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Special Immigrant Juvenile Status: a “Juvenile” Here is not a “Juvenile” There

Heryka Knoespel

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Special Immigrant Juvenile Status: a “Juvenile” Here is not a “Juvenile” There

*Heryka Knoespel**

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I. Introduction

Parents serve an important role in a child's life. Society expects a parent to advocate for their child's needs. Nevertheless, when abuse, neglect or dependency issues occur in a household, society can no longer trust a parent to carry out vital roles on behalf of their child. Unfortunately, due to high volumes of children, limited resources, and the conflicting priorities of a state government, being in state custody as a child cannot compare to having a reliable parent advocate. Ultimately, abused, neglected, or abandoned children are left with little power over their own situation. Further, when an abused, neglected, or abandoned child is in the United States without legal status, their life can quickly unravel as their opportunities for employment, education, and public benefits decrease.

This Note provides an overview of the Special Immigrant Juvenile ("SIJ") immigration remedy available to abused, neglected, or abandoned persons under the age of twenty-one in the United States¹ and discusses a procedural issue associated with the remedy. Part I provides the history of the SIJ remedy. Part II gives an overview of the SIJ petition process. Part III details the benefits of receiving SIJ status and compares the SIJ remedy to other immigration remedies available for undocumented children. Part IV explains the problem—although eighteen to twenty-one year olds qualify for SIJ status at the federal level, many states prohibit these individuals from accessing state-level juvenile courts to secure the necessary judicial findings, a prerequisite for filing the federal SIJ petition.² Part V tracks how states with large immigrant populations—Florida, Texas, New York, and California—have approached the problem. Part VI recommends that state legislatures harmonize state law with federal law to allow persons between the ages of eighteen and twenty-one to secure findings from a juvenile court for the purpose of filing an SIJ petition with United States Citizenship and Immigration Services ("USCIS").³

1. See Immigration and Nationality Act, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005-06 (1990) (codified at 8 U.S.C. § 1101(a)(27)(J) (2006)).

2. See *id.* (explaining the need to be declared dependent on a juvenile court as a prerequisite).

3. See FLA. STAT. ANN. § 39.013 (West 2013) (allowing the court to retain jurisdiction over SIJ applicants).

II. The History of the Special Immigrant Juvenile Immigration Remedy

In 1990, Congress passed the Immigration and Nationality Act.⁴ The Immigration and Nationality Act included a Special Immigrant Juvenile classification as an immigration remedy for unaccompanied immigrant minors present in the United States.⁵ The requirements were few: a state juvenile court had to declare the petitioner dependent on the court; the court had to deem the individual eligible for long-term foster care; and the court had to determine that it was not in the individual's best interest to return to their home country.⁶ The language "eligible for long-term foster care" meant that the juvenile court found that family reunification was no longer a viable option.⁷ Further, if a child received SIJ status, the child's parents could not benefit from the child's status by filing for family-based immigration legal status through the child.⁸ The legislative history shows the Act passed with no controversy.⁹

But, in 1997, Congress had to amend the Act to prevent abuse from unintended beneficiaries.¹⁰ Specifically, persons who entered the United States as visiting students began fraudulently applying for SIJ status.¹¹

4. See Immigration and Nationality Act, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005-06 (1990) (codified at 8 U.S.C. § 1101(a)(27)(J) (2006)) (establishing Special Immigrant Juvenile Status).

5. See *id.* (intending to assist a specific group of unaccompanied minors but not expressly stating this intent in the Act until a 1997 amendment).

6. See *id.* (stating the initial requirements under the 1990 Act).

7. See 8 C.F.R. § 204.11(a) (2009) ("Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option.").

8. See 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2006) ("No natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.").

9. See 101 Bill Tracking S. 358 (1990) (Lexis); see also IMMIGRATION ACT OF 1990, <http://www.govtrack.us/congress/bills/101/s358#overview> (last visited Sept. 23, 2013) (showing quick, favorable movement through the House and Senate).

10. See *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003) ("This is a giant loophole . . . every visiting student from overseas can have a petition filed in a state court . . . declaring that they're a ward and in need of foster care, . . . [and] they're granting them.").

11. See *id.* ("The SIJ provisions of the INA were enacted in 1990 to protect abused, neglected, or abandoned children who, with their families, illegally entered the United States. Congress provided an alternative to deportation for these children. Rather than being deported along with abusive or neglectful parents, or deported to parents who had abandoned them once in the United States, such children may seek special status to remain in the United

Therefore, Congress amended the Act to expressly state that SIJ remedy was only for children needing long-term care because they were *abused, neglected, or abandoned*.¹² Previously, although the remedy was intended for this subset of unaccompanied minors in the United States, the language of abuse, neglect, and abandonment did not appear in the Act.¹³

Even though the language was added, the Act does not define “abuse,” “neglect,” or “abandonment.” Instead, state law has discretion to define these terms.¹⁴ State law definitions of these terms vary widely. For example, in California, the state law definition of “abuse” outlines specific causes and circumstances,¹⁵ including the willful harming or endangering of a child, as well as instances of both physical and mental pain.¹⁶ Moreover, in California, “neglect” refers to “the negligent treatment or the maltreatment of a child by a person responsible for the child’s welfare under circumstances indicating harm or threatened harm to the child’s

States. This rule was abused, however, by juveniles entering the United States as visiting students.”); *see also* M.B. v. Quarantillo, 301 F.3d 109, 114 (3d Cir. 2002) (“The legislative history demonstrates an intent to remove immigration decisions from the exclusive control of juvenile courts and the social agencies affiliated with them.”).

12. *See* Immigration and Nationality Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (1997) (requiring findings of abuse, neglect, or abandonment); *see also* 143 Cong. Rec. H10809-01, 1997 WL 705004, H. Rep. No. 105-405 (1997).

13. *Id.*

14. *See* Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54980 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. 204.11(b)(1)(v)), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-09-06/pdf/2011-22625.pdf> (“The concepts of abuse, neglect, and abandonment are not defined in immigration law. Specific legal definitions of the terms ‘abuse, neglect, or abandonment’ for the purposes of juvenile dependency proceedings derive from State law and therefore vary from state to state.”).

15. *See* CAL. PENAL CODE § 11165.6 (West 2008) (“[C]hild abuse or neglect’ includes physical injury or death inflicted by other than accidental means upon a child by another person, sexual abuse as defined in Section 11165.1, neglect as defined in Section 11165.2, the willful harming or injuring of a child or the endangering of the person or health of a child, as defined in Section 11165.3, and unlawful corporal punishment or injury as defined in Section 11165.4. ‘Child abuse or neglect’ does not include a mutual affray between minors. ‘Child abuse or neglect’ does not include an injury caused by reasonable and necessary force used by a peace officer acting within the course and scope of his or her employment as a peace officer.”).

16. *See* PENAL § 11165.3 (“The willful harming or injuring of a child or the endangering of the person or health of a child, means a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered.”).

health or welfare[,] . . . [t]he term includes both acts and omissions on the part of the responsible person.”¹⁷

Whereas, in the District of Columbia, “abused” means “infliction of physical or mental injury upon the child, sexual abuse or exploitation of a child, or negligent treatment or maltreatment of a child.”¹⁸ The District of Columbia also specifies certain acts it considers abusive that do not constitute mere “discipline.”¹⁹ Simply put, discipline must be reasonable.²⁰ The statute lists acts not considered discipline, such as “burning, biting, or cutting a child,”²¹ or “striking a child with a closed fist.”²²

Even the term “abandoned” carries different definitions depending on the state law applied. In New York, the law deems a child “abandoned” if a parent shows “an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child.”²³ Therefore, a state’s unique definition of abuse, neglect, and abandonment will determine whether a person qualifies for the federal remedy and once the state issues findings of abuse, neglect, or abandonment, USCIS cannot reinvestigate the findings.²⁴

In 2008, the Trafficking Victims Protection and Reauthorization Act (“TVPRA”) substantially changed the eligibility requirements for SIJ status.²⁵ The change not only expanded the group of aliens eligible for SIJ,²⁶ but it also delineated specifically the findings a state juvenile court

17. PENAL § 11165.2.

18. D.C. CODE §16-2301(23)(A) (2012).

19. § 16-2301(B)(i).

20. *Id.*

21. § 16-2301(B)(i)(I).

22. § 16-2301(B)(i)(II).

