

State Court Actions That Intersect with Federal Immigration Matters: U Visa Certifications and Special Immigrant Juvenile Status Findings

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Introductions

- Judge Susan Breall
 - San Francisco, CA
- Judge Rosemary Collins
 - Rockford, IL
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Learning Objectives

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

- Carryout the role Congress delegated to State Court Judges in Special Immigrant Juvenile Status (SIJS) and U Visa cases
- Identify minors before your court who are SIJS eligible and know how to issue SIJS predicate orders
- Understand the role Congress and the Department of Homeland Security created for judges and other judicial officers in U visa certification in cases of immigrant crime victims before the court

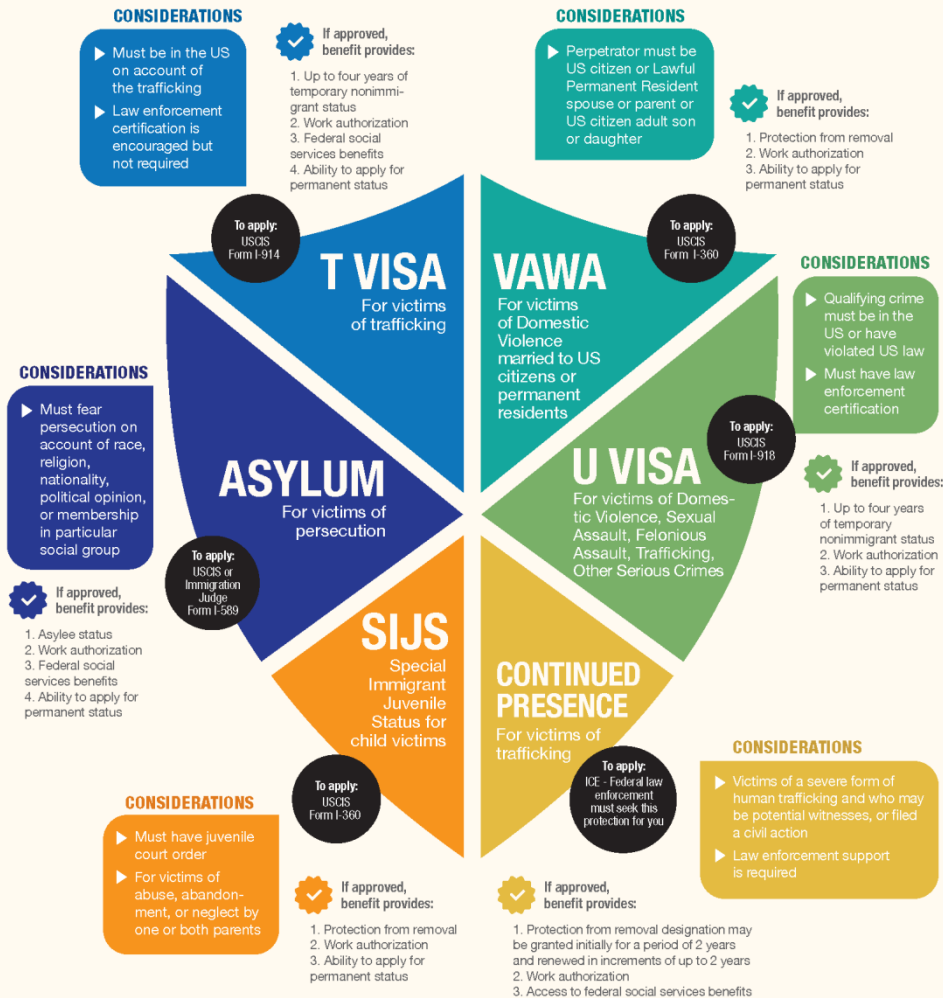
The Congressionally Created Role for State Court Judges: U Visa and Special Immigrant Juvenile Status

Purpose of Crime Victim Protections

Congress enacted VAWA self-petitioning (1994), the U and T visas (2000) and Special Immigrant Juvenile Status (1990, 2008) to:

- Improve community policing and community relationships
- Increase prosecution of perpetrators of crimes against immigrant victims
- Allow victims to report crimes without fear of deportation
- Enhance victim safety
- Promote child welfare and protection
- Keep communities safe

PROTECTIONS FOR IMMIGRANT VICTIMS



DHS.GOV/BLUE-CAMPAIGN

For victim support call 1-888-373-7888 or text INFO or HELP to BeFree (233733)

Immigration Relief Expands Benefits Access

VAWA self-petition

- Filing = Public/Assisted Housing
- Prima facie = Qualified Immigrant
 - TANF, Education, Health subsidies; SNAP for children

