SPECIAL IMMIGRANT JUVENILE STATUS UPDATES

AILA TEXAS CHAPTER SPRING 2017 CONFERENCE
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I. UAC TRENDS

In 2014, the unaccompanied alien children[2] ("UAC") surge reached its peak. Tens of thousands of children were apprehended throughout the U.S.-Mexican border.[3] Prior to this time, UAC apprehensions had risen steadily. By the end of the 2011 Fiscal Year ("FY"), agencies within the Department of Homeland Security ("DHS") reported just 16,067 apprehensions.[4] The following year, there were 24,481 apprehensions.[5] FY2013 and FY2014, respectively, saw 38,833 and 68,500 UACs detained.[6] In FY2015, UAC apprehensions declined 42% to 39,970.[7] But by the end of FY2016, they spiked again to 59,692, almost a 20,000 person increase from the previous year.

Since the start of the new presidential administration, President Trump's immigration Executive Orders have discouraged UACs from fleeing to the United States. U.S. Customs and Border Protection ("CBP") recently released UAC border crossing data through the month of February 2017.[8] From January to February of this year, the influx of illegal border crossing has decreased by over 40% from a year ago.[9] As of the date of this article, there were only 6,339 UAC apprehensions officially reported. Between December 2016 and January 2017, there was a

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[2] UAC are defined by statute as children who lack lawful immigration status in the United States, who are under the age of 18, and who either are without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is available to provide care and physical custody. The United States' policy regarding the treatment and administrative processing of UACs is mainly governed by the Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457); the Homeland Security Act of 2002 (P.L. 107-296); and the Flores Settlement Agreement of 1997.

[3] Foreign nationals from El Salvador, Guatemala, Honduras, and Mexico account for almost all of the UAC population.

[4] *See* "Unaccompanied Alien Children: An Overview," Congressional Research Service, Jan. 18, 2017.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See* "Southwest Border Migration," U.S. Customs and Border Patrol, Mar. 8, 2017, *available at* http://www.cbp.gov/newsroom/stats/sw-border-migration (last visited Apr. 2, 2017).

[9] *Id.*

39% decline, and a 60% decrease was reported for the month of February 2017.[10] These numbers are shocking considering that CBP historically reports a 10-20% increases in apprehensions for these months.

Despite enforcement increases along the U.S.-Mexican border, push and pull factors will continue to drive UAC immigration to the United States. Violence, crime, drug cartels, gang activity, trafficking, exploitation, government corruption, and economic deprivation spur children to leave their homes behind in hope of safety and survival. Once UACs are released from an ORR ("Office of Refugee Resettlement) detention facility and are reunified with a family member or ORR sponsor, their hopes hinge on finding legal assistance and counsel. Many UACs, however, remain unrepresented and their hopes of being protected in the United States are eventually dashed.[11] It is even more unlikely that those unrepresented children will attain legal relief.[12]

II. *SIJS*:

Special Immigrant Juvenile Status ("SIJS") is one of the most common forms of relief for UACs. It is unique compared to other immigration forms of relief because the SIJS process involves a state "juvenile court."[13] SIJS was created by Congress in 1990 and subsequently amended. It provides a form of immigration relief for unmarried children under 21 years of age who have been abandoned, neglected, and/or abused by one or both of their parents.[14]

A SIJS applicant must first acquire a final order from a state court judge that includes certain factual findings. This state court order is a precondition to filing the SIJS-based I-360 petition with U.S. Citizenship and Immigration Service ("USCIS").

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[10] *Id*.

[11] *See* "A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings Continue to Present a Critical Need For Legal Representation," American Bar Association, May 2016, *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/uacstatement.authcheckdam.pdf (last visited Apr. 2, 2017).

[12] *Id.* ("A recent study found that represented Children have a 73% success rate in immigration court, as compared to only 15% of unrepresented children. Furthermore, studies show that children who are represented have a much higher appearance rate in immigration court, 92.5%, versus 27.5% for unrepresented children**.").**

[13] Defined in 8 C.F.R. § 204.11(a), juvenile court is "[a] court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." Recently, the term "Juvenile court" has come into question in Texas. *See Budhathoki v. Dep't of Homeland Sec.*, No. A-16-CA-275-SS, 2016 WL 7159125 (W.D. Tex. Oct. 21, 2016), *available at* https://casetext.com/case/budhathoki-v-dept-of-homeland-sec (last visited Apr. 2, 2017). Since *Budhathoki*, U.S. Citizenship and Immigration Service ("USCIS") has increasingly tried to argue that a Texas juvenile court must have the authority to issue care and custody determination of a child. This is particularly troublesome in cases involving post-18 child state court actions. This issue is addressed in depth in Section III of this report.