23. N.Y. SOC. SERV. LAW § 384-B (5)(a) (McKinney 2012).

24. *See* Memorandum from William R. Yates, Associate Director for Operations, to Regional Directors & District Directors 4-5 (May 27, 2004), http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%2019982008/2004/sij_memo_052704.pdf (“The adjudicator generally should not second-guess the court rulings or question whether the court’s order was properly issued.”).

25. *See* Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (amending the INA, and making changes to requirements for SIJ status, streamlining SIJ procedures).

26. *See* Memorandum from Donald Neufeld, Acting Associate Director Domestic Operations, USCIS & Pearl Chang, Acting Chief Office of Policy & Strategy, USCIS, to Field Leadership 2 (Mar. 24, 2009), http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf (“An eligible SIJ alien now includes an alien who has been declared dependent on a juvenile court; whom a juvenile court has legally committed to, or placed under the custody of an agency or department of a

must make for a valid SIJ petition.²⁷ Prior to TVPRA, the INA required that the juvenile court make a finding that the child was eligible for long-term foster care. This caused concern that only children who were in state foster care were eligible for SIJ status.²⁸ To address this concern, the TVPRA amended the statute to allow eligibility for children declared dependent on a juvenile court, *or* legally committed to or placed under the custody of a State agency or department. Therefore, the TVPRA clarified that SIJ status was not just for children in foster care. Additionally, the TVPRA added the new requirement that “reunification with one or both parents is not viable due to abuse, neglect or abandonment or a similar basis found under State law.”²⁹ This is a significant change because it has led to what many advocates call the “one parent SIJ cases,” where the child was abused, neglected, or abandoned by one parent but resides with the other parent. Also, to expedite the process, TVPRA required that USCIS adjudicate a SIJ petition within 180 days of the petitioner’s filing.³⁰

Most importantly, TVPRA granted some limited age-out protections for SIJ petitioners.³¹ As of December 23, 2008, if petitioner was a “child”³² on the date that an SIJ petition was filed, regardless of the petitioner’s age at the time of adjudication, USCIS may not deny SIJ status based on age. USCIS officers must now consider the petitioner’s age at the time of filing with USCIS to determine whether the petitioner has met the age requirement. Officers can no longer deny or revoke SIJ status based on age if on the date the SIJ petition was filed, the alien was under twenty-one years of age.³³ Thus, even if the petitioner turns twenty-one while the SIJ

State; or who has been placed under the custody of an individual or entity appointed by a State or juvenile court.”)

27. *See id.* at 2 (indicating specifically what was required of a state juvenile court order regarding findings for Special Immigrant Juvenile cases).

28. *Id.*

29. Trafficking Victims Protection Reauthorization Act § 235(d), Pub. L. No. 110-457, 122 Stat. 5044 (2008).

30. *See id.* at 4 (“Section 235(d)(2) of the TVPRA 2008 requires USCIS to adjudicate SIJ petitions within 180 days of filing.”).

31. *See* Trafficking Victims Protection Reauthorization Act § 235(d), Pub. L. No. 110-457, 122 Stat. 5044 (2008) (explaining the need for age-out protections).

32. *See id.* (referring to the use of “child” eligible for SIJ to follow the definition under INA § 101(b)(1) of an unmarried person under the age of 21 at the time of filing).

33. *See* Memorandum from Donald Neufeld, Acting Associate Director Domestic Operations, USCIS & Pearl Chang, Acting Chief Office of Policy & Strategy, USCIS, to Field Leadership 3-4 (Mar. 24, 2009), http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf (explaining age protections).

petition is being adjudicated, it is not grounds for an automatic revocation of the petition, a common occurrence prior to TVPRA. This protection is important because it set a concrete deadline as to when USCIS will determine the petitioner's age. Although under TVPRA, USCIS must complete SIJ adjudications within six months of petitioner's filing,³⁴ this is seldom the case.³⁵ As a result, if the age protection were not in place, many petitioners would be left wondering whether USCIS had processed their application prior to their twenty-first birthday.³⁶ With this change, SIJ petitioners now know that if they were under twenty-one years old when they filed their SIJ petition with USCIS, then their age qualifies under the Act. As a result of the age protection changes implemented by the TVPRA, many more qualify for SIJ status.

The most recent change to SIJ status occurred in 2011, when USCIS proposed a rule reinterpreting the federal Act.³⁷ USCIS stated on its website:

The proposed rule includes protections against aging-out, meaning that petitioners would still be eligible for SIJ status even if they reach the age of 21 while the petition is pending. Also, petitioners would be required to have a valid juvenile court order that is in effect at the time of filing. *While this court order would be required to remain in effect through the time of adjudication, the proposed rule would exempt that requirement for individuals if their court order is no longer in effect at the time of adjudication because the petitioner's age prevents continued dependency.*³⁸

34. See Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54983 (Sept. 6, 2011) (to be codified at 8 C.F.R. pt. 204, 205 and 245), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-06/pdf/2011-22625.pdf> (explaining that USCIS intends to adhere to the 180-day benchmark contained in TVPRA 2008); see also 8 C.F.R. § 103.2(b)(10)(i) (2008) (stating the 180-day timeframe begins when the SIJ petition is received, but, if USCIS sends a request for additional evidence, the 180-day timeframe will stop and resume once USCIS receives a response from the SIJ petitioner).

35. See January Contreras, U.S. CITIZENSHIP AND IMMIGRATION SERVS. OMBUDSMAN, *Special Immigrant Juvenile Adjudications: An opportunity for Adoption of Best Practices* (Apr. 15, 2011), available at <http://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf> (explaining that there is a delay in SIJ petition turnover).

36. *Id.*

37. See Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54983 (Sept. 6, 2011) (to be codified at 8 C.F.R. pt. 204, 205 and 245), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-06/pdf/2011-22625.pdf>.

38. U.S. CITIZENSHIP AND IMMIGRATION SERVS., *USCIS Seeks Public Comment on Proposal to Amend Special Immigrant Juvenile Regulations*, (Sept. 6, 2011) <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgn>

The rule was promulgated although not with all of its original language. As of today, the SIJ remedy is now available to unmarried³⁹ persons under twenty-one years old,⁴⁰ who were abused, neglected, or abandoned,⁴¹ and continue to be dependent on a juvenile court.⁴² The 2011 rule did not address the procedural problem explored in this Note. This history sheds light on SIJ processes in place today.

III. *Petitioning for Special Immigrant Juvenile Status: A Two Step Process*

The two steps involved in petitioning for SIJ status are (1) obtaining juvenile court findings at the state level and (2) filing forms with USCIS at the federal level.⁴³ These steps must occur consecutively.⁴⁴ While immigration officials have the final say on whether they will grant a SIJ petition,⁴⁵ the individual cannot even apply to USCIS for the remedy without first having the necessary findings issued by a state juvenile court.⁴⁶

extoid=9cf147e523f32310VgnVCM10000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD (emphasis added).

39. See 8 C.F.R. § 204.11 (c)(2) (2009) (requiring applicant to be single).

40. See Trafficking Victims Protection Reauthorization Act of 2008 § 234(e)(3)(A) (“(A) the date on which the child reaches the age designated in section 412(d)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1522(d)(2)(B)).”); see also 8 C.F.R. § 204.11(c)(1) (2009) (requiring applicant to be under the age of twenty-one).

41. See 8 U.S.C. § 1101(a)(27)(J)(i) (2006) (intending remedy for abused, neglected or abandoned children).

42. See Pub. L. No. 105-119, § 113, 11 Stat. 2440, 2460 (1997) (codified as amended at 8 U.S.C. § 1101(a)(27)(J)(i) (2003)) (“[W]ho has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose 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.”).

43. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., *SIJ Petition Process*, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=65d508d1c67e0310VgnVCM10000082ca60aRCRD&vgnextchannel=65d508d1c67e0310VgnVCM10000082ca60aRCRD> (last visited Sept. 10, 2013) (explaining the SIJ petition process).

44. *Id.*

45. See Vesselin Mitev, *Salvadoran Immigrant Abandoned as a Child Permitted to Seek Special Status*, N.Y. L.J., Mar. 5, 2010, <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202445540726> (“[T]he ultimate determination as to an immigrant juvenile’s status rests squarely within the purview of the federal government.”).

46. See 8 U.S.C. § 1101(a)(27)(J)(ii) (2006) (stating that the SIJ applicant must have findings from judicial proceedings).

