

State Court Judicial Role in Issuing Special Immigrant Juvenile Status Findings and U Visa Certifications

New Mexico Judicial Conclave
Albuquerque, New Mexico
June 7, 2018

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Introductions

- Judge Mary Weir
16th Judicial District Court, Jackson County, Missouri
- David B. Thronson
Michigan State University College of Law

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Learning Objectives

By the end of this training you will be better able to:

- Understand the role that state courts play in the SIJS adjudication process and the judicial role in U and T visa certification.
- Identify children before the court in a wide range of state family court cases who might be SIJS eligible
- Understand how to access legally correct information from the U.S. Department of Homeland Security on SIJS, U and T visas and sign U visa and T visa certifications
- Implement procedures for signing U or T visa certifications in civil and criminal cases that are consistent with federal law.

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Participant Goals

What do you want to be sure to learn today?

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Special Immigrant Juvenile Status (SIJS)

- SIJS is a form of humanitarian immigration relief that provides for a path to lawful permanent resident status for children who are unable to be reunited with one or both parents due to abuse, abandonment, neglect, or a similar basis under state law.

- SIJS provides the hope of stability and safety for vulnerable immigrant children.

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Federal Statutory Framework

- State court findings are required as evidence
 - The state court order does not provide immigration status
 - But the state court order is one of many required pieces of evidence in the federal adjudication and welfare matters
- Only the federal government can provide lawful immigration status

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Federal Statutory Framework

- SIJS relies upon state court expertise:
- The required state court findings are on issues that are inherent in state court decisions about child care, custody and placement of children:
 - Adjudicating facts of child abuse, neglect and abandonment
 - Making determinations regarding child care, custody and placement that further the best interests of children

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SIJS Terminology “Juvenile Court”

- Federal statutes and regulations define a “juvenile court” as any “court located in the United States having jurisdiction under State law to make judicial determinations about custody and care of juveniles.”

8 C.F.R. § 204.11

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State Court Findings

- The court exercised jurisdiction over the care and custody of the child
- It is not in the child’s best interest to return to their home country
- The child’s reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law

See Immigration and Nationality Act § 101(A)(27)(J)

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State Law Applies

USCIS states that the “order (or orders) should use language establishing that the specific findings (conclusions of law) were made under state law.”

USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles – Chapter 3(A)(2) – Juvenile Court Orders and Administrative Documents, Findings,
<https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html>

SIJS Terminology “Dependent”

The mere “acceptance of jurisdiction over the custody of a child by a juvenile court ... makes the child dependent upon the juvenile court, whether the child is placed by the court in foster care or, as here, in a guardianship situation.”

In re Menjivar, 29 Immig. Rptr. B2-37 (1994)

State Courts Regularly Make Custody & Placement Determinations

- Who will be the custodian/guardian of the child?
- With whom will the child live?
- Will the child be committed to the custody of the state or private agency for care, treatment, or rehabilitation

Types of Proceedings With Jurisdiction To Make SIJS Findings:

- Dependency
- Delinquency
- Termination of parental rights
- Guardianship
- Protection orders
- Paternity
- Child support
- Custody
- Divorce
- Legal Separation
- Declaratory judgments
- Adoption

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Best Practices for Court Order

- Include a statement of the court's jurisdiction citing the state statute, court rule, or other authority under which the court is exercising jurisdiction.
- Follow your state court procedures and note that you do so to demonstrate that the court made an informed decision

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Viability of Reunification

- Order must include finding that reunification with a parent is not viable due to abuse, neglect, abandonment, or a similar basis under state law
- Does not require formal termination of parental rights or a determination that reunification will never be possible
- Does not necessitate no contact with parent – visitation and communication can occur

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Viability of Reunification

- Reunification is not viable if granting the parent custody is not envisioned by the court as a viable option
- Changes in circumstances can occur, but if the court is issuing a final order that does not grant custody to the parent, then reunification is not viable

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Abuse, Neglect, Abandonment

There is no governing federal definition of these terms, and USCIS states the “order (or orders) should use language establishing that the specific findings (conclusions of law) were made under state law.”

