

US Department of Homeland Security (DHS), US Department of Health and Human Services (DHHS), US Department of Justice (DOJ)

FEDERAL AGENCIES INVOLVED



Department of Homeland Security (“DHS”)

- **U.S. Customs and Border Patrol (“CBP”)**
 - Apprehends aliens at/near the U.S. border
- **U.S. Immigration and Customs Enforcement (“ICE”)**
 - Apprehends aliens in the interior; manages detained & non-detained aliens without lawful status; represents the government in seeking orders of removal in immigration court
- **U.S. Citizenship and Immigration Services (“USCIS”)**
 - Administers benefits/visas for non-citizens within the U.S.
 - *USCIS’s Administrative Appeals Office (“AAO”): The final administrative authority within USCIS for many kinds of appeals, including denials of Special Immigrant Juvenile Status*

DHHS: Office of Refugee Resettlement (“ORR”)

- “Unaccompanied Alien Children” or “UACs”
 - Maintains shelters
 - and/or finds foster care placement
 - until their release to relatives (“sponsors”).

Department of Justice (“DOJ”):

- **Executive Office for Immigration Review (“EOIR”)**
 - Immigration Courts fall under EOIR.
 - Immigration Judges (“IJ”) adjudicate (rule on) certain claims.
 - May grant status or issue removal orders.
- **Board of Immigration Appeals (“BIA”)**
 - Reviews decisions of EOIR
 - Appeals from the BIA lie with the Circuit Courts of Appeal

SIJS COURT PROCESS

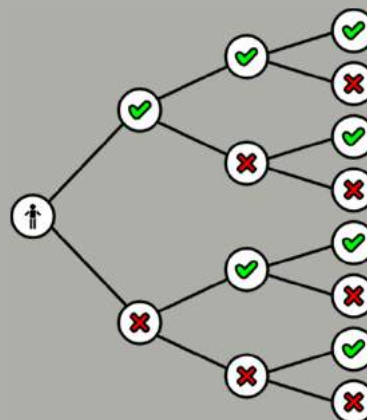


Immigration Court Process

1. Issuance of “Notice to Appear” and Notice of Hearing
2. Pleadings
3. Seek a form of immigration relief
4. IJ ruling on case

Case Outcomes

- Relief is granted by Immigration Judge (IJ)
- Order of removal
- Case is administratively closed
- Respondent takes Voluntary Departure
- Case is terminated (dismissed)



Typical SIJS Case Process

1. UAC discharged from ORR to sponsor
2. Pleadings with EOIR, seek time to pursue SIJS
3. Draft, Verify, and File Custody Complaint
4. Send for Service via Private Process Server abroad
5. Hearing (Temporary or Permanent Order)
6. Submit Custody Order to USCIS
7. If SIJS is awarded, terminate EOIR Proceedings
8. File for Adjustment of Status (Green Card)

How is SIJ status granted?

USCIS adjudicates petition for SIJS and either grants or denies Special Immigrant Juvenile Status (see 8 C.F.R. § 204.11)

- 204.11(b): Explains that a **petition for special immigrant juvenile status** for the child must be filed with USCIS, using Form I-360
- 204.11(d): Outlines the **documents which must be submitted to USCIS in support of the petition**, which include:
 - documentary evidence of the alien's age (birth certificate, passport, etc.), and
 - a state court order including the findings described previously
- 204.11(e): **Explains that USCIS will issue a decision on the petition.** The

Recap of SIJS

A child in the U.S. who does not have lawful immigration status, who can demonstrate to the federal immigration agency USCIS that:

- s/he has been abused, abandoned or neglected by a parent (and therefore cannot reunify with that parent), *and*
- an adult or agency in the U.S. has been awarded custody of him/her, OR s/he is dependent on a state court, *and*
- his/her best interests are not served by returning him/her to country of origin

can request permission to remain in the U.S.

Role of the state court order

A court order from a state court empowered to make determinations on the care and custody of minor children is *one required element* with which the young person makes the required showings (described on the previous slide) and requests status as a Special Immigrant Juvenile from the immigration agency (USCIS).

First factual finding USCIS will look for

The **first** required finding is that that “reunification with *one or both* of the [Minor Child’s] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under [North Carolina] law.” 8 U.S.C. § 1101(a)(27)(J)(i).



