking is not being locally or federally investigated or prosecuted. Immigrant women and girls face high rates of sexual assault and are often trafficked as part of that pattern of abuse, in either sex trafficking or labor trafficking rings. In the states identified, if the facts amount to human trafficking and the victim’s parent or step-parent had a role in the trafficking, if she is otherwise eligible, she may be able to apply for SIJ as a result.

Parental substance abuse is included in the state law definitions of either child abuse or neglect by 24 states.¹⁶¹ Possible types of behavior that may qualify as child abuse under state law include:

¹⁵⁸ See state statute for individual definitions.

¹⁵⁹ Georgia and Wisconsin do not include emotional abuse in their definitions of abuse or neglect.

¹⁶⁰ See *Definitions of Child Abuse and Neglect*, CHILD WELFARE INFORMATION GATEWAY (June 2014).

¹⁶¹ *Id.*

- Prenatal exposure of a child to illegal drugs¹⁶²;
- Manufacturing controlled substances in the presence of a child¹⁶³;
- Allowing a child to be present where the chemicals or tools to manufacture illegal drugs are kept¹⁶⁴;
- Furnishing a child with drugs or alcohol¹⁶⁵; and
- Using controlled substances that impair a caregiver's ability to provide proper care to their child.¹⁶⁶

Attorneys and advocates working with immigrant children should be aware in states where certain forms of substance abuse related activities are considered child abuse or neglect, that these actions or activities can be the basis for findings of child abuse for SIJ purposes. Immigrant children with parents who have a history of substance abuse should be screened for parental substance abuse related offenses.

Sexual abuse and/or exploitation of a child is included as part of the definition of abuse in every state. Additionally, seven states identify sex trafficking in their definition of sexual abuse.¹⁶⁷ For purposes of SIJ, the abuse must have been committed by either a parent or step-parent to qualify for immigration relief. Sexual exploitation is included in most of the definitions of sexual abuse; typically it includes behaviors such as allowing or encouraging a

¹⁶² Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, North Dakota, Oklahoma, Oregon, South Dakota, and Wisconsin. *Id.*

¹⁶³ Colorado, Indiana, Iowa, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, and Washington. *Id.*

¹⁶⁴ Arizona, Arkansas, and Washington. *Id.*

¹⁶⁵ Arkansas, Florida, Hawaii, Illinois, Minnesota, Ohio, and Texas. *Id.*

¹⁶⁶ California, Delaware, Kentucky, Minnesota, New York, Oklahoma, Rhode Island, and Texas. *Id.*

¹⁶⁷ Florida, Louisiana, Maryland, Massachusetts, Minnesota, North Carolina, and Texas. *Id.*

minor to engage in prostitution or child pornography. For SIJ purposes, the qualifying abuse, abandonment, or neglect may have taken place either in the U.S. or abroad, so long as the behavior described would violate the state statutes in the state in which the child is seeking the order. USCIS will adjudicate the totality of the facts, history, and evidence provided in the immigrant child's application. The state court in entering its SIJ findings need only determine if the abuse the applicant is alleging that the court credits as having occurred would be a violation of that state's statutes. A young immigrant girl who fled her home country because her stepfather was sexually abusing her can go to court in any state in the U.S. and that court can issue an order factually stating that the facts of what occurred to the child constitutes sexual abuse as defined by the state law.

Emotional abuse is defined as part of the definition of abuse or neglect in 33 states and the District of Columbia. Examples of common statutory language include "injury to the psychological capacity or emotional stability of the child as evidenced by an observable or substantial change in behavior, emotional response, or cognition" and injury as evidenced by "anxiety, depression, withdrawal, or aggressive behavior." When discussing cases of domestic violence, this can include behavioral patterns of coercive control, witnessing domestic violence perpetrated by one parent on the other parent, or extreme cruelty.¹⁶⁸ The state statutes vary significantly as to what constitutes emotional abuse, some states include allowing others to emotionally abuse the child, mental injury resulting from sexual abuse, and incidents resulting in impairment of the child's normal range of behavior.