USCIS SIJS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html>

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Abuse, Neglect, Abandonment

- Apply state law without regard to where abuse, abandonment or neglect occurred
- Describe how the actions of the parent fit the state law definition of abuse, neglect, or abandonment
- Formal charges of abuse, neglect or abandonment against a parent are not required

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Where in your state statutes are there definitions of abuse, abandonment, and neglect?

Abuse

- Child Abuse Prevention and Treatment Act (CAPTA)
 - “[a]ny recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which presents an imminent risk of serious harm.”
- Most common types of abuse:
 - Physical abuse
 - Neglect
 - Sexual abuse and exploitation
 - Emotional abuse
 - Parental substance abuse
 - Abandonment
 - Domestic Violence

Abandonment

- Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA):
 - *left without provision for reasonable and necessary care or supervision*
- as failure to provide reasonable care, support, communication, or contact with the child
- failure to perform duties as parents, or as unwillingness to take physical custody of the child or make arrangements for the child's care
- When the Parent or his/her location is unknown
- Some states require evidence of a person's intention or willingness to abandon the child
- Incarceration

Neglect

- Failure to meet child’s basic needs
- Abuse or failure to prevent abuse of a child
- Abandonment
- Failure to discharge responsibilities to care for the child (i.e. Incarceration, hospitalization, mental incapacity)
- Exposure to drugs at or before birth

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Similar basis under state law

- Where there is a legitimate underlying child welfare reason for the state court to exercise jurisdiction over a decision regarding the care and custody of a child, the explicitly terms abuse, neglect, or abandonment are not required.

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Similar basis examples

- A “destitute child” in New York
– N.Y. SOC. SERVS. LAW § 371(3)
- A child who is “without proper custody or guardianship” in Michigan
– MICH. COMP. LAWS § 712A.2(4)(b)(1)

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Make Findings of Neglect or Abuse Rather Than Similar Basis for:

- Child Endangerment
 - All state statutes more than neglect and may also fall within definition of abuse
- Forced marriage
 - All state statutes = abuse
- Domestic violence
 - When child abuse falls within state domestic violence statute definitions

“1 or both parent”

- USCIS unequivocally accepts the plain language of the statute “as a clarification that petitioners ... may be reunified with one parent or other family members.”
- A “qualifying court appointed custodial placement could be with one parent, if reunification with the other parent is found to be not viable due to that parent’s abuse, neglect, or abandonment of the petitioner.”

USCIS SLIS Policy Manual Volume 6 – Immigrants Part J – Special Immigrant Juveniles
Chapter 2(D)(2), Parental Reunification
<https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html>

Best Practices for Court Order

- Utilizing its own state definitions, the state court should identify the factual reasons that reunification with a parent is not viable
- Cite state law definitions of abuse, neglect, or abandonment that are the basis of these findings
- Make findings regarding each parent
- If relying on a similar basis, explain how this basis is similar to abuse, neglect, or abandonment

Best Interests

- Any time a state court makes a decision about the care and custody of a child, it takes the best interests of the child into account.
- It is precisely this experience and expertise that Congress sought to tap when it required that SIJS petitioners provide a state court determination

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Factors to consider...

- Risk of danger to the child
- Family violence, abuse, neglect, abandonment
- Trauma child has suffered and child's physical, emotional, safety, mental health needs
- Help the child is receiving
- Family support system
- Emotional well being

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Factors to consider...

- Educational resources
- Child's wishes and fears
- Parent's fitness and caregiving capacity
- Parent's demonstrated capacity to provide stability continuity of care
- State laws that preclude or discourage placement with abusive parent

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Approach

- Make factual findings about harm to the child in United States or abroad
- Apply state law definitions to determine if harm meets definitions of abuse, neglect, abandonment, or similar basis under state law
- Apply state best interest factors to
 - Custody, placement, commitment
 - Determination if in child's best interests to return to placement in home country

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Home country not in child's best interests

- Identify each potential custodian in United States and home country
- Apply state best interests factors to each placement
- State in court order the factual findings that support chosen placement