TVPRA: “one or both” parents

2008 TVPRA revisions: a child is now eligible for SIJS where “reunification with 1 or both parents is not viable due to abuse, abandonment, neglect or a similar basis.” *What does this mean?*

- State courts routinely read this to mean that a child is eligible for SIJS where there has been abuse, abandonment, neglect or similar preventing reunification with *one* parent, **even if the child has reunified with the other parent.**
- This interpretation is in keeping with **plain language** of the statute.
- **Consistent with the legislative history of the SIJS law:** The TVPRA expanded SIJS eligibility and specifically removed earlier language limiting SIJS to cases where reunification with both parents was not an option.
- **Child still needs protection and immigration relief:** The child may be fleeing an abusive parent in the home country and migrated in an effort to reunify with the other parent. Unless the child has an independent right to immigration relief, he or she could be deported to the abusive parent.

Second factual finding USCIS will look for

- The **second** required finding is that it is not in the best interest of the Minor Child to be returned to his/her previous country of last habitual residence. 8 U.S.C. § 1101(a)(27)(J)(ii).



Which state court?

- USCIS will consider an order from **ANY** state court that is empowered to make determinations about child care and custody, e.g. family courts, juvenile delinquency courts, etc.
- Federal law refers to these as “**juvenile courts**” - NOT the same as what we in NC call “juvenile court” - the federal regulation explicitly states that when it refers to a “juvenile court,” it means “**any court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.**” 8 CFR 204.11

What does USCIS look for in the state court order?

- (1) Reunification w/ one or both parents not viable due to abuse, abandonment, neglect, or similar
- (2) Not in child’s best interest to return to country of origin
- (3) Child has been placed in the custody of an individual or entity, or is **dependent** on the court
 - * “**Dependent**” - a child is considered “dependent” on a state court when the court accepts jurisdiction of a case in which it is asked to make a determination as to her care or custody; when the child’s custody is anything other than the child remaining in the custody of two natural parents.

What is Child Custody?

- Child custody is a “bundle” of rights and responsibilities relating to the care, custody, and control of a minor child.
- Prior to any court involvement or other binding legal action, biology controls and the parents share equal custody rights (regardless of whether a child is legitimated or any formal paternity determination)
- Child custody may be shared by multiple individuals/entities, and some, all, or none of whom may be the biological parents.
- Child custody consists of both legal custody (decisionmaking authority) and physical custody (physical care, visits, delegated care)
- Mere physical custody or possession (caretaking) of a child does not constitute the kind of legal custody required for SIJS.

What kinds of custodians exist under NC Law?

- A biological parent or an adoptive parent (Ch 48)
- A general guardian or guardian of the person (Ch 35A or 7B)
- A custodian appointed by a court (Ch 50 or, rarely Ch 7B)

What categories are not custodians?

- *Caretakers*
- *Individuals appointed by ORR as voluntary ‘sponsors’*
- *Individuals with (revocable) powers of attorney over the child*

NC Definitions of Abuse, Neglect, and Abandon & other similar bases; Viability of Reunification

- Common Law: There are no binding statutory definitions for provided for courts (other than Juvenile A-N-D & TPR's).
- Must make determinations based on common law principles
- Courts must normally use the **plain meaning** or dictionary definition.
- Finding caselaw: discussions where the presumption of parental fitness was rebutted by showing acts inconsistent with parental status, which include (but are not limited to) abuse and neglect.
- These kinds of determinations are of the same general sort as the special findings for SIJS.
- Statutory definitions provided by Juvenile Code should be *persuasive*

Statutory Guidance:

Child Welfare Proceedings (A-N-D and TPR) statutes were drafted to the meet state's due-process burdens, representing a high standard

- **N.C. Gen. Stat. § 7B-101** defines "Abused Juvenile," "Neglected Juvenile," and "Dependent Juvenile."
- **N.C. Gen. Stat. § 7B-1111** Contains definitions for Abandonment and other grounds sufficient for a termination of parental rights

Why is jurisdiction in NC?

- Jurisdiction does not arise unless and until North Carolina meets the definition of a “Home State,” which under **NCGS § 50A-102 and -201** generally occurs after six months of residence by the child in NC.
- The court may have temporary emergency jurisdiction under § **50A-204** when the child is present in North Carolina and has been abandoned or threatened with abuse or mistreatment (which may ripen into non-temporary jurisdiction with passage of time).

Foreign countries treated like other states

The UCCJEA (incorporated into N.C.G.S. at Chapter 50) treats foreign countries as though they were other states for purposes of these definitions.

§ **50A-105** International application of Article:

(a) A court of this State shall treat a foreign country as if it were a state of the United States...



