



**Chapter VII:
Service of Process in State Court:
Cases Seeking Special Immigrant Juvenile Status Findings¹**

By Leslye Orloff
December 29, 2017

As discussed in previous chapters, state court findings for Special Immigrant Juvenile Status (SIJS) are made in state proceedings where judges make determinations regarding child care and custody. As state court proceedings, the law governing who must be served and how service is made is state law. As United States Citizenship and Immigration Services (USCIS) notes:

There is nothing in USCIS guidance that should be construed as instructing juvenile courts² on how to apply their own state law. Juvenile courts should follow their state laws on issues such as when to exercise their authority, evidentiary standards, and due process.³

The list of persons who must receive service of process in state court proceeding is set by state law and is the same in all matters that come before the court for the type of case filed. Seeking SIJS findings does not create a need to serve any federal government official with copies of proceedings taking place in state courts, including but not limited to: the Office of Refugee Resettlement, the Department of Homeland Security, or an Immigration Judge. After the state court findings are made, federal immigration officials have defined roles in the adjudication of subsequent SIJS immigration petitions filed by eligible immigrant children. USCIS officers will adjudicate the SIJS petition. The application for lawful permanent residence filed by an SIJS eligible child will be adjudicated by either an Immigration Judge or a USCIS officer, depending on the immigration posture of the case. In cases brought in immigration court the government is always represented by ICE Counsel. However, none of these federal players

¹ This publication was also developed under grant numbers SJI-15-T-234 and SJI-20-E-005 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.² The definition of “juvenile courts” that controls for purposes of SIJS is the definition under federal immigration laws which include a wide range of state court proceedings fall outside of the limited definition the term “juvenile court” may have under state law. “A juvenile court is defined as a U.S. court having jurisdiction under state law to make judicial determinations about the custody and care of children. The title and the type of court that may meet the definition of a juvenile court will vary from state to state. Examples of state courts that may meet this definition include: juvenile, family, dependency, orphans, guardianship, probate, and delinquency courts.” U.S. Citizenship & Immigration Servs., *Volume 6: Special Immigrant Juveniles Part J*, in U.S. CITIZENSHIP & IMMIGRATION SERVS. POLICY MANUAL (2017), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter1.html> (last visited Mar. 28, 2018), *Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS (2017) [hereinafter SIJS BENCH BOOK], <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/> (last visited Mar. 26, 2018). *See also* 8 CFR 204.11(a) (2018).

³ U.S. Citizenship & Immigration Servs., *Volume 6: Special Immigrant Juveniles Part J*, in U.S. CITIZENSHIP & IMMIGRATION SERVS. POLICY MANUAL (2017), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter1.html> (last visited Mar. 28, 2018); *Appendix D1: USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles*, in NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, SIJS BENCH BOOK, 12 (2017), <http://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6/> (last visited Mar. 26, 2018).

**National Immigrant Women’s Advocacy Project (NIWAP, pronounced *new-app*)
American University, Washington College of Law**

4300 Nebraska Avenue NW · Washington, D.C. 20016

(o) 202.274.4457 · info@niwap.org · wcl.american.edu/niwap · <http://niwaplibrary.wcl.american.edu/>

has a role in the state court proceedings regarding care and custody in which SIJS findings are sought, and service to them is not required.

Constitutional due process requires that certain affected individuals be given notice of the proceedings where their rights may be affected. Jurisdictions have widely differing rules regarding who must be served in various types of cases that affect the care and custody of children. State courts also have widely differing rules of what forms of service satisfy due process. These practices and rules are not altered simply because SIJS findings are sought. Service requirements in a matter in which SIJS findings are sought are not any different from the regular service of process that must take place in the underlying proceeding. More pointedly, the presence of federal immigration law related requests in a case and the likelihood of persons not in the United States having an interest in the case, do not change the underlying state nature of the state court proceeding.

For all court cases brought in a state court, the state's relevant service of process rules apply. Many states have specific rules governing extraterritorial service of process. For example, states may allow process to be served outside of the state in the same manner as service is made within the state.⁴ When state service rules require service of process on a party to a proceeding who resides outside of the U.S., this chapter provides an overview of general issues to consider when serving a person residing outside the United States. Judges and practitioners must be familiar with their local service rules and based on those rules, judges must determine the requirements for service of process in the case. Service in most cases will include personal service or service by mail. However, other sources of law regarding service can provide useful guidance and options to ensure that due process is afforded.