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Home country not in child's best interests

- Make findings that illustrate why, under state best interest factors, court is not choosing placements in child's home country
- Compare the supports, help, services child needs United States v. home country

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Delinquency and Criminal Issues

- Juvenile delinquency finding ≠ conviction for immigration purposes
- Juvenile dispositions can have immigration consequences
 - Negative factors in discretionary determinations
 - Some grounds of inadmissibility or deportability do not require a criminal conviction

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What Children with SIJ Status Receive

- Ability to apply to adjust status to Lawful Permanent Resident
 - Legal employment authorization
 - Facilitates access to state issued driver's licenses and identification cards
 - Eligible for citizenship after 5 years as LPRs
 - As LPRs, eligibility for post secondary educational grants and loans, public and assisted housing
 - Food stamps (only until the immigrant child turns age 19)
- Parents of recipients of SIJS may NEVER obtain any immigration benefit based on the relationship to the child**

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U Visa and T Visa Overview

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Purpose of the U Visa

- Improves access to justice for immigrant crime victims
- Is a tool that helps build community policing and relationships with immigrant crime victims
- Increases prosecution of perpetrators of crimes against immigrant victims
- Allows victims to report crimes without fear of deportation
- Enhances victim safety
- Keeps communities safe

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U Visa for Immigrant Victims

- A victim of qualifying criminal activity is eligible for a U Visa when:
 - The criminal activity occurred in the U.S. or violated U.S. law;
 - The victim possesses information about the crime;
 - The victim has been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of the offense; and
 - The victim has suffered substantial physical or mental abuse as a result of the victimization

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U Visa Regulations Definitions

Although terms are used interchangeably

- As a matter of law (U visa regulations)
 - “investigation or prosecution” always means
 - “Detection, investigation, prosecution, conviction, or sentencing”
 - “Crime” always means
 - “criminal activity”
- “Criminal activity” chosen to offer early access to justice system protection
 - Improving stability for crime victims

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U Visa Qualifying Criminal Activity

- Domestic violence
- Sexual assault
- Rape
- Incest
- Prostitution
- Torture
- Felonious assault
- Manslaughter
- Murder
- Female genital mutilation
- Kidnapping
- Abduction
- Trafficking
- Involuntary servitude
- Slave trade
- Being held hostage
- Fraud Foreign Labor Contracting
- Peonage
- False Imprisonment
- Blackmail
- Extortion
- Witness tampering
- Obstruction of justice
- Perjury
- Stalking

Attempt, conspiracy or solicitation to commit any of these crimes any similar activity

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U-Visa Criminal Activities (11/2011 data)

- Domestic violence- 45.9%
- Rape, Sexual Assault, Incest, Trafficking- 30.4%
- Felonious Assault, Murder, Manslaughter- 9.9%
- Blackmail, extortion, perjury, obstruction of justice, attempts, conspiracy, solicitation- 8.47%
- Kidnapping, being held hostage, unlawful criminal restraint, torture- 5.3%

Activity	Percentage
Domestic violence	46%
Rape, Sexual Assault, Incest, Trafficking	30%
Felonious Assault, Murder, Manslaughter	10%
Blackmail, extortion, perjury, obstruction of justice, attempts, conspiracy, solicitation	9%
Kidnapping, being held hostage, unlawful criminal restraint, torture	5%

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Criminal Activities: Types of Proceedings

- Family
 - ✓ Civil Protection Order
 - ✓ Custody Case
 - ✓ Child Abuse, Neglect, or Termination of Parental Rights
 - ✓ Divorce Case
 - ✓ Paternity Case
- Juvenile
- Criminal
- Probate
 - ✓ Elder / Dependent Adult Abuse
 - ✓ Guardianship
 - ✓ Conservatorship
- Civil
 - ✓ Employment
 - ✓ Tort damages against a perpetrator

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U Visa Certification: Who Can Certify?