b. *Obtaining SIJ orders based on neglect.* - Neglect is typically defined as the failure to provide a basic need for a child. State law definitions of what constitutes need differ, but most include failure to provide a child with food, clothing, shelter, medical care, or supervision substantially affecting the child's health, safety, or well-being. Neglect statutes differ more from state to state in comparison to abuse statutes that contain more consistent definitions. Some state neglect statutes include forms of abuse, or the fact the child was

¹⁶⁸ Leslye Orloff et al., *supra* note 18.

abused as evidence of neglect. Other states have adopted very broad definitions of neglect and include homelessness as a means of neglect, regardless of willfulness of the parent. It is therefore very important and best practice for courts to include in the court order a neglected immigrant child will be using to file for SIJ relief the following:

- A quote and citation to the state law definition of child neglect;
- Specific factual findings detailing the facts that the court determined constitutes child neglect; and
- An articulation of the basis for the court's conclusion that applying the state law definition of child abuse to the facts of the case before the court, the court concludes as a matter of law that the immigrant child before the court was neglected by the child's parent or parent(s).

This detailed approach is best practice for state court orders in SIJ cases and is particularly important for neglected immigrant children. The state definition of neglect, for purposes of special finding needed for the SIJ application, may apply to events that occurred outside of the U.S.. If an immigrant child was made homeless by her caretaker parent in her home country, that evidence is enough for a state court finding of neglect in certain states.¹⁶⁹

Other types of neglect some states have adopted in statute are failure to educate. Failure to educate as required by law is recognized in state statutes as neglect by 29 states and territories.¹⁷⁰ Every state has different mandatory education requirements. In states that consider failure to educate neglect, a parent's failure to comply with

¹⁶⁹ Colorado, Connecticut, South Dakota, American Samoa. *Definitions of Child Abuse and Neglect*, *supra* note 155.

¹⁷⁰ Failure to educate as required by law is statutorily recognized as neglect by Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Kentucky, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, West Virginia, and Wyoming, District of Columbia, Puerto Rico, American Samoa, Virgin Islands. *Id.*

minimum educational requirements for children is sufficient for a finding of neglect. Fifteen states and territories include variations of failure to provide certain types of medical care as child neglect under state law. This includes the withholding of medical treatment or nutrition from infants with life-threatening conditions and failure to provide special medical or mental health treatment that the child needs as a form of neglect.

Nationwide, neglect statutes include many nuanced forms of abuse, control, and lack of parental accountability and responsibility. It is important for attorneys and advocates working with special immigrant youth to become familiar with the child neglect laws of the state in which the immigrant child seeking SIJ is living. Knowledge of state neglect laws will help advocates and attorneys detect conditions, events, and the treatment by a parent in the child's home country that would constitute a form of child neglect under the state laws of the state in which the court is being asked to provide SIJ findings. Close analysis of the relevant state statute combined with detailed questions and focused interviewing of immigrant youth is necessary to fully evaluate if an immigrant child may be eligible for SIJ based on neglect by at least one parent.

c. *Abandonment.* - Abandonment is defined in two distinct state statutes. First, the majority of states and territories define abandonment within the state child protection code where address abuse and neglect is addressed. Thirty-nine states and territories either include abandonment as part of the definition of abuse or neglect or define it separately. State courts can find abandonment took place by one parent in a variety of family court and juvenile proceedings. States have generally defined abandonment to include:

- Failure to retain contact with
- Failure support a child;
- The fact that the child lacks knowledge as to the identity of a parent;
- An articulated intent to forego parental responsibility; and

- The physical act of leaving the child.¹⁷¹

The second place that the term “abandonment” is defined is in the family law jurisdictional statute governing custody cases. The governing jurisdictional statute in custody cases in virtually every state¹⁷² is the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in which abandonment is defined and used as a means for asserting jurisdiction over the child in custody cases. Abandonment can be based on either state law definition. Both definitions can serve as the governing law used by the court to make its SIJ findings. Abandonment, as defined under state law, is a valid ground for SIJ findings in any state court proceeding in which the court has jurisdiction over the child. .

The federal law does not define abandonment and instead for SIJ purposes relies on state law definitions. USCIS has addressed the fact that children who entered the U.S. unlawfully to join his/her parent may be considered “abandoned” by the other parent for SIJ purposes.¹⁷³ So long as the individual facts of a case support a finding of abandonment based on state law, a judicial officer can make that finding and USCIS can favorably adjudicate an the immigrant child’s application for SIJ.