[14] The statutory authority for SIJS is found in the Immigration and Nationality Act § 101(a)(27)(J), codified at 8 U.S.C. § 1101(a)(27)(J) ("INA").

The final state court order must include special findings:[15]

1. That the child is dependent upon the court[16] OR committed to the custody of a state agency, individual, or entity;
2. That reunification with one OR both parents is not viable for the child due to abuse, neglect, abandonment or similar grounds under state law; and
3. That it would not be in the child's best interest to return to his or her country of nationality (or last residence).

Although the state court predicate action can be pursued in a variety of ways, the most common form is in a Suit Affecting Parent-Child Relationship ("SAPCR").[17]

Once the final order is signed by the state court judge, the next step is to file form I-360 with USCIS.[18] A USCIS officer may interview the child to verify his/her identity, age, and marital status. Once approved, the child is classified as a Special Immigrant Juvenile.

The final step is to file the I-485, the application for lawful permanent residency.[19] Once the I-360 is approved, and if the child is still in immigration court proceedings, the child's attorney can request the immigration judge terminate removal proceedings.[20] The I-485 filing fee is $985 for children under 14, and $1140 for children 14 and older.[21] A fee-waiver (I-912)

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[15] The final order should also contain determinations as to the age and marital status of the child. The INA should not be cited in state court pleadings and final orders; the petitioner should rely only on state law. USCIS has requested further evidence ("RFE") from many SIJS applications where the language of the predicate order's findings mirror the text of the immigration statute exactly. Specific facts as to the abuse, abandonment, and/or neglect suffered by the juvenile should be should be explicitly stated.

[16] This is a term that is used in the federal SIJS statute, 8 C.F.R. § 204.11(c)(3). The Administrative Appeals Office ("AAO") within USCIS originally interpreted "dependent" to simply mean that the state court has jurisdiction over the child. *See In re Menjivar*, AAU A70 117 167 (INS Administrative Appeals Unit, Dec. 27, 1994). In post-18 children Texas cases, USCIS is beginning to question whether an 18 year-old child can still be considered "dependent" by a state, family court if the state court no longer has jurisdiction to make final determinations about the child's care and custody.

[17] Other methods may include Declaratory Judgments, Child Support, and Guardianship actions depending on the county of residence.

[18] *See* United States Citizenship and Immigration Services, I-360, Petition for Amerasian, Widow(er), or Special Immigrant, https://www.uscis.gov/i-360 (last visited Apr. 2, 2017). Supporting documents include: Juvenile Court Order, copy of Birth Certificate with certified English translation, ORR Verification of Release Form (if applicable). There is no filing fee.

[19]Timing of the filing of the I-485 application depends on available EB4 visas. Starting in January 2017, USCIS started utilizing "Chart A--Final Action Dates". *See* United States Citizenship and Immigration Services, Adjustment of Status Filing Charts from the Visa Bulletin https://www.uscis.gov/visabulletininfo (last visited Apr. 2, 2017). SIJS grantees cannot file the I-485 until the priority date of the I-360 receipt notice is earlier than the final action date. For example, the March 2017 visa bulletin currently has a July 15, 2015 final action date for EB4 categories for applicants from Mexico, El Salvador, Honduras, and Guatemala. Please see the USCIS Visa Bulletin for the latest updates.

[20] This process may vary depending on the jurisdiction that you practice in. Typically in Houston, ICE Trial Attorneys have started opposing administrative closures and terminations if the respondent's EB4 category is not current. Check with your local non-profit, or ICE Office of Chief Counsel before filing a motion.

[21] According to the USCIS fee schedule, the I-485 fee may be waived in certain situations where the public charge ground of inadmissibility does not apply. The biometrics fees may still apply.

should be filed in conjunction with the other supporting documents.[22] A USCIS officer will interview the child at the adjustment interview to verify his/her identity and application information.