A. Obtaining a Juvenile Court Order

First, a juvenile court in the United States must make certain findings of fact.⁴⁷ Under the federal definition, a “juvenile court” is determined by the court’s function rather than the name the state gives the court. Specifically, the law defines a juvenile court as “a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles.”⁴⁸ USCIS recognizes that the exact name of a juvenile court may differ among states.⁴⁹ Courts that handle juvenile matters including dependency, guardianship, delinquency, or adoption will qualify.⁵⁰ If a juvenile “has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court,” then he or she is dependent upon the court.⁵¹

A petitioner needs a juvenile court to make necessary findings. These include that the child is unmarried, under twenty-one, dependent on the court, cannot be reunited with one or both parents due to abuse, abandonment, or neglect, and it is not in the child’s best interest to return to his or her country of citizenship.⁵²

Certain states have streamlined their SIJ procedures, making the remedy more accessible within their court system. For example, New York⁵³ and California⁵⁴ created an official court order form for SIJ findings that simplify the proceeding for the presiding judge. North Carolina has created a sample court order form so judges become familiar with the necessary findings for SIJ status.⁵⁵ With a juvenile court order in hand, the petitioner may progress to the second stage of the SIJ process.

47. *Id.*

48. 8 C.F.R. § 204.11(a) (2009).

49. *See id.* (defining juvenile court as “a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of the juveniles”).

50. *Id.*

51. § 204.11(c)(6).

52. *See* § 204.11(d)(2) (listing the required showings for SIJ status).

53. *See* NEW YORK FAMILY COURT, *GF-42 Special Immigrant Juvenile Status Order*, <http://www.nycourts.gov/forms/familycourt/pdfs/gf-42.pdf> (last visited Sept. 23, 2013).

54. *See* CALIFORNIA SUPERIOR COURT, *JV-244 Order Regarding Eligibility for Special Immigrant Juvenile Status*, <http://www.courts.ca.gov/documents/jv224.pdf> (last visited Sept. 23, 2013).

55. *See* Memorandum from Deana Fleming to District Administrators and Attorney Advocates 4 (July 27, 2006), <http://www.nccourts.org/Citizens/Gal/Documents/>

While the state juvenile court process may seem tedious, it is actually beneficial for the petitioner to appear before a juvenile court because the judges are trained in abuse, neglect, and dependency issues. First, it gives the SIJ immigration status legitimacy by showing the public that a judge trained in issues of abuse, neglect, and dependency finds the child's story credible. This leaves less room for criticism of the SIJ immigration remedy because a neutral fact finder, whose role it is to routinely make best interest determinations for children, issues the necessary findings. Second, it is beneficial for SIJ petitioners because, unlike other immigration remedies, a judge must consider whether it is in the child's best interest to return to their home country. For these reasons, it is logical to leave the findings of a federal immigration case to a juvenile state court.

B. Filing for Adjudication with United States Citizenship and Immigration Services

After receiving state juvenile court findings, a SIJ petitioner must file forms with USCIS.⁵⁶ A petitioner will need to file at minimum two forms: Form I-360⁵⁷ Petition for Special Immigrant and Form I-485⁵⁸ Application to Register Permanent Residence or Adjust Status. Additional forms become relevant depending on an individual's circumstances.⁵⁹

Once USCIS receives the petition, the petitioner will then receive notification of the date and time of their interview.⁶⁰ In some cases, USCIS may waive an interview.⁶¹ For example, USCIS may waive an interview

sijs%20info.pdf.

56. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., *SIJ Petition Process*, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=65d508d1c67e0310VgnVCM100000082ca60aRCRD&vgnnextchannel=65d508d1c67e0310VgnVCM100000082ca60aRCRD> (last visited Sept. 23, 2013) (explaining the required forms for the SIJ petition process).

57. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., *Petition for Amerisian, Widow(er), or Special Immigrant*, <http://www.uscis.gov/files/form/i-360.pdf> (last visited Sept. 23, 2013).

58. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., *Application to Register Permanent Residence or Adjust Status*, <http://www.uscis.gov/files/form/i-485.pdf> (last visited Sept. 23, 2013).

59. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., *SIJ: Forms you May Need*, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ea282af9f0101310VgnVCM100000082ca60aRCRD&vgnnextchannel=3d8008d1c67e0310VgnVCM100000082ca60aRCRD> (last visited Sept. 23, 2013) (explaining additional forms an SIJ petitioner may need to file).

60. *Id.*

61. See 8 C.F.R. § 245.6 (1996) (stating that an interview may be waived when an SIJ

for petitioners under the age of fourteen or when it is determined that an interview is not necessary.⁶² At the interview, a District Adjudications Officer will interview the petitioner under oath to assess eligibility for SIJ status and adjustment of status.⁶³ District Adjudications Officers have direct, delegated authority to decide naturalization and citizenship applications. These officers are located in district and sub-offices of USCIS throughout the United States.⁶⁴ At the time of the interview, the District Adjudications Officer may ask questions about the SIJ petition but may not undermine the juvenile court's findings of abuse, neglect, or abandonment.⁶⁵ After the interview, USCIS will then provide written notification to the petitioner of the approval or denial of the SIJ petition. If the officer denies the petition, the petitioner may appeal the decision to the Office of Administrative Appeals.⁶⁶ The Office of Administrative Appeals has jurisdiction over most immigration petition appeals entered by USCIS district offices,⁶⁷ reviewing denied SIJ petitions *de novo*.⁶⁸

petitioner is under age 14, or when it is determined that an interview is unnecessary).

62. See § 245.6 (explaining interview procedures for SIJ candidates).

63. *Id.*

64. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., *Appendix 4-5 District Adjudications Officer GS 1801-9 PD # HI070E (Grade Nine)*, <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-26756.html> (last visited Sept. 23, 2013) (explaining the role of a District Adjudications Officer).

65. See January Contreras, U.S. CITIZENSHIP AND IMMIGRATION SERVS. OMBUDSMAN, *Special Immigrant Juvenile Adjudications: An opportunity for Adoption of Best Practices 5* (Apr. 15, 2011), available at <http://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf> (“USCIS is permitted to inquire as to whether the juvenile court judge made a finding of abuse, neglect or abandonment. However, it is expressly prohibited from engaging in a *de novo* review of the facts and circumstances underlying the determination of dependency.”); see also Memorandum from Donald Neufeld, Acting Associate Director Domestic Operations, USCIS & Pearl Chang, Acting Chief Office of Policy & Strategy, USCIS, to Field Leadership 4 (Mar. 24, 2009), http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf (“During an interview, an officer should focus on eligibility for adjustment of status and should avoid questioning a child about the details of the abuse, abandonment or neglect suffered, as those matters were handled by the juvenile court, applying state law.”).

66. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., *The Administrative Appeals Office*, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=dfe316685e1e6210VgnVCM100000082ca60aRCRD&vgnnextchannel=dfe316685e1e6210VgnVCM100000082ca60aRCRD> (last visited Sept. 23, 2013) (“The Administrative Appeals Office reviews the decisions made by USCIS adjudications officers on petitions and applications for immigration benefits to ensure consistency and accuracy in the interpretation of immigration laws, regulations and policies.”).

67. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., *USCIS Adopted Decisions*, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgn>

IV. *The Benefits of Obtaining Special Immigrant Juvenile Status*

Approval of an SIJ petition can substantially improve an individual's life because it yields lawful permanent residency. Also, if granted, an SIJ petitioner can apply for United States citizenship within five years.⁶⁹ Moreover, SIJ status provides practical benefits that citizens take for granted. Under most circumstances, an undocumented youth may only attend college at the tuition rate for international students, not at in-state tuition rates. With the death of the DREAM Act,⁷⁰ SIJ status can make college financially attainable for an undocumented immigrant child. Upon receiving legal status, an individual may obtain a driver's license, work legally, receive federal education based financial aid, attend college at an in-state tuition rate, and gain eligibility for some public benefits.⁷¹ SIJ status is the only path for children to obtain permanent residency as a result of being abused, neglected, or abandoned by one or both parents.⁷²

Alternatively, a person not eligible for SIJ status may qualify for prosecutorial discretion under President Obama's 2012 Deferred Action for Childhood Arrivals program (DACA).⁷³ The program is meant to shield

extoid=57ceb9e54cf0e010VgnVCM100000ecd190aRCRD&vgnnextchannel=02729c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Sept. 23, 2013) (detailing which immigration petitions fall under the scope of the Administrative Appeals Office).