The UCCJEA was adopted to ensure stability and full faith and credit in custody and visitation proceedings. It has been adopted by almost all of the states and territories and provides guidance on how and when states should assert jurisdiction over a child based on factors other than mere presence of the child in the jurisdiction. One factor included in UCCJEA determinations of abandonment of a child by a parent. Typically, under the UCCJEA, a child must be present in the state for at least six months before the court can exert the preferred home state jurisdiction to adjudicate matters involving the care and custody of a child

¹⁷¹ *Id.*

¹⁷² Adopted by every state except Massachusetts, which still uses the Uniform Child Custody Jurisdiction Act (UCCJA) instead of the more recent Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *Id.*

¹⁷³ ILRC, Primer for One Parent Cases at 11 (citing Amy S. Paulick, Assistant Chief Counsel, Department of Homeland Security, DHS Line, In the Matter of [Redacted]).

An exception to this rule, which almost every state adopted, is emergency jurisdiction based on abandonment. If a child has been abandoned and is physically present in the state the court may assert emergency jurisdiction over a child who has been in the jurisdiction for less than six months. The UCCJEA defines abandonment as “left without provision for reasonable and necessary care or supervision.”¹⁷⁴ Every state has adopted this definition of “abandon” except Ohio, where “abandoned” means the parents of a child have failed to visit or maintain contact with the child for more than 90 days, regardless of whether the parents resume contact with the child after that 90-day period.¹⁷⁵ It is not necessary that the abandonment be occur at the time of the assertion of jurisdiction. The abandonment requirement is met when the child is without proper care from a parent. It is not an assertion of jurisdiction based on abandonment that can only be made when the child is in imminent need of protection because of the abandonment. Many children have been abandoned by parents as babies or young children and do not come to family court seeking assistance until they have entered the U.S. and found stability with their other parent or a family member. They come to court seeking to legal recognition of that stability in a guardianship, custody, or child support proceeding. If the child has just re-settled in a new household with a parent, relative, or guardian and this home life has not been in place for the 6 months to establish home state jurisdiction for purposes of UCCJEA, the family can assert emergency jurisdiction based on the child’s presence and abandonment. The state UCCJEA definition of abandonment can be applied to the facts and findings of the case, and the court’s findings would support an application for SIJ.

2. *One or Both Parent Requirement.* - When seeking SIJ orders, the qualifying offense need only be committed by one of the immigrant child’s parents and this finding accompanied by a finding that reunification with that offending parent is not a viable option would be sufficient to for SIJ purposes. The child’s other non-offending parent may be the custodian of the child without affecting the child’s eligibility for SIJ. SIJ was initially created to assist children living in long term foster care, Congress decided in 2008 to amend

¹⁷⁴ UCCJEA art. 1, § 102(1).

¹⁷⁵ 47 Ohio Jur. 3d Family Law § 1109.

that statute in order to provide equal treatment and protection for children who have been provided a nurturing relationship with the child's other non-offending parent.

Although the SIJ statute was amended in 2008 to greatly expand the SIJ protections to a larger group of immigrant children, the federal regulations governing the SIJ program have not been amended to reflect the changes in the new law. Many provisions of the prior federal regulations governing SIJ were overruled by the 2008 statutory amendments.¹⁷⁶ USCIS acknowledges that the law and the regulation are inconsistent and advises courts to “be familiar with current immigration law.” Where federal regulations are inconsistent with and/or have been explicitly overruled by subsequent federal statutes, courts should apply the most up to date federal laws.

The Immigration and Nationality Act (INA) section 101(a)(27)(J) establishes the definition of a Special Immigrant Juvenile. This definition was last amended by Congress in the Trafficking Victims Protection Reauthorization Act of 2008.¹⁷⁷ The TVPRA statutory changes supersede portions of the Code of Federal Regulations relating to SIJ cases.¹⁷⁸ USCIS has made it abundantly clear through policy, memos, and practice that the federal law only requires findings of abuse abandonment, or neglect by perpetrated by one parent, not both.¹⁷⁹ When identifying SIJ eligible children, USCIS

¹⁷⁶ The Proposed Rule was issued in September 2011, the Final Rule is expected in the next year. *Proposed Rules*, Federal Register (Sept. 6, 2011), <http://www.justice.gov/sites/default/files/eoir/legacy/2011/09/15/fr06sept11.pdf>.