III. *SIJS ISSUES AND CHALLENGES*:

a. Delayed Adjustment

Annual limits of the Employment based, fourth preference (EB4) category for SIJS applicants from the Northern Triangle (El Salvador, Guatemala, and Honduras) were finally reached in April 2016. Since then, the cutoff date in the U.S. Department of State Visa Bulletin has shifted, but not by much. The final action date for EB4 categories is currently set at July 15, 2015 for applicants from the Northern Triangle.[23] Unfortunately USCIS is no longer accepting corresponding I-485 applications until the priority date for the individual applicant becomes current.

b. Extended Removal Proceedings

Rather than agreeing to terminate removal proceedings, some ICE Trial Attorneys ("TAs") are refusing to join in joint motions to terminate, or for administrative closures. Results may vary by jurisdiction, but Immigration Judges are less inclined to grant these motions without the TA's consent. In Houston, Immigration Judges will grant extended continuances until the child's I-360 priority date becomes current.

c. State Court Challenges

Best Interest Findings: Locally in Houston, district court judges have been inconsistent when issuing their final ruling for the special findings.[24] While some judges willingly defer to the federal SIJS statute to include final rulings with the special findings, other judges have been more inclined to restrict their rulings within the four-corners of the Texas Family Code. As a result, some judges have declined to make any special findings that involve the child being returned to his/her country because they view these findings as an "immigration" determination, rather than a best interest one. Practitioners have had to "blend" the special findings into the proposed order rather than explicitly include a finding that it is not in the child's best interest to

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[22] The I-912 must contain proof of a means tested benefit, proof of income, or proof of financial hardship. The attorney should also include an I-765 (Employment Authorization Document--EAD) with the I-485 filing. In most situations, an EAD serves as the child's primary form of identification. I-485 supporting documents include two passport-style pictures, G-325A, sealed I-693 Medical Exam, I-360 Filing Receipt/Approval Notice, Order Terminating Removal Proceedings (if applicable), and copy of the child's Birth Certificate with a certified English translation.

[23] *See* United States Citizenship and Immigration Services, Adjustment of Status Filing Charts from the Visa Bulletin https://www.uscis.gov/visabulletininfo (last visited Apr. 2, 2017).

[24] The special findings include: that the child is dependent upon the court OR committed to the custody of a state agency, individual, or entity; that reunification with one OR both parents is not viable for the child due to abuse, neglect, abandonment or similar grounds under state law; and that it would not be in the child's best interest to return to his or her country of nationality (or last residence).

return to his or her country of nationality.[25]

Adjudication of Paternity: In custody cases in which the Petitioner and Respondent were never married, some Harris County judges have asked and required the adjudication of parentage before ruling on any of the special findings. These cases have involved situations in which the parent's names were correctly identified in the child's birth certificate, an acknowledgement of parentage was signed and notarized by the opposing party, and the parents were once committed in a common-law or civil union relationship ("*unión libre*"). Despite the evidence, some of the judges have insisted that a DNA test be administered which can be very costly, and in some cases, impossible to achieve. The Adjudication of Paternity must also be certified by a state certifying agency and faxed to the Texas Vital Statistics Unit under the Texas Attorney General's Office.[26] If none are available, then both the Petitioner and the Respondent are required to testify in open court regarding the parentage of the child.

In response to these challenges, some practitioners have had to modify their original petitions to adjudicate parentage if the relationship can be established under the Texas Family Code.[27] Their waivers of citation include specific language acknowledging the Respondent's parentage.[28] Practitioners have submitted detailed briefs asserting that the Civil Registry System in Latin American countries are analogous to the Texas Paternity Registry. Despite these alterations, some judges have insisted that the Petitioner must also prove that the Respondent (alleged father) had a fiduciary duty at the time the alleged abuse, abandonment, or neglect took place.

Amicus Appointments: Some district court judges in Harris County are also assigning Amicus attorneys to evaluate the best interest of the child subject to the suit.[29] Typically there is a non-refundable, mandatory fee of $750. Some Petitioners are being asked to pay the outstanding fee upfront. If they are unable to pay, then generally their case is paused until the fee is fully furnished.[30] Amicus attorneys are usually assigned for Declaratory Judgment suits in the Harris County Juvenile Court.

d. Post-18

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[25] The following is a best interest to not return example using blended language: "The Court finds that Respondent should not be appointed Joint Managing Conservator of the Child because appointment would significantly impair the Child's emotional health and physical development. It is in the best interest of the Child to reside with her mother instead, who currently resides in Houston, TX."

[26] *See* The Attorney General of Texas, AOP Frequently Asked Questions, https://www.texasattorneygeneral.gov/faq/cs-aop-frequently-asked-questions.

[27] Petitioner must be able to overcome the presumption of paternity, Tex.Fam.Code Ann. § 160.204 (West 2014), or establish parentage under Tex.Fam.Code Ann. § 160.201 (West 2014).

[28] You can include in your waiver of citation the following text, "I, FULL NAME OF RESPONDENT, am the Respondent in this cause. I am the biological father of X, the child subject of this suit."

[29] Attorney Ad-Litems are generally assigned for the Respondent if the Respondent is being served through Citation by Publication.