68. See 5 U.S.C. § 557(b) (1967) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.")

69. See IMMIGRANT LEGAL RES. CTR., *Introduction and Overview to Special Immigrant Juvenile Status* (Jan. 2010), http://www.ilrc.org/files/2010_sijs-chapter_03-sijs_overview.pdf 3-10 (discussing benefits of SIJ).

70. See Development, Relief, and Education for Alien Minors Act of 2007, S. 774, 110th Cong. (2007) (proposing to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit States to authorize cancellation of removal and adjustment of status of certain alien students who are long-term United States residents who entered the United States as children in order to determine State residency for higher education purposes).

71. See IMMIGRANT LEGAL RES. CTR., *Introduction and Overview to Special Immigrant Juvenile Status* (Jan. 2010), http://www.ilrc.org/files/2010_sijs-chapter_03-sijs_overview.pdf (discussing benefits of SIJ).

72. Other remedies, however, are available. For example, there is an immigration remedy available for a crime victim who and reports the crime to the police and cooperates with the authorities if there is an investigation. This remedy is called a U Visa, but it is not limited to children.

73. See Memorandum from Janet Napolitano to David V. Aguilar, Acting Commissioner U.S. Customs and Border Prot., Alejandro Mayorkas, Director U.S. Citizenship and Immigration Servs., & John Morton, Director U.S. Immigration and Customs Enforcement (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1->

from deportation those children who entered the United States at a young age and “know only this country as home.”⁷⁴ To qualify for prosecutorial discretion under the program, an applicant must (1) have come to the United States under the age of sixteen, (2) have continuously resided in the United States for a least five years preceding the date of June 15, 2012 and be present in the United States on June 15, 2012, (3) be currently enrolled in school, graduated from high school, obtained a general education development certificate, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States, (4) have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety, and (5) not be above the age of thirty.⁷⁵ One may apply through USCIS by submitting Form I-821D.⁷⁶

Persons granted deferred action under the program will receive deferred action for two years, subject to renewal, and may be eligible for employment authorization.⁷⁷ The program only defers removal action of an individual as an act of prosecutorial discretion. The biggest difference between SIJ status and the Deferred Action for Childhood Arrivals program is that “deferred action does not confer lawful status upon an individual.”⁷⁸ Therefore, deferred action is not as secure as SIJ status because it is only a temporary fix, failing to provide a pathway to citizenship like SIJ status does. Moreover, the Executive branch can revoke the program at any time.

Further, the instability of the program grows as states grapple with whether or not to extend benefits, such as driver’s licenses, to persons granted deferred action under the program.⁷⁹ Even though the federal

exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (“By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation’s immigration laws against certain young people who were brought to this country as children and know only this country as home.”).

74. *Id.*

75. *See id.* at 1 (setting criteria by which to consider deferred action applicants).

76. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., *Consideration of Deferred Action for Childhood Arrivals*, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=05faf6c546129310VgnVCM100000082ca60aRCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited Sept. 23, 2013).

77. *See* DEP’T OF HOMELAND SEC., *Deferred Action for Childhood Arrivals*, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited Sept. 23, 2013) (detailing the program’s benefits).

78. *Id.*

79. *See* Franco Ordonez, *As states weigh licenses for young illegal immigrants, N.C.*

government has said persons approved under the program are lawfully present in the United States and should receive benefits, several states are debating whether to comply with the mandate.⁸⁰ For example, North Carolina, after debating whether to comply or not with the President's program, has finally acquiesced but has said that the driver's licenses issued will differ from the standard North Carolina driver's license.⁸¹ In North Carolina, immigrants granted Deferred Action for Childhood Arrival will receive a driver's license, but it will be distinguishable. Initially, the driver's license would be vertical with a pink header stating in bold and all caps "NO LAWFUL STATUS."⁸² Pat McCrory, North Carolina's Republican governor, says it is a "pragmatic compromise" between those who did not want to issue licenses and those that wanted regular licenses.⁸³ Ultimately, the pink header was dropped but the license reads "LEGAL PRESENCE NO LAWFUL STATUS" in red letters at the top.⁸⁴ As states begin deciding how to execute the President's program at the state level, it

switches its position, CHARLOTTE OBSERVER, Jan. 10, 2013, <http://www.charlotteobserver.com/2013/01/10/3778437/as-states-weigh-licenses-for-young.html#storylink=misearch> (listing Arizona, Iowa, Michigan and Nebraska as states not granting drivers licenses to deferred action recipients as well as North Carolina on the brink of deciding against it); *but see On driver's licenses, a test for McCrory*, CHARLOTTE OBSERVER, Jan. 24, 2013, <http://www.charlotteobserver.com/2013/01/24/3810679/on-drivers-licenses.html#storylink=misearch> ("Iowa has since decided to issue the drivers licenses while North Carolina, Michigan and Arizona reconsider their decision not to, but Nebraska maintains its position not to issue the licenses.").

80. *Id.*

81. See Michael Biesecker, *Pink Stripe on NC Illegal Immigrant Licenses Eyed*, ASSOCIATED PRESS, Feb. 22, 2013, http://m.apnews.com/ap/db_268773/contentdetail.htm?contentguid=e9W7qG5x (detailing proposed design features for immigrant driver's licenses); see also Rob Schofield, *DOT will make drivers licenses for immigrants look second class*, THE PROGRESSIVE PULSE, Feb. 18, 2013, <http://pulse.ncpolicywatch.org/2013/02/18/dot-will-make-drivers-licenses-for-immigrants-look-second-class/> (explaining North Carolina Transportation Secretary Anthony Tata's idea of creating different looking driver's licenses for immigrants granted the right to stay in the United States under the Deferred Action for Childhood Arrivals).

82. See *id.* ("Not only will the licenses be vertical rather than horizontal—something ordinarily reserved for beginning drivers—but they will also feature a pink header and include the following words in all caps 'NO LAWFUL STATUS.'").

83. See Liz Goodwin, *North Carolina Immigrant Protest Pink Driver's Licenses*, YAHOO! NEWS, Mar. 5, 2013, <http://news.yahoo.com/blogs/ticket/north-carolina-immigrants-protest-pink-driver-licenses-202908864--election.html> (discussing the controversy over the proposed North Carolina driver's licenses for immigrants granted deferred action).

84. See Gustavo Valdes, *North Carolina debuts driver's licenses for undocumented immigrants*, CNN, Mar. 25, 2013, <http://www.cnn.com/2013/03/25/us/north-carolina-immigrant-licenses> (introducing North Carolina's new driver's licenses for undocumented immigrants).

is clear that not all beneficiaries of the Deferred Action for Childhood Arrivals program will receive its intended benefits.

V. The State-Level Procedural Problem: Persons Eighteen Through Twenty-One Cannot Initiate Special Immigrant Juvenile Procedures

Most states set their age of majority at age eighteen. This means a person above that age cannot access a juvenile court. This makes it impossible for a person to receive the necessary juvenile court findings in order to petition for SIJ status at the federal level because they cannot initiate proceedings in a juvenile court. As some states do not permit a finding of dependency for those over the age of eighteen, a person not declared dependent on the juvenile court before reaching the age of eighteen will not be eligible to apply for SIJ status. The extent of this problem and how many people it affects is difficult to measure because of how state juvenile courts are organized. Persons eighteen through twenty-one seeking SIJ findings will be unable to have their case heard in a juvenile court because they lack standing. Cases will rarely be published illustrating their inability to obtain jurisdiction in a state juvenile court because they cannot access the court.

One case illustrative of this problem is Carmen's story,⁸⁵ a client at the Washington and Lee University School of Law Citizenship and Immigration Clinic. Carmen had a difficult childhood in her home country. Carmen's father, avoiding someone who was trying to kill him, abandoned Carmen and her family when she was six-years-old. At the tender age of eight, Carmen's mother abandoned her too. Carmen's grandparents let her and her siblings live with them, but living there was not easy. Carmen's grandparents verbally and physically abused the children. To make matters worse, Carmen knew that her grandfather sexually abused many of her cousins. She lived in constant fear that he would also try to molest her.

About six years later, Carmen left her grandparent's house to live with her aunt, believing living conditions might be better there. Her life did not improve. Her aunt ran a bar from inside her home and made Carmen work in the bar as a waitress despite her young age. Her aunt beat her almost daily with belts, jump ropes, wire cables, and tree branches. Carmen often bled from the beatings and suffered bruises from the abuse. Carmen's aunt even threatened to beat her with a machete, which Carmen saw her use

85. Client name has been changed for confidentiality, redacted declaration (on file with the Washington and Lee School of Law Immigrant Rights Clinic).

violently towards her own children. Carmen's closest encounter with death was at the age of fifteen. Her aunt strangled her. During the time she lived with her aunt, gang members who frequented the bar gang raped Carmen several times.

