

WORKING WITH IMMIGRANT CHILDREN

FAMILY LAW SECTION
STATE BAR OF MICHIGAN
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Children as Immigrants



More than 60,000 unaccompanied children will be detained in the United States in fiscal year 2014, more than double the number in 2013.

Kids in Need of Defense (KIND) and Center for Gender and Refugee Studies, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (Washington, DC and San Francisco: KIND and Center for Gender and Refugee Studies, University of California Hastings College of the Law, 2014).

The “Surge” in Context



Children in immigrant families now account for approximately one-fourth of all children in the United States.

Donald J. Hernandez and Wendy D. Cervantes, *Children in Immigrant Families: Ensuring Opportunity for Every Child in America* (Washington, DC: First Focus and Foundation for Child Development, 2011).

Children as Immigrants



In 2010, approximately 1 million children without authorized immigration status lived in the United States with their parents.

Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends* (Washington, DC: Pew Research Center, 2011).

Children in Mixed Status Families



5.5 million children have at least one parent without lawful immigration status.

Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends* (Washington, DC: Pew Research Center, 2011).

Mixed Status Families in the United States



3.8 million parents of U.S. citizen children lack lawful immigration status.

Almost 9 million people live in families with at least one unauthorized immigrant.

Jeffrey S. Passel and D'Vera Cohn, A Portrait of Unauthorized Immigrants in the United States, (Pew Hispanic Center, April 2009) at 8.

Enforcement is Up



In Fiscal Year 2011, ICE
reported a record 396,906
removals.

*Press Release, FY 2011: ICE announces year-end
removal numbers, highlights focus on key priorities
including threats to public safety and national security
(Oct. 18, 2011).*

Enforcement and Families



Data from U.S. Immigration and Customs Enforcement show that about 90,000 parents of U.S.-born citizen children were deported between July 2010 and September 2012.

Seth Freed Wessler, “Primary Data: Deportations of Parents of U.S. Citizen Kids,” *Colorlines*, December 17, 2012.

Left Behind



It is estimated that there may be as many as 5,100 children in foster care whose parents have been deported or detained at some time.

Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System* (New York: Applied Research Center, 2011).

De Facto Deportation



The total number of U.S.-born children of Mexican parents counted in the 2010 Mexican census was about 500,000, compared with about 240,000 in 2000.

Immigration Between the U.S. and Mexico,
<http://www.pewhispanic.org/2012/04/23/immigration-between-the-u-s-and-mexico>

Unaccompanied Alien Children



“An unaccompanied alien child (UAC) is one who has no lawful immigration status in the United States; has not attained 18 years of age, and with respect to whom; 1) there is no parent or legal guardian in the United States; or 2) no parent or legal guardian in the United States is available to provide care and physical custody.”

<http://www.acf.hhs.gov/programs/orr/resource/who-we-serve-unaccompanied-alien-children>

Unaccompanied Alien Children



- In recent years, the number of arriving UAC had averaged between 7,000 and 8,000 annually. Most were boys. By the end of FY2012 the number of UAC increased from 8,000 to 14,000. Most of the children came from Guatemala (35%), El Salvador (27%), and Honduras (25%).
- Additionally, in FY2012 more of the arrivals were girls due to increasing gender-based violence in Central America. Nearly 25,000 arrived by the end of fiscal year 2013.

Refugee Definition



Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(A)

Asylee Definition



Asylum status is a form of protection available to people who:

- Meet the definition of refugee; and
- Are already in the United States or seeking admission at a port of entry

Unaccompanied Refugee Minors



“The State Department identifies refugee children overseas who are eligible for resettlement in the U.S., but do not have a parent or a relative available and committed to providing for their long term care. Upon arrival in the U.S., these refugee children are placed into the Unaccompanied Refugee Minors (URM) program and receive refugee foster care services and benefits.”