Common Forms of Service⁵

The most common form of service of process is to personally deliver a copy of a summons and complaint on the defendant. Generally the person delivering the documents must be over age 18 and not a party to the proceedings. Each jurisdiction will have its rules and nuances related to personal service that apply to all cases that come before the court including proceedings that include requests that the court's order include SIJS findings.

The most common alternative to personal delivery service of process is service by mail. Domestically, service by mail generally is accomplished by sending a summons and a copy of the complaint by registered or certified mail to the party being served, return receipt requested.

In crafting state rules regarding service by mail, many jurisdictions are influenced by and may even incorporate provisions from the following:

⁴ See Mich. Ct. R. §§ 2.103-2.108; N.M. R. Civ. P. 1-004(N) (mirroring Fed. R. Civ. P 4(f) and taking into account the special considerations required by international law).

⁵ It is important to note the information contained in this section describes examples of several service of process options that may be available for use in SIJS cases. State law governs service of process and notice requirements in that apply to each type of state court proceeding. The state laws regarding who must receive notice of court proceedings and how service can be accomplished may differ by the type of state court proceeding. However, the notice and service of process rules to be applied in SIJS cases are the same that apply to the underlying proceeding under state law.

- Federal Rule of Civil Procedure (FRCP) 4
- The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)⁶
- The Inter-American Convention on Letters Rogatory and its Additional Protocol (Inter-American Service Convention or IASC)⁷

Each of these sources of law is discussed below. Remember that the extent to which they are applicable or relevant to the interpretation of state requirements of service is determined by state law.

Service under Federal Rules of Civil Procedure

Many countries are not signatories to international treaties that set out service of process agreements between countries including the Hague Service Convention and the Inter-American Service Convention. When that is the case, Rule 4 of the Federal Rules of Civil Procedure, provides a framework for service of process on litigants outside the United States. If a foreign defendant agrees to accept service voluntarily, Rule 4(d) provides for waiver of formal service of process.⁸ Among the different methods available under FRCP 4, litigants should become particularly familiar with the provisions under FRCP 4(f):

- (f) Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served at a place not within any judicial district of the United States:
- (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
 - (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
 - (A) as prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction;
 - (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
 - (C) unless prohibited by the foreign country’s law, by:
 - (i) delivering a copy of the summons and of the complaint to the individual personally; or

⁶ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matter, *opened for signature* Nov. 15, 1965, 658 U.N.T.S. 163, <https://treaties.un.org/doc/Publication/UNTS/Volume%20658/volume-658-I-9432-English.pdf> (last visited Mar. 27, 2018).

⁷ U.S. DEP’T OF STATE, INTER-AMERICAN SERVICE CONVENTION AND ADDITIONAL PROTOCOL, <https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process/iasc-and-additional-protocol.html> (last visited Mar. 27, 2018).

⁸ An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. Fed. R. Civ. P. 4(d).

- (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
- (3) by other means not prohibited by international agreement, as the court orders.⁹

Service under the Hague Service Convention

Some state rules incorporate the principles and procedures of the Hague Service Convention. This treaty codifies universally accepted procedures for service of process in civil or commercial matters among the signatories, and eliminates the need to serve process through consular or diplomatic means. Hague service rules only apply in cases in which the address to the person being served is known. If the address for the defendant is not known, litigants are not able to avail themselves of the provisions provided under the Hague Service Convention.

The Hague Service Convention provides three main alternate methods for service:

- Use of the country's designated Central Authority.
- International service by mail.
- Direct service through an agent in the foreign country.

The Service Convention also allows for service through diplomatic or consular channels and for service under the destination state's local rules.

Service through the Central Authority

Article 2 of the Convention requires each signatory to designate a Central Authority to act as the service agent for process served under the Convention. Although service through a Central Authority is not required in many countries, litigants commonly choose to effect service through this method.¹⁰

Article 3 of the Convention states that litigants who want to serve through the Central Authority, must file a formal request form. In the United States litigants file a *Form USM-94*, available at the U.S. Marshals Service.¹¹

Article 5 of The Hague Service Convention requires that initial documents being served must be translated into the official language of the foreign country. Initial documents generally include the summons and the complaint. In light of this translation requirement, it is useful for courts to specifically state which documents the court requires be served.

Time to effectuate service

⁹ Fed. R. Civ. P. 4(f).