¹⁷⁷ Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

¹⁷⁸ 8 CFR 204.11 has been amended by statute to redefine eligibility therefore sections overruled include but are not limited to the following: §204.11(a), (c)(3), (c)(4), c(5), (d)(2)(i), and (d)(2)(ii).

¹⁷⁹ See *Special Immigrant Juvenile Status: Information for Juvenile Courts*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Information_for_Juvenile_Courts_-FINAL.pdf (stating an eligible child must be abused, abandoned, or neglected by a parent); See *Immigrant Relief for Abused Children*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Immigration_Relief_for_Abused_Children-FINAL.pdf (stating an eligible child may be living with the non-abusive parent).

lists children living with the non-abusive parent, foster parent, or legal guardian as part of a non-exhaustive list of eligible family scenarios in which an SIJ eligible child may be living.

The legal inconsistency between the SIJ statutory requirements and incorrect information contained in the regulations that were overruled by the statute amendments in 2008 has led to confusion among courts and attorneys who have struggled to understand how to obtain SIJ findings when only parent has abused, abandoned, or neglected the child. Nebraska and New Jersey have issued published judicial opinions incorrectly that rely on the overruled regulations and interpreted the amended statute to require court findings that both parents must have been at fault for abuse, abandonment, or neglect in order for state court judges to issue special findings to be used in SIJ applications.¹⁸⁰

Both cases relied on the fact the reunification was possible with one of the biological parents and therefore the refused to issue an SIJ finding to the child based abuse, abandonment or neglect by the child's other parent. The New Jersey case held the "1 or both" phrase to require that reunification with neither parent is viable because of abuse, neglect or abandonment of the juvenile."¹⁸¹ Both courts also looked to the pre TVPRA 2008 legislative history and the pre TVPRA 2008 administrative history of the SIJ statute, despite the plain meaning of the statutory language. The New Jersey court acknowledged that the legislative history supported the fact the amended statutory language required one parent but went on to justify its failure to follow the requirements of the federal statute by imposing the court's own view on what it sees as the "competing goals" of protecting the non-abusive parent and protecting against immigration abuse. The New Jersey court created its own interpretation of the SIJ legislative and regulatory histories to fit the court's stated goals.¹⁸² There is no legislative history to support the assertion that Congress intended to preclude children reunification with the non-abusive parent from SIJ protections. To the contrary, the statute was amended and the legislative history

¹⁸⁰ *In re Interest of Erick M.*, 820 NW 2d. 639 (Neb. 2012); *H.S.P. v. J.K.*, 87 A.3d 255 (N.J. Super. Ct. App. Div. 2013).

¹⁸¹ *H.S.P. v. J.K.*, 87 A.3d at 266.

¹⁸² *Id.*

provide evidence that Congress explicitly intended to protect the immigrant SIJ eligible child's relationship with the child's non-abusive parent. The plain meaning of the statute should suffice when courts are interpreting the "one or both" parent requirement. If the federal statute was interpreted to mean that "one or both" means both, the phrase "or both" would be superfluous in the statute.¹⁸³

The Immigrant Legal Resource Center explains, "Congress used the disjunctive to indicate that SIJ findings could be made when reunification is not viable with just one parent, and also could be made when reunification is not viable with both parents."¹⁸⁴ Further, if the statute omitted the words "or both" and simply read, "reunification is not viable with one of the immigrant's parents," the plain meaning of that phraseology would render immigrant youth for whom reunification was not viable with both parents ineligible for SIJ. This would clearly be at odds with the purpose of SIJ, which is to protect vulnerable immigrant children. Lastly, the court's decision "did not consider the federal agencies' interpretation of the SIJ statute."¹⁸⁵

There are currently four published state court opinions that interpret the one or both parent requirement consistently with USCIS published statements and with federal guidance.¹⁸⁶ In addition to statements and brochures clearly identifying the requirement that only one parent is abusive, USCIS has proposed revisions to the application for SIJ to reflect USCIS agreement that immigrant children are eligible for SIJ relief if the one of their parents abused, abandoned, or neglected the child. The form change would allow an applicant to check that he or she is eligible based on a non-viability

¹⁸³ *Special Immigrant Juvenile Status: A Primer for One Parent Cases*, IMMIGRANT LEGAL RESOURCE CENTER (2014) [hereinafter ILRC, Primer for One Parent Cases].