When Carmen's boyfriend learned of the abuse she was suffering, he offered for her to come live with him in another village. Hoping that the distance would allow her to escape the abuse, Carmen agreed to live with him. Because of his drug and alcohol dependency issues and physical abuse, their living arrangement only lasted a year. Carmen believed he belonged to a gang because he had several gang member friends. Also, he had the letters "MS" tattooed on his knuckles, which stands for "Mara Salvatrucha" (a popular gang in Honduras) and several dots tattooed between his thumb and his pointer finger, a sign of certain crimes committed.

Because Carmen feared returning to live with her grandparents, aunt, and ex-boyfriend, Carmen fled to the United States. She knew that when her mother abandoned her, she immigrated to the United States. Carmen thought she could live with her mother. Border Patrol detained Carmen upon entering the United States. She was seventeen years old at the time. She was later released into her mother's care. Unfortunately, Carmen underwent more physical abuse in her mother's household by her father-in-law and sister. It got so severe that the police were dispatched to the home in one incident where Carmen was beaten relentlessly.

People abused Carmen her entire life. Both parents abandoned her at an early age. While she lives with her mother now, her mother does not protect her from physical abuse. Carmen is a good candidate for SIJ status because she has been abused, neglected and abandoned by at least one parent and it would not be in her best interest to return to her home country because she fears her ex-boyfriend and family. Carmen, however, would not qualify at this time because she is nineteen years old. Because her state's age of majority is eighteen she cannot access a state juvenile court to begin the SIJ process. This is unfortunate as the federal age limit for the remedy is twenty-one. Like Carmen, there are many other youth between the ages of eighteen and twenty-one who qualify for SIJ status but cannot initiate proceedings in a state juvenile court due to their age.

VI. Gauging Opportunity for Change: Tracking State Action

The Department of Homeland Security (DHS) recognizes that “certain inequities caused by variations in state law are unavoidable.”⁸⁶ This understanding suggests that while the federal government may establish the ceiling of age eligibility for SIJ, a state has the power to establish the baseline eligibility for its residents. Alternatively, cognizant of state juvenile courts’ jurisdiction maximum age, if Congress wanted all juveniles to become ineligible for SIJ when they turned eighteen, it would be explicitly expressed as their intent. Instead, the statute states that the petitioner is eligible for SIJ until he or she is twenty-one years old.⁸⁷ States should consider the injustice of qualifying for a federal immigration benefit but being unable to apply due to the state law’s age of majority.

Fairness implications and forum shopping are at stake. The Government of the United States has broad, undoubted power over immigration and the status of aliens based on its constitutional power to “establish an uniform Rule of Naturalization.”⁸⁸ In spite of this, in the case of special immigrant juveniles, Congress has delegated some of its power to state juvenile courts to assess abuse, neglect, and abandonment issues as well as best interest determinations for the child. But, when SIJ petitioners become aware of more favorable venues for their claims, they are more likely to settle in those states and flood those state juvenile courts. This burdens these specific state courts in furtherance of a *federal* remedy. Therefore, immigration issues should be as uniform as possible across state venues.

The need for consistency was recognized at the federal level in 2011 when USCIS focused on streamlining the SIJ adjudication and interview procedure after stakeholders expressed concern about “lack of consistent expertise being applied in adjudications.”⁸⁹ USCIS issued a report to

86. See Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, Final Rule, Department of Justice, Immigration and Naturalization Service, Supplementary Information, 58 Fed. Reg. 42843, 42846 (Aug. 12, 1993) (“An alien in one state would be eligible for the benefit, while an alien in substantially identical circumstances living in another state would not be eligible.”).

87. See 8 C.F.R. § 204.11(c)(1) (2009) (“An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien: (1) Is under twenty-one years of age.”).

88. See U.S. CONST. art. I, § 8, cl. 4 (“To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”).

89. See January Contreras, U.S. CITIZENSHIP AND IMMIGRATION SERVS. OMBUDSMAN, *Special Immigrant Juvenile Adjudications: An opportunity for Adoption of Best Practices*

standardize procedures for SIJ adjudications across its field offices.⁹⁰ The same concern exists at the state level because of inconsistent state laws regulating the extension of a state juvenile court's jurisdiction over SIJ petitioners and the ability of youth between eighteen and twenty-one to initiate proceedings.

A. Florida's Solution: Amending State Law to Extend Jurisdiction for Special Immigrant Juvenile Petitioners

In 2005, Florida amended their state law to extend a state juvenile court's jurisdiction over certain noncitizens after they reach the age of eighteen.⁹¹ Florida cooperates with the federal immigration process by extending jurisdiction over SIJ petitioners until the conclusion of the federal adjudication or petitioner's twenty-second birthday (whichever comes first).⁹²

The Florida statute states that once a court declares a child dependent, a court shall retain jurisdiction until the child turns eighteen years old.⁹³ But, the youth can petition the court to extend jurisdiction to allow for their SIJ petition to be considered by federal authorities.⁹⁴ The

(Apr. 15, 2011), *available at* <http://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf> (“Case problems submitted to the Ombudsman show two broad issues arising in SIJ processing: (1) lack of consistent expertise being applied in adjudications; and (2) delays in file transfer between USCIS and other DHS components.”).

90. *See id.* (“For USCIS, there is an opportunity to identify leadership teams that have implemented best practices and to encourage the adoption of these practices throughout the nation.”).

91. *See* FLA. STAT. § 39.013(2) (2013) (allowing extended jurisdiction over youth over eighteen years old with pending special immigrant juvenile petitions); *see also In re Amend. to Fla. R. Juv. P.*, 951 So.2d 804, 812 (Fla. 2007) (“If a petition for special immigrant juvenile status and an application for adjustment of status have been filed on behalf of a foster child and the petition and application have not been granted by the time the child reaches 18 years of age, the court may retain jurisdiction solely for the purpose of allowing the continued consideration of the petition and application by federal authorities. Review hearings shall be set solely for the purpose of determining the status of the petition and application. The court's jurisdiction shall terminate on the final decision of the federal authorities, or on the immigrant child's 22nd birthday, whichever occurs first.”).

92. *Id.*

93. *See id.* (expressing that generally when an order is granted it is valid until an individual reaches the age of eighteen).

94. *See id.* (creating extended jurisdiction past the age of eighteen for those with pending special immigrant juvenile petitions).

court's jurisdiction will terminate upon petitioner receiving the final decision from the federal authorities.⁹⁵

Moreover, the Florida statute provides that in dependency proceedings, if a child is not a citizen, then a case plan will be developed to evaluate whether the child qualifies for SIJ status.⁹⁶ If the child is eligible, the court may provide findings of his or her eligibility.⁹⁷ No later than sixty days after a court grants an order, the department will file a petition for SIJ status on behalf of the child.⁹⁸ In cases where the petition is filed but not granted by the time the child turns eighteen, the court may retain jurisdiction to allow the petition to be reviewed by the federal authorities.⁹⁹ The court may not retain jurisdiction after the immigrant child's twenty-second birthday.¹⁰⁰

After the Florida statute was amended, the Office of Administrative Appeals reviewed an eighteen-year-old SIJ applicant's petition because it was a matter of first impression whether the 2005 amended Florida child welfare statute was sufficient for petitioner to meet the regulatory requirements for SIJ eligibility.¹⁰¹ The District Adjudications Officer believed the Florida statute was amended "solely to allow individuals who were over the age of 18 to gain permanent residence through the Special Immigrant Juvenile petition."¹⁰²

95. *See id.* (ending the jurisdiction at the issuance of a final decision from the federal authorities).

96. *See* § 39.5075(3) ("If the case plan calls for the child to remain in the United States, and the child is in need of documentation to effectuate this plan, the department or community-based care provider must evaluate the child's case to determine whether the child may be eligible for special immigrant juvenile status.").

97. *See* § 39.5075(4) ("The ruling of the court on this petition must include findings as to the express wishes of the child, if the child is able to express such wishes, and any other circumstances that would affect whether the best interests of the child would be served by applying for special immigrant juvenile status.").

98. *See* FLA. STAT. § 39.5075(5) (2013) (explaining the department's timeline for filing a special immigrant juvenile petition on behalf of the child).

99. *See* § 39.5075(6) (stating that retention of jurisdiction is solely for the purpose of allowing the petition to be reviewed by the federal authorities).