Battered spouse waiver

- Qualified Immigrant
- Can avoid deeming

Continued Presence

- Benefits access like refugees
- Need HHS certification

T visa

- Benefits access like refugees (7 years) with HHS certification
- Qualified Immigrant with bona fide determination

U visa

- Lawfully present upon wait-list approval = health care exchanges no subsidies

Family Based Visa Petition Approved + Battering or Extreme Cruelty

- Public and Assisted Housing
- Not required to file for VAWA

Special Immigrant Juvenile

- Eligible for subsidized health care upon filing through age 21

Deferred Action for Childhood Arrival (DACA)

- No access to exchanges or subsidies under ACA

Access to Legal Immigration Status:

- Provides a path to economic security
 - Work authorization
 - Driver's licenses
 - Financial aid to attend university
 - Health care exchange access
 - Benefits vary by state and form of immigration status
- Removes fear of deportation, promotes stability and facilitates access to:
 - Nurturing family relationships
 - Stable school environment
 - Mentors, role models and community support

Immigrant Children in Family Court

- May have options for legal immigration status
 - Child's own application
 - Child included in parent's application
- Immigrant children's best interests are promoted when state courts:
 - Sign U visa certifications
 - Award custody to non-abusive parents, family members, guardians
 - Issue detailed findings required for children to apply for Special Immigrant Juvenile Status
 - Distribute U.S. DHS legal rights for victims/children brochures
- Update: unaccompanied minors HHS/ORR placements

U Visas and U Visa Certification

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.

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
or any similar activity.**

U Visa Criminal Activities

- Domestic violence (including child abuse) -- 45.9%
- Rape, sexual assault, incest, trafficking -- 30.4%
- Felonious assault, murder, manslaughter -- 9.9%
- Kidnapping, being held hostage, unlawful criminal restraint, torture -- 8.47%
- Blackmail, extortion, perjury, obstruction of justice, attempts, conspiracy, solicitation -- 5.3%

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

Have You or a Judicial Officer at Your Court Signed U Visa Certifications?

Helpfulness in the Regulations

- DHS determines whether a victim:
 - has been helpful, is being helpful or is likely to be helpful in the
 - *Detection, or Investigation, or Prosecution, or Conviction or Sentencing*
- Certification provides required evidence

Examples of Helpfulness

- Calling 911 to report a crime
- Filing a police report
- Providing a statement to police, prosecutor, court
- Seeking a protection order
- Litigating the abuse as part of a custody case
- Appearing at court in a criminal case
- Serving as a witness in a prior prosecution
- Testimony in a sentencing hearing
- EEOC witness in an employment case

Helpfulness in the Regulations

- 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

U Visa Certification in Proceedings Involving Children in Immigrant Families

- Child or non-abusive parent seeking U visa
- Proceedings
 - Protection order
 - Custody
 - Criminal case
 - Child abuse case
 - Other civil case where the court is provided evidence and making findings of abuse

The U-visa Application Process



Typical length of process = 28 months

Things to Know About Certifying

- “Do I believe this person was a victim of a qualifying crime?”
- “Did the person assist or willing to assist in detection, investigation, conviction, prosecution and/or sentencing?”
- 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?

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
 - Included the type of proceeding; and
 - If orders were issued, attached a copy of the order

U-visa Facts and Benefits

- Only 10,000 U-visas can be granted annually
 - Waitlist approval backlog 100,000 visas
- The U-visa grants a temporary 4 year stay
- Work authorization (≈ 28 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

Minnesota Judicial Ethics Opinion U Visa Certification (June 26, 2015)

- Judge may sign certifications when
 - “adequate basis for the averments made in the certification”
- Certification after the criminal or civil case is completed does not raise impartiality issues
 - In open cases should disclose certification to the parties
- Certification describes immigrant victim’s past/present helpfulness
 - Does not vouch for character
- In civil and criminal cases whether to sign a U visa certification is an issue of law that does not implicate judicial ethics codes

Full Opinion Available at:

<http://www.bjs.state.mn.us/file/advisory-opinions/opinion-2015-2-final.pdf>

Hon. Pendleton also published a training update based on the opinion at

<http://pendletonupdates.com/>

U Visa Certification By Family Court Judge

- Generally issued after the court has ruled in a protection order or custody case involving domestic violence
- Ex-parte motion for certification
- Judge signs certification, attaches court order and
- Evidence of helpfulness

Problems With Reported Decisions

- No Chevron deference to DHS regulations
- Result in legally incorrect opinions: E.g.,
 - Judges cannot certify
 - In an open case/closed case
 - Judges do not investigate or prosecute
 - Regulations say judges certify based on detection, conviction, sentencing
 - In case heard by another judge
 - Requires a criminal case or helpfulness to the judge
 - Not recognizing that past/present helpfulness
Congressionally deemed sufficient

What Questions Do You Have About Special Immigrant Juvenile Status and the State Court's Role?