¹⁸⁴ *Id.* at 6.

¹⁸⁵ *Id.* at 5.

¹⁸⁶ *Matter of Mario S.*, 954 N.Y.S.2d 843 (N.Y. Fam. Ct. 2012); *Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 973 N.Y.S.2d 714 (N.Y. Fam. Ct. 2013); *In re Israel O.* (2015), 233 Cal. App. 4th 279; *Eddie E. v. Superior Court*, 183 Cal. Rptr. 3d 773 (Cal. Ct. App. 2015).

with one parent or check a box for both parents, establishing a clear distinction.¹⁸⁷

U.S. Immigration and Customs Enforcement filed a brief in Baltimore Immigration Court stating “[C]ounsel for USCIS has confirmed that a child who enters the U.S. illegally to join his/her parent in the U.S. may be considered “abandoned” for the purposes of an I-360. However, a child who enters the U.S. illegally to join both parents may not be considered abandoned.”¹⁸⁸ An I-360 is the immigration form used to file an application for SIJ. The important distinction made is that if the child is rejoining both parents and is living together with their parents, then the child has not been abandoned by either parent. If, however, the child has been abandoned by one parents and the child is living with the other parent, the child may file for SIJ.

The Executive Office for Immigration Review (EOIR) has stated on two separate occasions that the one or both requirement incorporated into the SIJ statute in the TVPRA 2008 amendments means at least one parent, not both. In January 2014, in a publication about SIJ rules, EOIR clarified the intent of the TVPRA amendments that “it is only reunification with one parent that must not be viable, the alien child could potentially be living with one parent and still qualify for SIJ status.”¹⁸⁹ EOIR made it very clear the one or both, means at least one. The court stated in its opinion, “the respondent demonstrated that reunification was not viable with one of his parents, thus, satisfying the requirements of the statute.”¹⁹⁰ This EOIR approach is consistent with USCIS practice since the TVPRA amendments in 2008 became law, USCIS regularly accepts and grants petitions for SIJ based on only one parent abusing, abandoning, or neglecting the immigrant child applying for SIJ

¹⁸⁷ See AILA InfoNet, USCIS Comment Request on Form I-360, p. 9, Part 8, Question 3.A, available at <http://www.aila.org/content/fileviewer.aspx?docid=50482&linkid=281819>.

¹⁸⁸ ILRC, Primer for One Parent Cases, *supra* note 139.

¹⁸⁹ Laura E. Ploeg, *Special Immigrant Juveniles: All the Special Rules*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Jan. 2014, available at <http://www.justice.gov/eoir/vll/ILA>.

¹⁹⁰ ILRC, Primer for One Parent Cases, *supra* note 179.

All of the federal agencies responsible for implementing SIJ statute and regulations, the Department of Homeland Security and the Department of Justice and each of their components, have published policy memoranda regarding their consistent statutory interpretation of the 2008 TVPRA amendments to the definition of which immigrant children qualify for Special Immigrant Juvenile Status. State courts are there obliged to defer to the federal interpretations of these federal agencies.¹⁹¹

D. Best Interest of The Child

The final required finding in SIJ cases is the finding that it is not in the immigrant child's best interests to return to the child's home country.¹⁹² The best interest of the child standard to be applied by state courts in SIJ cases is the same best interest of the child factors that courts routinely apply in the child custody and child abuse and neglect proceedings that the state courts adjudicate. The best interest of the child standard strives to achieve a safe and comfortable environment so that every child can develop and flourish. State best interest of the child laws list number of factors that courts are to consider when making best interest of the child determinations. The state best interest of the child statutes include a non-exclusive list of factor the courts must consider in making best interests of the child determinations. Courts can also consider other evidence and factors that arise based on the specific facts of the case before the court. Common factors listed in state best interests of the child statutes that courts are required to consider include:

- The wishes of the child as to which parent should be the child's custodian;
- The interaction and interrelationship of the child with their parent or parents, their siblings, and any other person who may significantly affect the child's best interest;

¹⁹¹ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

¹⁹² Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

- The child's adjustment to their home, school, and community;
- The mental and physical health of all individuals involved;
- The capacity of parents to provide for the child; and
- The presence or history of domestic violence in the home.