<http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-refugee-minors>

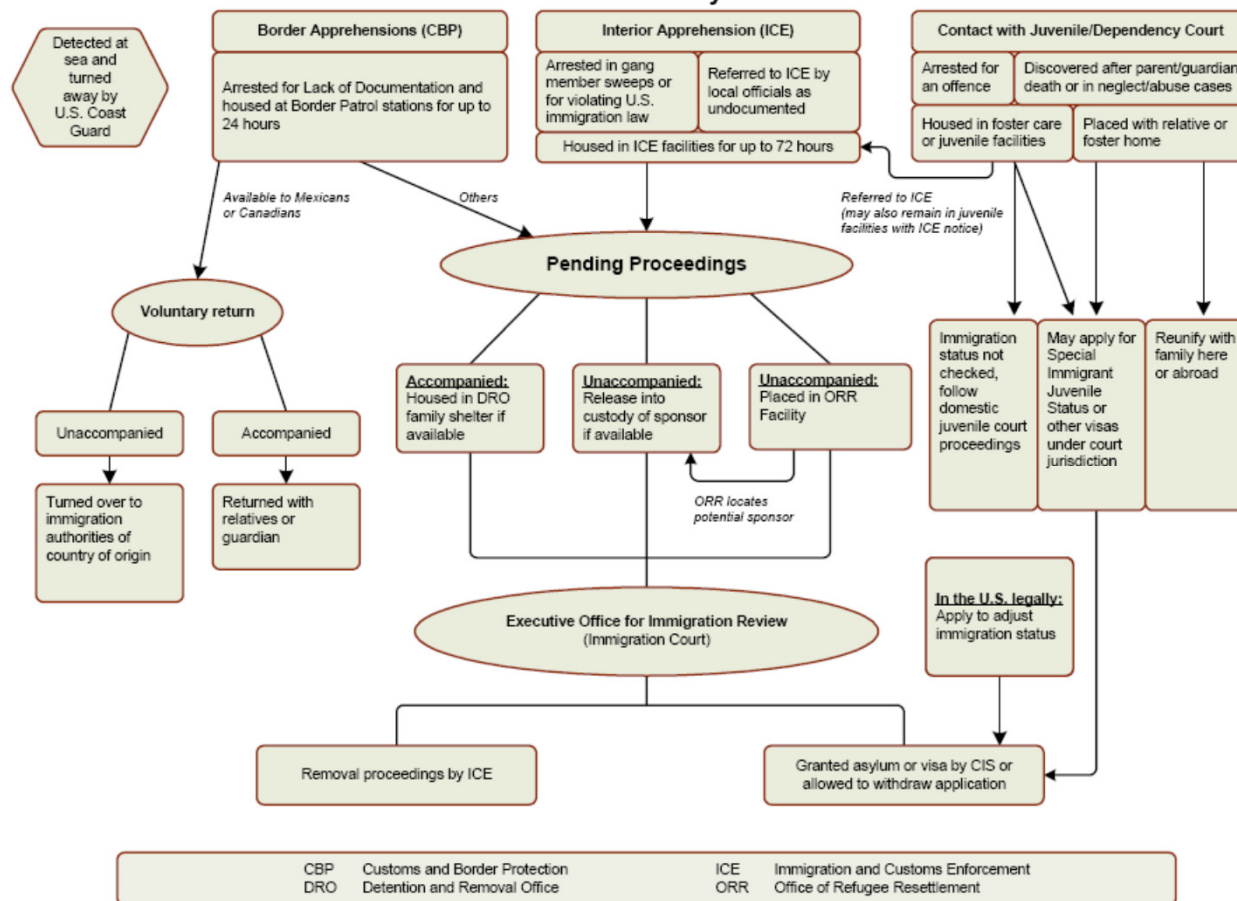
Immigration Relief for Children



- Special Immigrant Juvenile Status (SIJS)
- Asylum
- U and T Visas
- VAWA
- DACA
- Voluntary Departure

It's Complicated

Figure 1. General Process for Juvenile Aliens Involved with the Immigration and Juvenile Justice System



Source: CRS Presentation of chart from National Juvenile Justice Network, "Undocumented Immigrant Youth: Guide for Advocates and Service Providers," *Policy Brief No. 2*, November 2006.

Special Immigrant Juvenile Status



- Through an amendment to the Immigration and Nationality Act of 1990, Congress created this classification to provide immigration relief for certain undocumented children in foster care, guardianship, or adoption situations. This relief has become available for children in a variety of settings in which state courts are involved in making determinations of custody, such as juvenile delinquency proceedings and the placement of unaccompanied minors. See 8 U.S.C. § 1101(a)(27)(J)

SIJS Findings in Juvenile Court



- Child is dependent on a juvenile court;
- Reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law;
- Child's best interest would not be served by being returned to his or her country of origin.

8 U.S.C. § 1101(a)(27)(J)

Juvenile Courts



- A “juvenile court” is defined as a court “having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.” 8 CFR § 204.11(a).
- Dependency, guardianship, probate and delinquency courts are examples of juvenile courts.

Juvenile Courts

- “The actual name used under the state system is unimportant, as it is the functional role of the court in determining the care and custody of children that determines whether a state court is a ‘juvenile court’ for SIJS purposes. Any court that makes child welfare placement decisions is a ‘juvenile court’ under immigration law.” Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 63 JUV. & FAM. CT. 48, 54 (2012).

Role of Juvenile Court



- The statutory delegation of this fact finding role to the state courts seeks to draw upon the special expertise of the state in matters of child welfare and recognizes the corresponding lack of such expertise in federal immigration systems.

State v. Federal Roles

- The state juvenile court, however, does not make an immigration decision. This is because the federal role comes later in the process and the juvenile court does not make the final determination whether the child is eligible for SIJS or may stay in the U.S.

Matter of M.C. 3/4/2010 N.Y.L.J. 25, (col.3) (March 4, 2010 Fam. Court, Suffolk County) (noting that “the ultimate determination as to an immigrant juvenile’s status rests squarely within the purview of the federal government”).