100. *See id.* (indicating the maximum age permitted for retained jurisdiction is twenty-two).

101. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., Office of Administrative Appeals (June 19, 2006), http://www.uscis.gov/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2006/Jun192006_01C6101.pdf (affirming the decision of the director to approve the special immigrant juvenile petition).

102. *Id.* at 2.

The Office of Administrative Appeals approved the petition, stating that an extension of jurisdiction under the Florida statute is sufficient to meet the federal requirement of being dependent on a juvenile court.¹⁰³ In analyzing the new Florida statute, the Administrative Appeals Office reasoned that petitioner's counsel well articulated that the Florida Legislature was attempting to protect the welfare of all children in the custody of its courts, including undocumented immigrants. Prior to 2005, Florida dependency laws did not address undocumented immigrants despite the state's jurisdiction over a substantial number of undocumented immigrants. The amendment, however, allows an undocumented immigrant child who otherwise meets the SIJ requirements but is over eighteen to acquire resident status through the SIJ petition process.¹⁰⁴ The Office of Administrative Appeals explained that this would be banned if the Florida statute defeated the purpose of federal law.¹⁰⁵ Importantly, the Office of Administrative Appeals found Florida's action to be permissible and within their powers because the federal statute allows the SIJ remedy for persons under the age of twenty-one.¹⁰⁶ Here, the applicant had an order for extended jurisdiction from the Florida court, and otherwise met all the requirements under the federal statute.¹⁰⁷ Thus, Florida could extend juvenile jurisdiction for SIJ petitioners that crossed into the age of majority while USCIS was reviewing their application.¹⁰⁸

Florida's decision had positive implications for SIJ petitioners. After the 2008 TVPRA amendments passed, however, the problem that Florida's state law solved no longer exists. Still, age out protections are needed at the state level for petitioners between eighteen and twenty-one seeking to initiate the SIJ petition process in a state juvenile court. Nevertheless, the

103. *See id.* at 5 (confirming that the petitioner meets the statutory requirements of 8 C.F.R. § 204.11).

104. FLA. STAT. § 39.5075(6), (7) (2013).

105. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., Office of Administrative Appeals (June 19, 2006), http://www.uscis.gov/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2006/Jun192006_01C6101.pdf (affirming the decision of the director to approve the special immigrant juvenile petition).

106. *See* 8 C.F.R. § 204.11(c)(1) (2009) ("An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien: (1) Is under twenty-one years of age.").

107. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., Office of Administrative Appeals (June 19, 2006), http://www.uscis.gov/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2006/Jun192006_01C6101.pdf (affirming the decision of the director to approve the special immigrant juvenile petition).

108. *Id.*

Florida situation teaches a larger lesson—a state can fix SIJ procedural problems so long as it acts within federal law’s limitations.

B. The Struggle to Amend Texas State Law to Include Protections for Special Immigrant Juveniles

In Texas, family district courts have jurisdiction over “child welfare, custody, support and reciprocal support, dependency, neglect, and delinquency.”¹⁰⁹ Therefore, under the Act, family district courts are juvenile courts.¹¹⁰ The Texas Family Code, however, has not made any changes that would benefit SIJ petitioners between the age of eighteen and twenty-one. The Texas Family Code maintains that a “child” is “a person under 18 years of age who is not and has not been married.”¹¹¹

The Legislative Budget Board staff in the 2009 Texas State Government Effectiveness and Efficiency (GEE) report recognized the jurisdictional problem for SIJ petitioners and proposed extending the state juvenile court’s jurisdiction over SIJ petitioners as a solution.¹¹² Representative Hernandez Luna has advocated for a change since 2009.¹¹³ She not only hopes to follow in Florida’s footsteps of extended jurisdiction, but also wishes to address the ability of persons between ages eighteen and twenty-one to initiate proceedings in a juvenile court in order to obtain the necessary SIJ findings to file a petition with USCIS.¹¹⁴ As such, House Bill 4426, sponsored by Representatives Robert Alonzo, Leticia Van de Putte and Ana Hernandez Luna proposed amending the Texas Family Code to add chapter forty-six to address special immigrant juvenile status of “young

109. TEX. GOV’T CODE § 24.601(b)(4) (West 2013).

110. See Immigration and Nationality Act § 101(a)(27)(J) (2006).

111. TEX. FAM. CODE § 101.003(a) (West 2013).

112. See Legislative Budget Board Staff, Texas State Government Effectiveness and Efficiency 240 (Jan. 2009), <http://www.f2f.ca.gov/res/pdf/TXGovtEffectiveEfficiencyReportSIJONLY.pdf> (“Recommendation 6: Amend the Texas Family Code to extend the jurisdiction that county courts and district courts have over youth in foster care from age 18 to age 21, if Special Immigrant Juvenile Status petitions and legal permanent status applications have been filed.”).

113. See H.B. 1466, 82nd Sess., (Tex. 2011) (detailing the bill to be enacted).

114. See *id.* (detailing the favorable components of bill to be enacted for the benefit of SIJ petitioners).

adults,” or those between the ages of eighteen and twenty-one.¹¹⁵ The chapter would allow a “young adult” to file a suit requesting SIJ findings.¹¹⁶

The House Bill would also amend Texas Family Code chapters fifty-one, one hundred fifty-five, and two hundred sixty-two.¹¹⁷ This would allow a court to retain jurisdiction over a young adult who has petitioned for SIJ status until the earliest of: the young adult’s twenty-first birthday; the date the young adult was granted lawful permanent resident status; the date an appeal was denied for a permanent residency application based on a SIJ petition; or the day after the last day to file an appeal of the denial of an application for permanent residency based on a petition for SIJ status.¹¹⁸ The bill’s intent is to address “[t]he lack of consistency between ‘age out’ dates in the state and federal statute [that] complicates access to this relief for abused and abandoned children in Texas.”¹¹⁹ Thus, as proposed the House Bill would solve the problem that this Note addresses. Accordingly, House Bill 4426 was introduced into the eighty-first Texas Legislative Session, during which over one hundred other bills were filed referencing state immigration matters, and more than sixty percent were anti-immigrant bills.¹²⁰ It passed in the Texas House with 111 votes.¹²¹ The Senate, however, did not vote on the bill prior to the close of the session.¹²²

In 2011, Representative Ana Hernandez Luna tried again, filing House Bill 1466 in the eighty-second Texas Legislative Session.¹²³ The bill contained the same text as House Bill 4426, but this time the bill did not

115. See HOUSE RESEARCH ORGANIZATION, *Bill Digest* (May 8, 2009), <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/81-0/HB4426.PDF> (explaining House Bill 4426).

116. See *id.* (explaining the amended law’s benefits for young adults between the ages of eighteen and twenty-one).

117. See H.B. 1466, 82nd Sess., (Tex. 2011) (explaining the chapters in the state code that would be amended to accommodate SIJ petitioners).

118. See *id.* at 2 (providing a digest of the bill’s defining features).

119. SENATE RESEARCH CENTER, *Bill Analysis* (May 17, 2009), <http://www.legis.state.tx.us/tlodocs/81R/analysis/html/HB04426E.htm>.

120. See Thomas Esparza, Jr., *2009 Legislative Activity in Texas, Oklahoma and New Mexico* (Nov. 6, 2009), <http://www.tomesparza.com/2009/11/07/> (providing statistics courtesy of the Texas American Civil Liberties Union and the Mexican-American Legal Defense Fund).

121. See OPEN STATES, *HB 4426*, <http://openstates.org/tx/bills/81/HB4426/> (last visited Sept. 10, 2013) (showing the bill passed in the house with 111 votes on May 12, 2009).

122. See *id.* (showing the bill only progressing through the House).

123. See H.B. 1466, 82nd Sess., (Tex. 2011) (detailing the bill to be enacted).

make it out of the House, likely due to the political composition of the House at that time.¹²⁴

On January 14, 2013, Representative Hernandez Luna filed House Bill 496 with the same text as previous attempts.¹²⁵ Again, the bill aspires to allow “young adults” between the ages of eighteen and twenty-one to initiate proceedings for SIJ findings and to extend jurisdiction over individuals who have filed for SIJ.¹²⁶ The Bill would allow a young adult who is not a citizen or permanent resident of the United States to file a suit requesting the court to declare that the young adult has been abused, neglected, or abandoned and otherwise meets the requirements for SIJ status. Texas’s proposed change would be monumental, helping those youth between the ages of eighteen and twenty-one to initiate a proceeding for SIJ findings in a Texas family court. Thus, while Texas has not yet implemented any change to their Family Code, SIJ advocates are hopeful that Representative Hernandez Luna’s efforts will be better received in Texas’ eighty-third Legislative Session.