Overview Special Immigrant Juvenile Status (SIJS)

- Humanitarian protection that provides a path to lawful permanent residency
- Created by Congress in 1990 to help and protect foreign born children living in the United States
 - who have been abused, or abandoned, or neglected by at least one parent.

Unaccompanied Minor Process

- Apprehension
- Screening within 48 hours
- Transfer to HHS Office of Refugee Resettlement (ORR)
- ORR seeks safe sponsor for child who will
 - Provide care for the child
 - Bring the child to immigration court
- If no safe placement identified, child remains in federal HHS custody

Special Immigrant Juvenile Status (SIJS)

- Immigration relief for unmarried children under the age of majority under state law who have been
 - Victims of abuse, abandonment, neglect
 - By at least **one parent**
- State Court Findings Required As Evidence requires
 - State court with jurisdiction over care, custody, dependency or placement of the child
 - has issued a court order, finding, or declaration on three statutorily required issues
- The state court order does **not** award SIJS
 - **ONLY DHS can provide legal immigration status**

State Court Findings Needed for SIJS

State Law Applies To Each

1. The court issued regarding the child care, custody, dependency or placement of an immigrant child with
 - An individual (e.g. non-abusive parent, grandparent, kinship care, guardian, next friend) OR
 - State agency, private agency, including foster care system
2. Reunification of the child is not viable with a parent due to the parent's abuse, abandonment, or neglect
3. It is not in the child's best interest to return to their home country
 - Best caregiver identification/often not necessary to compare countries

Apply State Law

- Best Interests
- UCCJEA – Temporary Emergency Jurisdiction

SIJS: Congressional Goals

- Included a role for state court judges as experts in child best interests, custody, child welfare matters
- State court expertise:
 - Adjudicating facts of child abuse, neglect and abandonment
 - Issuing orders regarding child care, custody and placement that further the best interests of children
- Only the DHS can issue SIJS & permanent residency
- DHS uses the state court order as evidence in adjudicating the immigration application

SIJS: State and Federal Roles

State Courts With Jurisdiction Over Children

- Issue orders providing evidence to help DHS adjudicate SIJS application
- Make findings of fact **under state law** on
 - Custody, dependency, placement, care of a child
 - Child suffered abuse, abandonment, or neglect by at least one parent
 - Parental reunification
 - Child's best interests

DHS Adjudicators

- Adjudicate application filed by child
- Reviews evidence, including the state court's order, to determine if the child applicant is eligible for SIJS
- Determine if state court order was sought primarily
 - To provide the child relief from harm caused by abuse, abandonment or neglect; OR
 - For immigration purposes

State Courts Regularly Make Custody & Care Determinations

- Who will be the custodian/guardian of the minor
- Who the minor will live with
- Who will receive child support for the child living with them
- Whether the minor will be committed to the custody of the state or private agency for care, treatment, or rehabilitation
- Issue orders directing the child's care
 - Child support, health care, applying for benefits or services for the child

All of the Following are Potentially Eligible for SIJS

- A minor who is:
 - Abused, abandoned or neglected
 - In the U.S.
 - In the home country
 - Living with their
 - Non-abusive parent
 - Guardian
 - Adopted parent
 - State foster care
 - Federal foster care (ORR)

What Kinds of Proceedings Might You See SIJS Eligible Children In?

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
- Adoption
- Motions for a declaratory judgment

Courts with jurisdiction under state law to make judicial determinations regarding the custody, placement, care of children = *juvenile courts* for SIJS immigration purposes