¹⁰ U.S. DEP'T OF STATE, JUDICIAL ASSISTANCE COUNTRY INFORMATION, <https://travel.state.gov/content/travel/en/legal-considerations/judicial/country.html> (last visited Mar. 27, 2018).

¹¹ U.S. DEP'T OF JUSTICE, REQUEST FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS, <https://www.usmarshals.gov/district/la-e/general/usm94.pdf> (last visited Mar. 27, 2018).

The Convention does not give a time frame for service. However, Article 15 provides that alternative methods of service may be used if a Central Authority does not respond within six months of a request for service. Because the Convention does not provide a time for making service under its procedures, the Federal Rules of Civil Procedure 4(m) exempts service in a foreign country from the normal requirement that a summons and complaint be served within 120 days after commencing the action. But, a court may dismiss a case for failure to serve a foreign defendant within a reasonable time.

Service by mail

Article 10(a) of the Hague Service Convention preserves the right of litigants to effect service between signatory countries through mail, provided that the country of destination does not object. In *Water Splash, Inc. v. Menon*, the United States Supreme Court held that service by mail is permitted when:

- (a) the receiving country has not objected to service by mail; and (b) service by mail is authorized under otherwise applicable law.¹²

When a party will be attempting service by mail, best practice is to serve by registered mail. The US Post Office has a manual that lists countries that provide for registered mail service.¹³

Courts should be aware that service by mail has potential risks. It is possible that mail may not get delivered, or that mail is lost or misdirected, so a defendant may be able to vacate a default judgment if he is able to prove lack of delivery of mail.

Translation of Documents

According to Article 5 of the Hague Service Convention, papers must be translated into the official language of the foreign country if serving through a Central Authority. Standard practice is to have at least the summons and complaint translated. Otherwise, the defendant may be able to successfully argue that he did not receive fair notice of the lawsuit.

Service through diplomatic channels

Article 8 of the Hague Service Convention authorizes a contracting state to use its consular or diplomatic agents to serve judicial documents on persons located abroad. Article 9 authorizes contracting states to use consular or diplomatic channels to forward documents to the authorities of another Hague Service Convention participating country for service. However, US litigants rarely use this option because officers of the US Foreign Service are normally prohibited from serving process or legal papers or appointing other persons to do so.

Service under local rules

¹² *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017).

¹³ U.S. POSTAL SERV., INTERNATIONAL MAIL MANUAL: INDEX OF COUNTRIES AND LOCALITIES, <https://pe.usps.com/text/imm/immctry.htm> (last visited Mar. 27, 2018).

Article 11 of The Hague Service Convention provides that participating countries may allow judicial documents to be served by any means whether or not they are specifically set out by the Convention. Article 19 provides that the Convention does not affect a contracting country's internal laws permitting foreign documents to be served within that state by methods other than those set out in the Convention.

Service under the Inter-American Service Convention (IASC)

The IASC is an important supplement to The Hague Service Convention particularly when the defendants are located in Central and South America.¹⁴ A party makes a request for service under the IASC by completing an official Form *USM-272* and *272A*, available at the U.S. Marshals Office.¹⁵ The request consists of an original and two copies of the forms, and three copies of the summons and complaint and any other documents that court requires be served.

Letters Rogatory

Article 3 of the Additional Protocol to The Hague Service Convention and Article XX of the IASC both specify that "letters rogatory" must be prepared as part of the request to serve internationally. The United States has determined that Forms *USM-272/272A*¹⁶ satisfy this requirement, and that a separate, formal letter rogatory is not required. However, the IASC requires the form to bear the seal and signature of the clerk of the court from which the process issues, as well as the signature and stamp of the Central Authority of the country in which the court sits.

Translation and Service by mail

All documents must be translated to be able to serve under the IASC. The IASC does not provide for service by mail.

¹⁴ U.S. DEP'T OF STATE, INTER-AMERICAN SERVICE CONVENTION AND ADDITIONAL PROTOCOL, <https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process/iasc-and-additional-protocol.html> (last visited Mar. 27, 2018) (currently in force in Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela).

¹⁵ U.S. DEP'T. OF JUSTICE, REQUEST FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS PURSUANT TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY, <https://www.usmarshals.gov/process/usm272.pdf> (last visited Mar. 27, 2018).

¹⁶ U.S. DEP'T. OF JUSTICE, REQUEST FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS PURSUANT TO THE ADDITIONAL PROTOCOL TO THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY, <https://www.usmarshals.gov/process/usm272.pdf> (last visited Mar. 27, 2018).