Recap: What role does a NC state court order play in the SIJS process?



Any qualifying court's order placing the Minor Child in the custody of "an individual or entity" will be taken into consideration by USCIS in that agency's determination as to whether the Minor Child qualifies for Special Immigrant Juvenile Status.

Custody Case Process

1. File Complaint
 2. If and only if a true emergency, request an *ex parte* order.
 3. Schedule temporary hearing (possibly just 'permanent')
 4. Send for Service, optimally via Private Process Server if abroad
 5. *Hearing (Temporary); Set Date for Permanent*
 6. Service Perfected and Filed with Court
 7. Ensure the Court has memoranda including laws & resources
 8. Get an official court interpreter via NC AOC (free)
 9. Final Custody Hearing, may have live testimony or other evidence supporting all best interests issues, including SIJS Findings, resulting in Custody Order
- If legal or factual questions persist re SIJS findings, Court may request briefing or Court/party may request to continue/reopen evidence*



Common Problems

- State Court Judge doesn't want to make any 'special' findings or talk about 'federal law'
- Judge is concerned about human trafficking.
- Judge disbelieves the client's story and believes the parties are in collusion.
- Judge won't make 'reunification' findings outside Juvenile court.
- Judge won't make findings about return to foreign country.
- Clerk 'doesn't do' findings of fact
- Location of parent to be served is 'unknown'.
- Judge doesn't believe service/notice was sufficient.



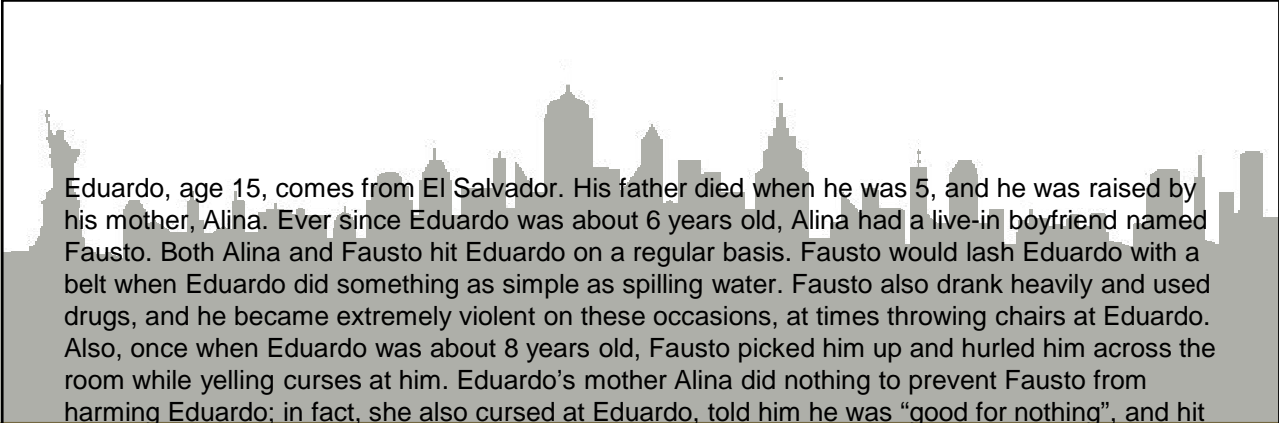
Hypothetical for Discussion






Hypotheticals for Discussion:

Example A - Eduardo

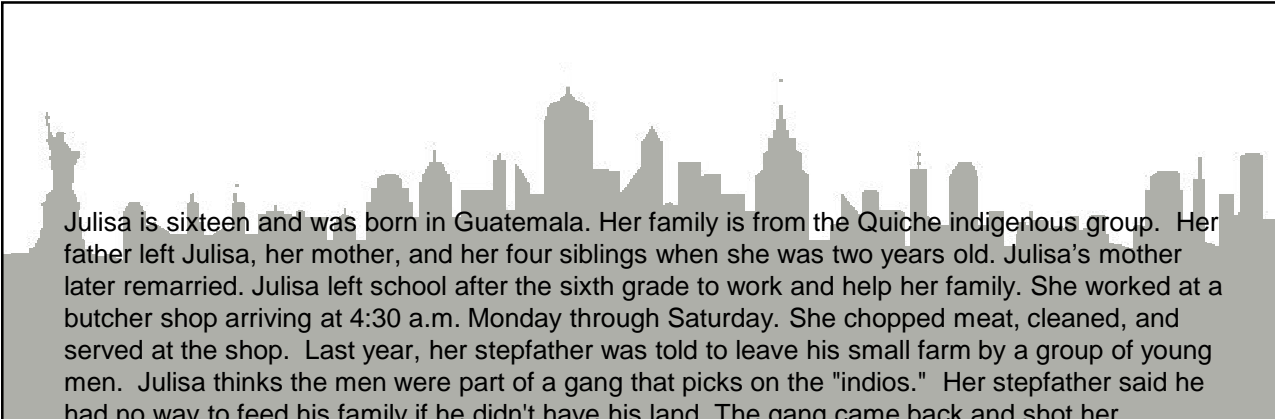


Eduardo, age 15, comes from El Salvador. His father died when he was 5, and he was raised by his mother, Alina. Ever since Eduardo was about 6 years old, Alina had a live-in boyfriend named Fausto. Both Alina and Fausto hit Eduardo on a regular basis. Fausto would lash Eduardo with a belt when Eduardo did something as simple as spilling water. Fausto also drank heavily and used drugs, and he became extremely violent on these occasions, at times throwing chairs at Eduardo. Also, once when Eduardo was about 8 years old, Fausto picked him up and hurled him across the room while yelling curses at him. Eduardo's mother Alina did nothing to prevent Fausto from harming Eduardo; in fact, she also cursed at Eduardo, told him he was "good for nothing", and hit him regularly with her hands or with household items such as shoes. Finally, when Eduardo was 14, he could no longer stand the domestic violence and he fled to the United States, hoping to live with his uncle Reynaldo, with whom he had had a relationship through phone conversations since he was very young. Eduardo now lives with Reynaldo in NC.



Hypotheticals for Discussion:

Example B - Julisa



Julisa is sixteen and was born in Guatemala. Her family is from the Quiche indigenous group. Her father left Julisa, her mother, and her four siblings when she was two years old. Julisa's mother later remarried. Julisa left school after the sixth grade to work and help her family. She worked at a butcher shop arriving at 4:30 a.m. Monday through Saturday. She chopped meat, cleaned, and served at the shop. Last year, her stepfather was told to leave his small farm by a group of young men. Julisa thinks the men were part of a gang that picks on the "indios." Her stepfather said he had no way to feed his family if he didn't have his land. The gang came back and shot her stepfather. He died a few days later. Julisa's mother told Julisa she had to go to the US to find work and to help her family. Julisa was apprehended at the border and was released to her Aunt Juana. Julisa's biological father's whereabouts are completely unknown.



Hypotheticals for Discussion:


Example C - Hector

Hector is 17 years old. He came from Honduras, and is currently living with his mother, Theresa, in NC. Hector's mother was never married to his father, Juan, and she was unable to convince him to put his name on the birth certificate as Hector's father. Juan left Hector's mother when Hector was a few months old, and has never had any contact with Hector. When Hector was nine years old, his mother came to the US and left him in the care of her own mother, his maternal grandmother. When Hector was 14, he began to be targeted by organized criminal gangs and was told he would be killed if he didn't begin working for them. Feeling unsafe and hoping to find a source of protection, Hector asked his grandmother about his father's whereabouts, and learned that the father lived in the next town over. Hector went to visit his father, Juan. Juan would not let Hector come to live with him unless he stopped attending school and went to work to help support the household, so he remained with his Grandmother, though he was threatened several times at school. When Hector was 15, his grandmother died. Having no other relatives who were willing to house and care for him, Hector left Honduras and made his way to the US, hoping to reunite with his mother. Hector was apprehended in Texas and released to his mother Theresa.



OPEN FLOOR:

ADDITIONAL QUESTIONS AND ANSWERS



Additional Resources

- Derrick's website www.LODJH.com has a section on legal resources that includes permanent links to today's materials and will be updated with future additions on this subject, URL: <http://www.derrickhensley.com/info.html>
- Consider listening to a podcast done in Fall 2014 by Joanna, Derrick, and Prof. Lenni Benson of New York Law School (link on website)
- Additional SIJS Resource are available at a Dropbox.com folder from another CLE (held at Elon University School of Law in 2014) with various SIJS materials (link on website)
- Links to many of the materials referenced herein, an example custody case file, and other materials will be provided.

Contact Information for Speaker

Questions? Call or e-mail me!

Derrick J. Hensley
The Law Office of Derrick J. Hensley
323 E. Chapel Hill St., Rm. 203
P.O. Box 380
Durham, NC 27702-0380
Ph. (919) 480-1999
Fax (919) 636-6018
info@LODJH.com