SIJS in State Courts

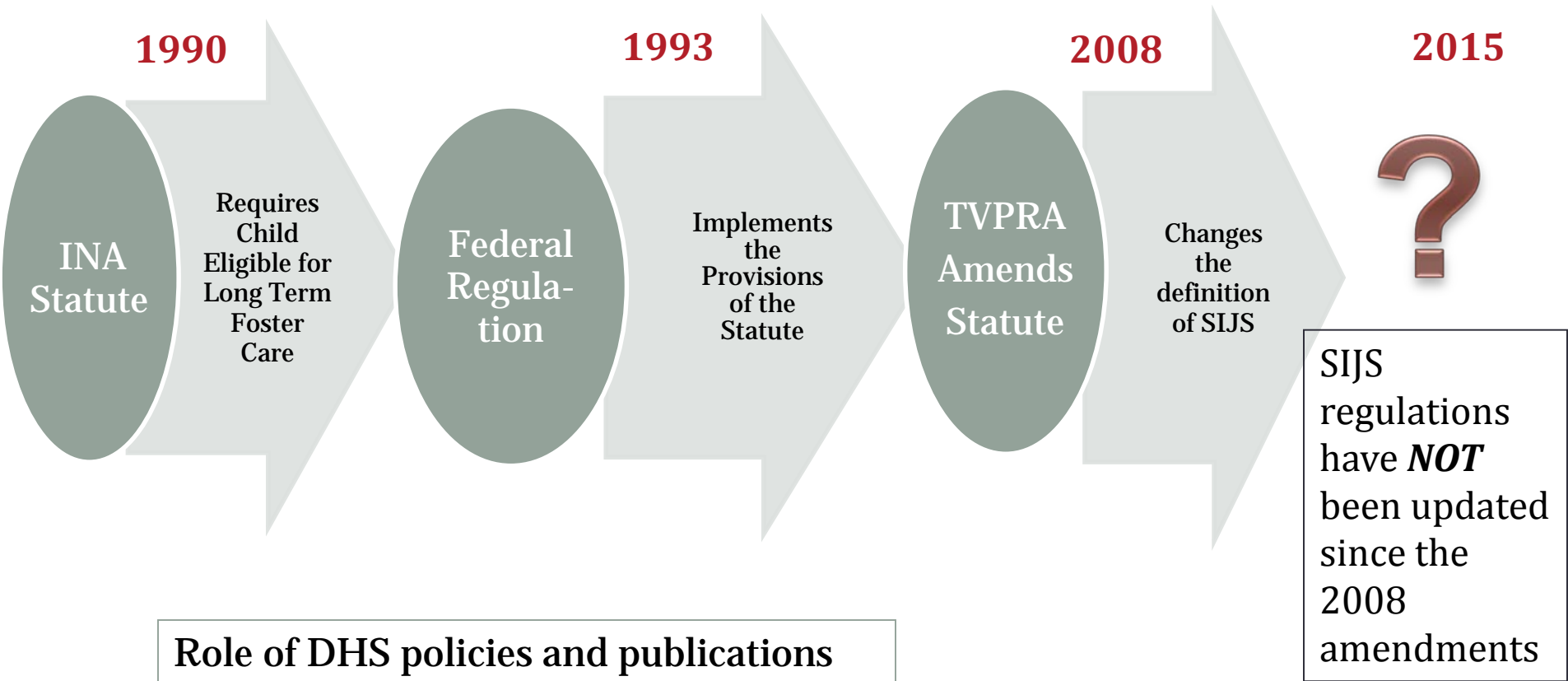
- Many SIJS cases are for 15-17 year old minors
 - State court order + filing before the child ages out
 - Up to age of majority set by state law
- SIJS is an option any time an abused, abandoned or neglected child is not a
 - Citizen or lawful permanent resident

“One *or* Both Parent” Requirement



A child can receive SIJS findings if they were abused, abandoned or neglected by one parent and are living with the other parent.

Statute vs. Regulation



Best Practice for Findings

- Issue orders that demonstrate to DHS that the court made an informed decision
 - Make factual findings regarding abuse, abandonment and/or neglect
 - Separately for each abusive parent
- Finding that the child is in need of protection as a result of having been abused, abandoned or neglected
- Trauma research

Case Scenario

In a case on your custody docket, Marco is a fifteen year old boy whose mother (Maria) and father (Juan) have been separated for five years because Juan abused both Maria and Marco. The abuse began while the family was living in Mexico, but escalated once the family relocated to the United States. Initially the abuse was directed at Maria, but as Marco became older, Juan started abusing him as well. To protect her son, Maria separated from Juan and has been caring for Marco ever since. Juan has not been providing any support for Marco and has seen Marco infrequently since the separation. Marco is doing well in his mother's care and has been getting A's and B's in school. Maria is seeking custody and Marco was served with notice of the proceedings. How will you proceed?

- Maria has come to court seeking custody and SIJS findings
- Maria died in a car accident and Maria's sister Lupe is seeking guardianship and SIJS findings
- Would it make a difference if all of the abuse occurred in Mexico?

What Children with SIJ Status Receive

- While case is pending:
 - Protection from deportation and removal
 - As lawfully present children – health care exchanges (no subsidies)
 - Programs and services necessary to protect life and safety including shelter and transitional housing
- At approval:
 - Lawful Permanent Residency (separate but usually concurrent filing)
 - Public and assisted housing
 - Post secondary educational grants and loans
 - Food stamps (only until the immigrant child turns age 19)
 - State funded benefits in some states
 - Legal work authorization and state issued driver's licenses
 - Eligible for citizenship after 5 years
- **SIJS' may NEVER file family petition for either of the child's natural parents**

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Technical Assistance and Materials

- Power Point presentations and materials for this conference at www.niwap.org/go/JFFNM
- 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

Thank you!