SIJ cases are unusual in family law cases because they require judges to make a best interest determination that is not in the child's best interest to return to the home country.¹⁹³ This type of comparison of legal protections and services available in the U.S. with those available in the child's country of origin has precedents in U.S. immigration law. One relevant example is the extreme hardship determination that immigration judges are required to make when adjudicating Violence Against Women Act (VAWA) cancellation of removal applications filed by immigrant spouses and children who have been subject to battering or extreme cruelty by their U.S. citizen or lawful permanent resident spouses or parents. Some of the factors immigration judges consider in deciding whether an abused immigrant child's or spouse's removal will cause extreme hardship to the immigrant applicant spouse or child include:¹⁹⁴

¹⁹³ The primary types of cases coming before family courts in which the courts may be called upon to make similar comparisons are international child custody cases including those that implicate the Hague Convention – The Convention on the Civil Aspects of International Child Abduction, held at the Hague on October 25, 1980 (the Hague Convention), and its US implementing legislation, the International Child Abduction Remedies Act (ICARA) 42 USC §§11601-11610.; *see also* Nunez-Escudero v Tice-Menley, 58 F.3d 374, 379 (8th Cir. 1995) (holding that a child should not be sent back to Mexico due to grave risk to the child).

¹⁹⁴ 8 C.F.R. §§ 1240.20(c) and 1240.58(c); *See also* INS Memorandum from Paul W. Virtue, INS General Counsel, to Terrance M. O'Reilly, Director of INS Administrative Appeals Office on Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children (October 16, 1998), *available at* <http://niwaplibrary.wcl.american.edu/pubs/extreme-hardship-and-documentary-requirements/>.

- The nature and extent of the physical and psychological consequences of the battering or extreme cruelty;
- The impact of the loss of access to the U.S. courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, alimony, maintenance, child custody, and visitation);
- The applicant's or applicant's child's need for social, medical, mental health, or other supportive services, particularly those related to the abuse or surviving the abuse, which would not be available or reasonably accessible in the foreign country;
- The existence of laws, social practices, or customs in the foreign country that would penalize or ostracize the applicant or applicant's child for leaving an abusive situation, or for taking action to stop the abuse;
- The abuser's ability or lack thereof to travel to the foreign country, and the ability, willingness, or lack thereof of foreign government authorities to protect the applicant and/or the applicant's child from future abuse; and
- The likelihood that the abuser's family, friends, or others acting on the abuser's behalf in the foreign country would physically or psychologically harm the applicant or the applicant's children if they were deported.

These factors illustrate some of the types of considerations courts might entertain in making best interest of the child determinations in addition to the best interest of the child factors listed in the state best interest of the child statute. Other factors the court could consider are the traditional factors that immigration

courts apply in all cancellation of removal cases including those cases filed by battered immigrant spouses and children. These factors are include, but are not limited to:¹⁹⁵

- The age (youth/old age) of the applicant;
- The children's ability to speak the native language of the foreign country and the children's ability to adjust to life there;
- Serious illness of the person or her child that necessitates medical attention not adequately available in the foreign country;
- A person's inability to obtain adequate employment abroad;
- The child's length of residence in the U.S.;
- Existence of other family members residing legally in the U.S. and lack of family in the home country;
- Irreparable harm arising from a disruption of educational opportunities;
- The adverse psychological impact of removal;
- The impact of separation that could be caused by removal on both mother and child;
- The extent to which deportation would interfere with court custody, visitation, and child support awards; and
- The extent to which the child applicant is an asset to or involved with their community in the U.S. (i.e., involvement in church/temple/mosque,

¹⁹⁵ 61 Fed. Reg. 13,067 (Mar. 29, 1996) (to be codified at 8 C.F.R. pts. 103, 204, 205, and 216).

children's school, community, other service programs).