- Federal, state, and local
 - Police, sheriffs, FBI, HSI, ATF...
 - Prosecutors
 - **Judges, Magistrates, Commissioners, Judicial Referees, Masters, Alderman, ALJs, Surrogates, Chancellors**
- Departments of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC)
- Child and Elder Abuse investigators and agencies
- Other government agencies

Why victims seek certification from courts

- Only justice system contact was a protection order, custody, or civil case
- No language access when called police for help
- Police did not investigate and case never sent to the prosecutor

According to DHS, a U Visa Certification Tells USCIS Only 3 Things:

- Certifier believes the applicant is a victim of a qualifying criminal activity
- Victim had knowledge of the criminal activity
- Victim was, is, or is likely to be helpful

Things to Know About Certifying

- Question is **NOT**:
 - Is/was there a prosecution?
 - Was there an arrest of the offender?
 - Do I have proof beyond a reasonable doubt?
 - Is this within the statute of limitations?
 - Was there a conviction?



Things to Know About Certification

- Judges, law enforcement and other certifiers
 - May complete U visa certification if they observe or detect a victim's helpfulness
 - Can be a civil, family or criminal case
- The investigation, prosecution or case
 - Can still be ongoing
 - Can be closed
 - May have settled
 - Occurred a long time ago
 - May never have been criminally prosecuted



Detecting Helpfulness



**Evidence of Helpfulness:
Some Examples in Criminal Case**

- Evidence in case that the victim:
 - Called 911
 - Participated in a criminal investigation
 - Identified perpetrator at line up
 - Testified before a grand jury or at trial
 - Appearance in a case
 - Attended criminal court hearings in the case
 - Victim witness statement
 - Testimony at sentencing

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**Evidence of Helpfulness:
Some Examples in Family/ Civil Case**

- Filed and/ or appeared at hearing for full protection order
- Plead and or testified about abuse or sexual assault in a court case (e.g. protection order, divorce, custody, small claims, housing, employment)
- Evidence in case that victim called the police, made a police report, cooperated in a criminal investigation
- Serving the perpetrator with notice of case with underlying abuse facts

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Helpfulness in the Regulations

- Statute and DHS Regulations: has been helpful, is being helpful or is likely to be helpful in the
 - Detection, or Investigation, or
 - Prosecution, or Conviction or
 - Sentencing
- There is no degree of helpfulness required
- The certification may be completed once the certifier can access or has evidence of the victim's helpfulness
- The investigation or prosecution can still be ongoing

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Helpfulness Requirement Met Even When:

- Victim reports a crime and there's no further investigation
- Report is of past crime that the victim did not report at the time
- Perpetrator absconds or is deported
- Perpetrator is being prosecuted for a different crime
- Victim is not needed as a witness
- Victim is dead (indirect victim is applying)
- Perpetrator is dead
- The criminal case did not result in a guilty plea or conviction
- Victim is applying for a civil protection order, but domestic violence is not being criminally prosecuted

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The U-visa Application Process



Typical length of process = 28 months

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U-visa Facts and Benefits

- Only 10,000 U-visas can be granted annually
 - Waitlist approval backlog 110,000 visas
- The U-visa grants a temporary 4 year stay
- Work authorization (≈ 28-36 months)
- Benefits for family members applicants
 - Under 21: spouse, children, parents, unmarried siblings under age 18
 - Over 21: spouse and children
- Lawful permanent residency after 3 years if
 - Cooperation or not unreasonably refuse to cooperate
 - + humanitarian need, family unity or public interest
- U.S. citizenship after 5 years of lawful permanent residency+ proof of good moral character

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New DHS Forms Published Make Judicial Certification Easier

- Judges' certification can occur when the judge signing the certification has
 - Probable cause
 - Made findings
 - Issued a ruling
 - Include the type of proceeding and
 - If orders were issued attach a copy of the order

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Technical Assistance and Materials

- Power Point presentations and materials for this conference at www.niwap.org/go/JTN1
- Judicial Training Manual at www.niwap.org/go/sji
 - **NIWAP Technical Assistance:**
 - Call (202) 274-4457
 - E-mail info@niwap.org
- Web Library: www.niwaplibrary.wcl.american.edu

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Questions



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