C. New York’s Guardianship Proceedings: Creating a Path for Persons Between the Ages of Eighteen and Twenty-One to Obtain Special Immigrant Juvenile Status

Pursuant to a 2008 amendment, New York Family Court Act Section 661(a)¹²⁷ explicitly authorizes the appointment of a guardian for a person “who is less than twenty-one years old who consents to the appointment or continuation of a guardian after the age of eighteen.”¹²⁸ Prior to the amendment, the maximum age for guardianship proceedings was eighteen.¹²⁹ This is an important change because it allows persons between

124. See THE TEXAS TRIBUNE, *82nd legislative session Bills*, <http://www.texastribune.org/session/82R/bills/HB1466/> (last visited Sept. 23, 2013) (tracking the progress of House Bill 1466).

125. See H.B. 486, 83rd Sess., (Tex. 2013) (providing the bill text and status).

126. *Id.* (“In this chapter, ‘young adult’ means a person who is at least 18 years of age and younger than 21 years of age.”).

127. See N.Y. FAM. CT. ACT § 661 (a) (McKinney 2008) (“For purposes of appointment of a guardian of the person pursuant to this part, the terms infant or minor shall include a person who is less than twenty-one years old who consents to the appointment or continuation of a guardian after the age of eighteen.”).

128. *Trudy-Ann W. v. Joan W.*, 901 N.Y.S.2d 296, 299 (2010).

129. See *In re Vanessa D. v. Deborah T.*, 856 N.Y.S.2d 868, 868 (2008) (dismissing a guardianship proceeding because the child was no longer a minor subject to the court’s jurisdiction); see also *Matter of Luis A.-S.*, 823 N.Y.S.2d 198, 199 (2006) (“However, the authority of the Family Court to appoint a guardian extends only to the person or property of

the ages of eighteen and twenty-one to initiate proceedings in a juvenile court and thus receive findings for a SIJ petition. In fact, following the 2008 amendment, *Matter of Antowa McD.*¹³⁰ expressly held that guardianship proceedings for persons between the ages of eighteen and twenty-one constitute a declaration of dependency on a juvenile court for purposes of applying for SIJ.¹³¹ Following the change, several SIJ petitioners between the ages of eighteen and twenty-one obtained SIJ findings through guardianship proceedings.¹³²

In *Matter of Sing W.C.*,¹³³ the court further acknowledged its protection of SIJ petitioners. The court determined that it possessed the authority to order the New York City Administration for Children's Services to conduct an investigation to determine guardianship for persons over the age of eighteen but under twenty-one in order to apply for SIJ, despite the agency's objection that their authority only extended to persons under the age of eighteen.¹³⁴

Further defending its position, in 2011, the New York Second Department reversed Family Court decisions denying SIJ status for a nineteen year old,¹³⁵ and a twenty year old,¹³⁶ reinforcing its view that the benefits of guardianship for SIJ purposes and the need to protect a child's best interest outweigh other countervailing considerations. In *Mohamed B.*,

a 'minor,' defined as a person not yet 18 years of age.").

130. See *In re Antowa McD.*, 865 N.Y.S.2d 576, 576 (2008) (reversing denial of findings that would enable appellant to apply for special immigrant juvenile status).

131. See *id.* ("Family court's appointment of a guardian constitutes the necessary declaration of dependency on a juvenile court.").

132. See *Trudy-Ann W. v. Joan W.*, 901 N.Y.S.2d 296, 299 (2010) ("Since we have appointed Alcie S. as Trudy-Ann's guardian, Trudy-Ann is dependent on a juvenile court."); see also *In re Jisun L. v. Young Sun P.*, 905 N.Y.S.2d 633, 635 (2010) (declaring that 21 year old appellant is dependent on the Family Court, unmarried, under 21 years of age, that reunification with one or both parents is not viable due to abuse and neglect, and that it is in his best interest to be returned to South Korea).

133. See *In re Sing W.C. v. Sing Y.C.*, 920 N.Y.S.2d 135, 142 (2011) (holding "that within the context of a proceeding commenced pursuant to Family Court Act § 661 (a) for the purpose of establishing eligibility for special immigrant juvenile status, the Legislature intended the meaning of the word 'child' to include any individual under the age of 21").

134. See *id.* at 138 (rejecting ACS's argument that, "since it was created by statute to investigate reports of suspected abuse and maltreatment of children, and the term 'child' is defined as a person under the age of 18").

135. See *In re Mohamed B.*, 921 N.Y.S.2d 145, 146 (2011) ("Mohamed B., a native of Sierra Leone, is 19 years old and unmarried.").

136. See *In re Alamgir A.*, 917 N.Y.S.2d 309, 310 (2011) ("Alamgir A., a native of Bangladesh, is 20 years old, unmarried, and has lived in the United States with nonrelatives since age 12.").

the child originally lived with his grandmother and older brother in Sierra Leone because his father regularly beat him and both parents neglected him.¹³⁷ Mohamed won a scholarship competition sponsored by a Connecticut church. The church obtained a visa for him to visit the United States.¹³⁸ Prior to his scheduled return to Sierra Leone, Mohamed became separated from his hosts while visiting Manhattan.¹³⁹ Following the separation, he lived with natives of Sierra Leone whom he met in New York City, and eventually enrolled in high school.¹⁴⁰ He then began living with his former teacher in New York.¹⁴¹ The evidence showed that Mohamed's former teacher gave him financial support, emotional support, and the ability to pursue educational goals.¹⁴²

Mohamed's former teacher commenced guardianship proceedings with Mohamed's consent.¹⁴³ Mohamed, now nineteen years old, moved for an order making findings that would enable him to apply to USCIS for SIJ status.¹⁴⁴ The Family Court granted the guardianship petition,¹⁴⁵ but denied the motion for SIJ findings due to concern about the circumstances surrounding Mohamed's separation from his hosts while in Manhattan.¹⁴⁶ The Second Department indicated that it was error to consider the underlying circumstances where the individual met the requirements of the federal Immigration and Nationality Act.¹⁴⁷ Mohamed met the requirements: he was under the age of twenty-one, unmarried, dependent on the court because he underwent guardianship proceedings, reunification with one or both parents was not viable due to abuse and neglect, and it was not in his best interest to return to Sierra Leone.¹⁴⁸ Therefore, the Family Court's focus on the circumstances surrounding Mohamed's separation from his hosts led to an improper denial of Mohamed's motion for SIJ

137. See *In re Mohamed B.*, 921 N.Y.S.2d 145, 147 (ordering that the child receive SIJ findings).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. See *In re Mohamed B.*, 921 N.Y.S.2d 145, 146 (2011) (explaining the lower court's error).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

findings.¹⁴⁹ This case illustrates that at the New York state level, persons between the ages of eighteen and twenty-one are able to receive SIJ findings by going through guardianship proceedings.

At the federal level, the USCIS Office of Administrative Appeals confirmed Section 661 as a viable option for New York SIJ petitioners.¹⁵⁰ In one case, a New York USCIS District Director denied a SIJ petition after the petitioner had received the necessary state findings. On appeal, the Office of Administrative Appeals emphasized that the juvenile court's appointment of petitioner's grandmother as his guardian in a guardianship proceeding verified that it was in petitioner's best interest to remain in the United States instead of returning to Guyana. The Office of Administrative Appeals relied on the guardianship proceeding as evidence of best interest because Section 661 determines that guardianship appointments will be based on the best interests of the child.¹⁵¹ Therefore, the Office of Administrative Appeals set precedent that the New York state guardianship law adheres to federal immigration law, creating a path for petitioners between the age of eighteen and twenty-one to petition for SIJ status. Consequently, any state that had doubts about following New York's footsteps can now do so without fear of being at odds with the federal Act.

D. California: Establishing Best Practices For Accommodating Special Immigrant Juvenile Petitioners

California's age of majority is eighteen.¹⁵² Under California state law, however, a court may retain jurisdiction over *all* juveniles until the age of twenty-one.¹⁵³ Thus, under California state law there is no conflict with the federal statute, allowing the applicant time to petition up to age twenty-one

149. See *In re Mohamed B.*, 921 N.Y.S.2d 145, 147 (2011) (reversing the lower court).

150. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., Office of Administrative Appeals (Oct. 14, 2009), http://www.uscis.gov/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2009/Oct142009_01C6101.pdf (granting special immigrant juvenile petition because petitioner met statutory requirement after being placed under the custody of his grandmother).