[30] Petitioners can also try to file a Motion for Pro Bono Amicus Attorney Appointment with the court if one is available, object to the use of one in the original pleadings, file a denial motion to discharge the Amicus through an interlocutory appeal, or file a Mandamus.

Perhaps one of the biggest challenges that many practitioners are facing in Texas involves USCIS challenges to post-18 predicate orders. These are cases in which the Texas SIJS predicate order was signed after the child commenced his/her eighteenth birthday.

Recent decisions have blocked SIJS prima facie cases from getting approved.[31] Many I-360s (and I-485s based on a post-18 order) that were once approved, are now being challenged, revoked, and rescinded by USCIS. Their reasoning in denying or revoking is based on the rationale that a "[j]uvenile court must have jurisdiction to determine both the custody and care of [the] juvenile under state law."[32] Once the state court's capacity to determine both custody and care extinguishes (presumably they argue when the child turns 18), then the Texas district courts no longer have jurisdiction to make both determinations, therefore, they are no longer considered a "Juvenile Court" under the INA.

Because a "Juvenile" is not defined in the Texas Family Code, USCIS has pointed to the strict definition of a "child" under the Texas Family Code § 101.003(a).[33] "Since Plaintiffs were over 18 years old, USCIS reasoned, they were not juveniles under Texas law. Therefore, the Texas courts were not making determinations about the custody and care of juveniles and could not be considered "juvenile courts" as defined by the INA."[34] As a result, even though the Plaintiffs in *Budhathoki* acquired a signed and valid SAPCR order with child support and special findings, the judge ruled that the final order did not identify any legal authority to support the finding that the child support award established the Plaintiffs' dependency in a juvenile court because of the child's majority in age.[35]

A federal appeal with the Fifth Circuit has since been filed in *Budhathoki*, however practitioners have taken preemptive measures to prevent future RFEs, Notices of Intent to Deny ("NOIDs"), and Notices of Intent to Revoke ("NOIRs").[36] Despite the added precautions, state court judges may still be reticent to accept jurisdiction for custody determinations on post-18 cases, as well as on cases for child support where the Respondent lives abroad.[37] Depending on your jurisdiction, post-18 cases may no longer be considered a viable SIJS option.

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[31] *See Budhathoki*, 2016 WL 7159125 and *Matter of J-A-D-L-,* ID# 00060126 (AAO Feb. 3, 2017*)*, *available at*: https://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2017/FEB032017_01C6101.pdf (last visited Apr. 2, 2017).

[32] *Matter of J-A-D-L-* at 3.

[33] "Child is defined as "a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes."

[34] *See Budhathoki* at 8.

[35] *Id.* at 14.

[36] Again, practitioners should always cite to the Texas Family Code in their pleadings and final orders and not the INA. One should argue that the child is still a "child" under Tex.Fam.Code Ann. § 101.003 (b), and that the child is dependent on the court pursuant to child support (Tex.Fam.Code Ann. § 154.001) or paternity (Tex.Fam.Code Ann. § 160.201).

[37] Practitioners should request custody and child support. Convince the state court judge that the court maintains jurisdiction for custody determinations on post-18 cases based on initial child custody jurisdiction (Tex.Fam.Code Ann. § 152.201). Don't forget that final post-18 orders with child support must contain custody findings as well.

IV. *RESOURCES*:

Further SIJS guidance can be found at:

- *Children's Immigration Law Academy, CILA*. CILA is an expert legal resource center created by the American Bar Association (ABA). CILA builds capacity for those working to advance the rights of children seeking protection through trainings, technical assistance, and collaboration. CILA serves both legal service providers and pro bono attorneys who are representing children in immigration-related proceedings in Texas. http://www.cilacademy.org/

- *Texas Family Law Practice Manual (and Forms), State Bar of Texas*. Free access for nonprofit attorneys. https://www.texasfamilymanual.com/

- *Texas Bar CLE Online Library, State Bar of Texas*. Fees may apply. http://www.texasbarcle.com/CLE/OLHome.asp

- *Local Rules*. Check your jurisdiction for local rules pertaining to your county.

    - Bexar:http://home.bexar.org/dc/Downloads/Bexar_County_Local_Civil_Rules_Part3.pdf
    - Dallas:http://www.dallascounty.org/department/districtclerk/guidelines.html
    - El Paso: http://www.epcounty.com/councilofjudges/epclocalrules.htm
    - Harris: https://www.justex.net/Courts/Family/LocalRules.aspx
    - Travis:https://www.traviscountytx.gov/images/courts/Docs/local_rules_civildistrict.pdf