Error not to make findings

- Every state court that has considered the matter has determined that making SIJS findings is an appropriate exercise of the juvenile court's jurisdiction. This is true across a range of hearing types, from abuse and neglect matters to guardianships to juvenile delinquency proceedings.

See Matter of M.C. 3/4/2010 N.Y.L.J. 25, (col.3) (March 4, 2010 Fam. Court, Suffolk County) (noting that the juvenile court's "primary role in guardianship proceedings is to make determinations which are in the best interest of the child and in the case of a request for 'special findings,' to determine if the requisite elements of 8 U.S.C. § 1101 (a)(27)(J)(i) apply.").

SIJS and USCIS



- ❑ The requisite findings in a juvenile court permit application to CIS to become a Special Immigrant Juvenile and adjust status to that of a lawful permanent resident.
- ❑ SIJ and LPR status are not automatic based on juvenile court findings.
- ❑ Many grounds of inadmissibility still apply.

Dependency

- Court dependents include any children “legally committed to, or placed under the custody of, an agency or department of the State, or an individual or entity appointed by a State or juvenile court.”

8 U.S.C. § 1101(a)(27)(J)(i)

- Placements in foster homes, group homes, with relatives or with guardians qualify.

Dependency



- A juvenile is dependent upon the District Court if he “[h]as been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court.”

8 C.F.R. § 204.11(c)(6)

Dependency



“The acceptance of jurisdiction over the custody of a child by a juvenile court, when the child’s parents have effectively relinquished control of the child, 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)

Reunification with parent



- Eligibility for Special Immigrant Juvenile Status requires a finding that “reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”

8 U.S.C. § 1101(a)(27)(J)(i)

Reunification with parent

- A finding for Special Immigrant Juvenile purposes that “reunification is not viable does not require formal termination of parental rights or a determination that reunification will never be possible.”

Katherine Brady & David B. Thronson, *Immigration Issues – Representing Children Who Are Not United States Citizens, Child Welfare and Practice*, in Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases (Donald N. Duquette and Ann M. Maralambie eds., 2d ed. 2010) (“Red Book”) at 418

Reunification with parent

- Family reunification is the initial and often ultimate goal in most child welfare proceedings. The possibility of reunification in the future need not deter a finding that reunification presently is not viable for purposes of SIJS.

In re D.A.M., 2012 Minn. App. Unpub. LEXIS 1158 (Minn. Ct. App. Dec. 10, 2012) (“That the [government] intends to return appellant to the custody of his mother at the end of his current placement does not, standing alone, establish that reunification with the mother is viable. Planning for the return of appellant to his mother after his placement does not answer the question of whether appellant will be able to successfully live in her care.”).

The child's best interest

- Eligibility for Special Immigrant Juvenile Status requires a finding that it is not in the child's best interest to be returned to his "previous country of nationality or country of last habitual residence."

8. U.S.C. § 1101 (a)(27)(J)(i)

- "A court is not required to 'make a determination as to whether the minor child would be at risk of harm if returned to the country of origin; [this] Court needs to find that return would not be in the child's best interest.' Thus, this is a factual determination about the child's situation, not an immigration decision."

See *In re E.G.*, 24 Misc. 3d 1238(A) (Family Court, Nassau County, NY 2009)

The child's best interest

- “This best interest of the child analysis is one of the reasons that this portion of the decision is made at the juvenile court level rather than in immigration proceedings, as this is a type of analysis in which juvenile courts have extensive expertise.”

See Katherine Brady & David B. Thronson, *Immigration Issues – Representing Children Who Are Not United States Citizens, Child Welfare and Practice*, in Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases (Donald N. Duquette and Ann M. Maralambie eds., 2d ed. 2010) (“Red Book”) at 420

The child's best interest

- In a best interest of the child analysis, the absence of family in the child's home country capable of providing an appropriate home environment for the child provides sufficient justification to find that the child should not return. Moreover, it is "entirely appropriate for the court to consider potential future opportunities for the child in the United States in comparison with the home country."

See Katherine Brady & David B. Thronson, *Immigration Issues – Representing Children Who Are Not United States Citizens, Child Welfare and Practice*, in Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases (Donald N. Duquette and Ann M. Maralambie eds., 2d ed. 2010) ("Red Book") at 420

Juvenile Delinquency and SIJS



- Juvenile delinquency that involves decisions for the care and custody of youth may serve as the basis for an application for Special Immigrant Juvenile Status if other findings are appropriate.

Juvenile Delinquency and Immigration



- Adjudications in juvenile proceedings are not considered “convictions” for immigration purposes.

See Matter of Devison-Charles, 22 I. & N. Dec. 1362, 1365-66 (BIA 2000); Matter of Ramirez-Rivero, 18 I. & N. Dec. 135 (BIA 1981).

Juvenile Delinquency and Immigration



- But anyone the Attorney General has “reason to believe” is a controlled substance trafficker is inadmissible.
INA § 212(a)(2)(C)
- Juvenile adjudications may be sufficient to create reason to believe and may impact discretionary relief.