

Factors That Can Demonstrate That It is Not in a Child’s Best Interests to be Returned to Their Home Country

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In Special Immigrant Juvenile Status (SIJS) cases,¹ one of the required SIJS findings is that it is not in the child’s best interests for the child to be returned to the child’s or their parent’s home country.² When making this SIJS finding, the steps that courts should take are as follows:

1. Identify each of the persons that under state law would need to be served with notice of the proceeding involving the immigrant child who may have an interest in the child’s custody or placement (e.g. each of the child’s parents, grandparents, or adult siblings).
2. Make a factual determination applying state best interest factors with whom it is in the child’s best interests to reside.
 - a. Include in the finding both facts supporting why the placement was chosen and facts supporting why that placement is in the child’s best interests.
 - b. For each other family member considered, make findings of fact articulating why that placement was not in the child’s best interests.
3. Review the factors listed in this document that are relevant to the child SIJS applicant’s case and add additional findings of fact regarding the other reasons why it is not in the child’s best interest to return to the child’s home country.

In SIJS cases for courts, it could be useful to make findings that identify and discuss the child’s needs, particularly those related to the traumas the child suffered. Then discuss the help and support the child is receiving in the U.S., compared to what is available in the child’s home country. Depending on the facts of the case before the court, considering and discussing these factors in the court’s order may also be helpful to the court in deciding custody or placement and the non-viability of reunification with the child’s parent or parents who perpetrated the abuse, abandonment or neglect of the child. The list below is based on the U.S. Department of Homeland Security’s Violence Against Women Act (VAWA) Cancellation of Removal regulations that apply in child abuse and domestic violence cases that come before the U.S. immigration courts.

¹ Special Immigrant Juvenile Status (SIJS) provides humanitarian immigration relief to children who are under the age of majority as defined by state law who have been abused, abandoned, or neglected by one or both of their parents. Children who qualify for SIJS may also be victims of human trafficking (sex or labor trafficking or commercial sexual exploitation of children). It is important to screen SIJS eligible children of human trafficking victimization because trafficking victims are provided greater protections under U.S. immigration laws and public benefits laws than other immigrant crime victims. Also SIJS applicant children cannot include any other family members in their applications and can never sponsor their non-abusive parent for immigration status. Child trafficking victims can include certain of their siblings and their parents in their T visa and continued presence applications.

² Immigration and Naturalization Act, § 101(a) (27) (J) (ii) (codified at 8 U.S.C. § 1101(a) (27) (J) (ii).)

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Some factors to consider include:

- The nature and extent of the physical or psychological consequences of abuse;
- How the child victim would be impacted by losing access to the courts and criminal justice system in the United States;
- How likely it is that the abusive³ parent's family, friends or those acting on behalf of the abusive parent, would physically or psychologically harm the applicant child or the applicant child's parent;
- In domestic violence cases in which both the child and the child's parent were abused: how likely it is that the batterer's family, friends or those acting on behalf of the batterer would physically or psychologically harm the applicant, the applicant's child or the applicant's parent;
- The accessibility or availability of supportive services for victims of domestic violence and or child abuse, abandonment or neglect;
- Whether laws or social practices exist in the home country that punish the applicant or the applicant's child or children for being victims of domestic violence or child abuse or attempting to leave an abusive household;
- Whether authorities in the home country have the capacity to protect the applicant and/or the applicant's child or children from future abuse;⁴
- The age of the applicant at the time of entry to the United States and at the time of application;
- The ability of the applicant to speak the native language and adjust to life in the home country;
- The overall health (including mental health) of the applicant and the availability of required medical and/or mental health treatment should the applicant be returned to the home country;
- The length of time that the applicant has resided in the United States;
- Whether there are family members who are or will be legally residing in the United States;
- The financial impact of the applicant's departure;
- Whether the applicant would have the opportunity to continue his or her education;
- Whether the applicant has family or other ties in the home country;
- The current political or economic conditions in the applicant's home country;
- Whether the applicant has contributed to or has ties to a community in the United States;
- The immigration history of the applicant; and
- Whether there is another way for the applicant to adjust to permanent resident status.⁵

³ For purposes of this tool "abusive" includes acts by one or both of the child's parents that constitutes abuse, abandonment, neglect or similar basis under state law.

⁴ See Leslye E. Orloff, *Chapter IV: Application of the Best Interest of the Child Standard in Special Immigrant Juvenile Status Cases*, in NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT, SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A GUIDE TO BEST PRACTICE FOR JUDGES AND COURTS 1-15 (2017), <http://niwaplibrary.wcl.american.edu/pubs/application-of-the-best-interest-of-the-child-standard-in-sijs-2/>; See also 8 C.F.R. § 1240.58(c).

⁵ Id., See also 8 C.F.R. § 1240.58(b).