Courts are required under federal immigration laws to apply state best interest of the child factors to make SJIS findings regarding whether it is in the child's best interests to not return to the child's home country. The state law family court judges apply to this determination is the same law that courts routinely apply in custody and child abuse and neglect cases. SIJ findings do not require that courts apply these factors in a direct comparison of risks, options, and the child's ability to thrive in the child's home country and in the U.S.. Courts may consider country conditions in making this determination but it is not necessary. It is sufficient to state that it is not in the child's best interest to return to the country of origin because it is in the child's best interest to be placed in the care or custody of the petitioner in the state court case. For example, if SIJ findings are requested in a guardianship case, the state court could correctly state in the SIJ order, it is in not in the best interest for child to return to the country of origin because child is in the care of guardian, which is in child's best interest. Attorneys representing immigrant children seeking SIJ determinations may present evidence in the state court proceedings regarding the services, support, and educational opportunities the child is receiving in the U.S.. This evidence and evidence of the abuse, abandonment or neglect that the child suffered can be presented through testimony of the child, testimony of the child's guardians, counselors, therapists, teachers, health care providers and others who can attest to the child's adjustment to and investment in their life in the U.S.. Several of these witnesses may also be able to attest to the support system the child has and needs in the U.S. to overcome the impact that the abuse, abandonment or neglect the child suffered has had on the child. Attorneys representing immigrant children may also choose to introduce testimony of the child, witnesses, or other evidence regarding country conditions in the child's home country and the treatment, risks, dangers and options for the child if the child were to be returned to their country of origin.

In making best interest of the child findings courts may include in their orders information about the unique facts of the child's case that played a role in the court's ruling that returning the

child to their country of origin would not be in the child's best interests. Like the finding of abuse, abandonment, or neglect, this factors that courts must consider in making the best interest of the child determination are to be based on state laws applied to facts of the case. Some of the facts that the court is considering and ruling on in SIJ cases are U.S. based fact and some will be facts that took place abroad or conditions that exist abroad that would affect the child if the child was returned to their home country. USCIS recognizes that state juvenile courts are the most appropriate determiners of fact as they have the most experience making adjudications that affect the care and custody of children based on state law including best interest of the child determinations.

VI. CONCLUSION

Congress's growing support of kinship care and the removal of the long-term foster care requirement from the statute show a desire to keep the immigrant child, when possible, with family members, friends, and other individuals who are in the best position to nurture the child applying for SIJ immigration protections. All SIJ eligible children have suffered trauma as a result of being abused, abandoned or neglected by at least one of their parents. Both the family court orders in which state court judges enter orders regarding the care or custody of the immigrant children including SIJ findings and the grant of Special Immigrant Juvenile Status by USCIS together provide critical stability and support for immigrant children. This approach involving state family courts and USCIS offering protection from deportation and access to lawful permanent residency for immigrant children who have suffered abuse, abandonment or neglect helps children heal, succeed in school and move on with their lives to become productive and contributing members of our communities.

Recent immigrant women and girls should be screened early and often experiences of abuse, neglect, or abandonment that children suffer perpetrated by their parents and step-parents to detect SIJ eligibility. This screening may also detect criminal activities suffered in the U.S. perpetrated by the child other family members or caretakers that could lead to the child's eligibility for U visa

protections. Continuous screening over time by various professionals working with immigrant children can uncover abuse occurring to the child after their arrival in the U.S. and can also result in the child building enough trust to divulge information about past abuses that may make the child SIJ eligible.

Courts should receive training to help courts detect cases in which non-citizen immigrant children before the court may be SIJ eligible. Training can also help courts craft orders containing SIJ findings that include sufficient detail about the facts of the case to provide a ruling from which USCIS adjudicators can see how and why the court reached its conclusions regarding abuse, abandonment, or neglect, the viability of reunification with the offending parent and the child's best interests. Finally, courts should distribute at courthouses DHS produced information about Special Immigrant Juvenile Status and other immigration remedies available for immigrant crime victims. This will improve access to justice as that immigrant victims of child abuse, child abandonment, child neglect, domestic violence, sexual assault, human trafficking and other U visa covered criminal activities. Immigrant victims who find the courage to seek help from state courts will learn about their legal rights to pursue immigration relief offering them the safety, stability and opportunity to receive protection from deportation and the ability to live, work, and heal under the protection of U.S. family court and immigration laws.