151. See N.Y. FAM. CT. ACT § 661 (a) (McKinney 2008) (“[T]he court may appoint a permanent guardian of a child if the court finds that such appointment is in the best interests of the child.”).

152. See CAL. FAM. CODE § 6500 (West 1994) (“A minor is an individual who is under 18 years of age.”).

153. See CAL. WELF. & INST. CODE § 303 (West 2013) (“The court may retain jurisdiction over any person who is found to be a ward or a dependent child of the juvenile court until the ward or dependent child attains the age of 21 years.”).

despite the state age of majority being eighteen.¹⁵⁴ Also, in California, SIJ petitioners have benefited from a broad interpretation of “juvenile court,” allowing their SIJ findings to be found by a superior court.¹⁵⁵ Moreover, effective January 1, 2013, California added a section to their code titled “Children in juvenile court cases eligible for special immigrant juvenile status; guidance on best practices and facilitation of exchange of information among counties.”¹⁵⁶ The section instructs the State Department of Social Services to annually provide best practices on how to assist a juvenile that is eligible for SIJ status.¹⁵⁷ The guidance helps petitioners apply for SIJ status before they turn twenty-one.¹⁵⁸ California’s focus on helping SIJ petitioners apply before they turn twenty-one (the federal age maximum) instead of eighteen (the California state age of majority), shows that California is committed to providing access to state courts to aid petitioners in obtaining the federal remedy.

California provides practical assistance to qualifying persons. For example, Los Angeles County has created a system that should serve as a model for the rest of the United States.¹⁵⁹ The program depends on the cooperation of social workers, judges, immigration officials, and pro bono lawyers working together to ensure that eligible persons are granted SIJ

154. See 8 C.F.R. § 204.11(c)(1) (2009) (“An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien: (1) Is under twenty-one years of age.”).

155. See *B.F. v. Superior Court*, 207 Cal. App. 4th 621, 630 (2012) (“We conclude the superior court sitting as a probate court has the authority and duty to make findings within the meaning of section 1101(a)(27)(J) and 8 Code of Federal Regulations part 204.11.”).

156. CAL. WELF. & INST. CODE § 10609.97 (West 2013).

157. See WELF. & INST. § 10609.97(a) (“The State Department of Social Services shall provide guidance on best practices and facilitate an exchange of information and best practices among counties on an annual basis, commencing no later than January 1, 2014, on assisting a child in a juvenile court case who is eligible for special immigrant juvenile status under Section 1101(a)(27)(J) of Title 8 of the United States Code. This exchange of information may be accomplished by posting training and other information on the department’s Internet Web site.”).

158. See *id.* § 10609.97(b) (West) (“The guidance shall include procedures for assisting eligible children in applying for special immigrant juvenile status, before the children reach 21 years of age or get married, and applying for T visas, U visas, and Violence Against Women Act self-petitions.”).

159. See Anna Gorman, *Green Cards Go Unclaimed by Many Youths in Foster Care: Certain Abused or Abandoned Dependents of the State are Eligible for Legal Residency, But Not All Know the Law*, L.A. TIMES, June 25, 2007, <http://articles.latimes.com/2007/jun/25/local/me-foster25> (“Los Angeles County is among the few areas where the law works well, experts said. The county’s program is seen as a model nationwide, because social workers, judges, immigration officials and pro bono lawyers work together to ensure that eligible juveniles get green cards.”).

status before their age prohibits it,¹⁶⁰ with the attitude, “it just takes one person to identify that someone is eligible,”¹⁶¹ California is making a difficult procedure more accessible for potential petitioners. In response, USCIS officials at that local office have streamlined their procedures for persons close to the age of twenty-one because they recognize the risk of them aging out.¹⁶² California’s efforts demonstrate that a law fixing SIJ procedural issues must also address practical realities.

VII. Recommendation

At the federal level, limited age-out protection exists. As a result of the 2008 TVPRA, USCIS can no longer deny a SIJ petition because the petitioner has reached the age of majority and can no longer claim dependency on the court. Furthermore, USCIS cannot automatically deny a petition if the petitioner turns twenty-one while the case is being adjudicated. Now, USCIS may approve the SIJ petition as long as the child is under the age of twenty-one when the petition is filed. Thus, the federal government has done its part to ensure age-out protections are in place. Accordingly, it is important for states to take action and set age-out protections for the part of the SIJ process that the state controls. Because the federal government cannot infringe state sovereignty, state legislatures must act independently to extend juvenile court jurisdiction over all SIJ eligible youth. This Note recommends that states lacking SIJ procedural protections amend their state codes to allow youth between the ages of eighteen and twenty-one to initiate SIJ findings at the state court level.

Texas’ proposed change to its state family code is the ideal solution to the age related procedural problem discussed in this Note. Its coverage of persons between the ages of eighteen and twenty-one ensures that all persons the federal Act intended to reach may apply for SIJ status. Like the Texas proposed bill, in drafting state law amendments, states should make specific mention of special immigrant juveniles because acknowledging the group will spread awareness of the remedy’s existence and significance. Also, by naming the group, there will be no question that the state intended SIJ petitioners to benefit from the amendment.

160. *Id.*

161. *Id.*

162. *Id.* at 2 (“Age out issues are of concern, . . . In order to prevent that from happening . . . we try to shorten that processing time frame as much as possible.”).

While the state changes will impact SIJ petitioners directly, the changes would also have wider implications. The nation's conversation on immigration is changing. Politicians in both parties are rethinking their stances on immigration. For example, former Republican presidential candidate Mitt Romney stated that his campaign did not do a good job connecting with Hispanic voters.¹⁶³ Many Republicans acknowledge that "the party needs to change its image" to be more welcoming of Hispanics and softer on immigration.¹⁶⁴ The need to attract Hispanic voters alone should serve as an incentive to make compromises and enact pro-immigrant measures. Hispanic voters are important because the Census estimates that by 2043, the Hispanic population will be the largest ethnic group in the United States.¹⁶⁵

The SIJ immigration remedy is not particularly controversial. SIJ status is an immigration remedy designed to help abused, neglected and abandoned children. It is much less controversial than other immigration measures. The SIJ remedy only benefits the abused, neglected, or abandoned youth. "Floodgate" concerns carry little weight. Unlike other immigration remedies, parents of SIJ beneficiaries cannot obtain lawful status as a result of their child possessing lawful status.¹⁶⁶ The parent still faces deportation if he or she entered the United States illegally. Accordingly, all political parties should be able to agree on protections for abused, neglected, and abandoned children and young adults.

Given the benefits SIJ status can confer on abused, neglected, or abandoned youth, states must act to prevent this vulnerable group of persons from losing access to a valuable federal immigration remedy. Some states have already taken action. Florida, Texas, New York, and California have all made strides to ensure that their state-level procedures for petitioning for SIJ status are accessible to persons eligible under the federal Act. An ideal state model will identify Special Immigrant Juvenile

163. *Mitt Romney on Fox News Sunday: Heart Told Him He'd Win, Until He Saw Florida*, ASSOCIATED PRESS, Mar. 3, 2013, <http://bigstory.ap.org/article/romney-heart-told-him-hed-win-until-he-saw-fla>.

164. See Tim Eaton, *Immigration Bills Dwindle at Texas Legislature*, STATESMAN (Feb. 3, 2013), <http://www.statesman.com/news/news/immigration-bills-dwindle-at-texas-legislature/nWFCR/> (discussing the changes leading to immigration becoming a nonissue).

165. See *Whites Will No Longer Be a Majority in the U.S. by 2043 as Hispanic Population Surges, Census Data Reveals*, ASSOCIATED PRESS, Dec. 12, 2012, <http://www.dailymail.co.uk/news/article-2247119/2043-census-prediction-US-whites-longer-majority-Hispanic-population-surges.html> (projecting changes in demographics).

166. See 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2006) (explaining neither natural nor adoptive parent can benefit from child's SIJ status).

status as a federal immigration remedy available to persons under the age of twenty-one, allowing youth between the ages of eighteen and twenty-one to initiate proceedings despite the state's age of majority. States must make efforts to complement the federal SIJ remedy. A juvenile under federal law should be a juvenile under state law. Anything else defies justice, compassion, and common sense.