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Special Immigrant Juveniles: All the Special Rules

by Laura E. Ploeg

Introduction

In the past, many alien children who had been mistreated by their parents were protected from abuse by intervening State courts, but they faced legal obstacles preventing them from remaining legally in the United States. A State court may have determined that a child was abused, abandoned, or neglected, removed the child from the harmful caregiver, found that it was in the best interests of the child to remain in the United States, and placed the child in foster care. However, when the child aged out of the juvenile court's jurisdiction, he or she often had no means of obtaining legal immigration status, attending college, or getting a job. To address this intersection between State family law and Federal immigration law, Congress created the Special Immigrant Juvenile ("SIJ") classification through its enactment of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. *See* Special Immigrant Status, 58 Fed. Reg. 42,843, 42,844 (Aug. 12, 1993) (codified at 8 C.F.R. pts. 101, 103, 204, 205, 245).[1]

However, as originally enacted, the law did not exempt juveniles who qualified for this classification from the Immigration and Nationality Act's other requirements for obtaining legal status. For example, otherwise qualified juveniles had difficulty obtaining visas because of their inability to demonstrate that they would not become a public charge in the United States. *See id*. at 42,844, 42,849. *See generally* section 212(a)(4) of the Act, 8 U.S.C. § 1182(a)(4). Also, many juvenile aliens faced insurmountable hurdles to obtaining permanent residence because of certain bars to admissibility based on past immigration law violations, such as working without authorization or having entered the country without inspection. *See* 58 Fed. Reg. at 42,844, 42,849. *See generally* section 245(c) of the Act, 8 U.S.C. § 1255(c). Congress addressed these issues in the 1991 technical amendments, relieving many of the burdens for juvenile aliens posed by other provisions of the immigration laws. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No.

102-232, 105 Stat. 1733. The statutory scheme relating to SIJ classification has since been amended several times, including important changes made by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 ("TVPRA").

This article will discuss the immigration benefits conferred by SIJ status and how an alien can obtain them. It will focus on practical and procedural considerations, note limitations of SIJ status, and contrast SIJ status with other types of immigration relief available to juveniles.

Benefits Conferred by SIJ Status

Overview of Immigration Benefits

SIJ status provides the juvenile with the opportunity to adjust status to that of a lawful permanent resident ("LPR") under section 245(h) of the Act, with the possibility of naturalization 5 years after adjustment. Section 316(a) of the Act, 8 U.S.C. § 1427(a); *see also* Memorandum from William R. Yates, Assoc. Dir. for Operations, United States Citizenship and Immigration Service ("USCIS"), to USCIS officials, at 2 (May 27, 2004), *reprinted in* 81 Interpreter Releases, No. 25, June 28, 2004, app. IV at 840 [hereinafter "Yates Memo"]. These benefits are somewhat limited by the fact that SIJs who adjust to LPR status cannot petition for an immigrant visa on behalf of their natural parents, even if they are still living with one parent who was not responsible for their abuse, abandonment, or neglect. Section 101(a)(27)(J)(iii)(II) of the Act, 8 U.S.C. § 1101(a)(27)(J)(iii)(II); *see also* Yates Memo, *supra*, at 2. Therefore, the child's immigration situation may remain a bit precarious because of the uncertainty that may linger regarding a parent's immigration status.

Benefits with Respect to Inadmissibility Grounds and Adjustment of Status

Recipients of SIJ status avoid legal issues relating to having entered the country without inspection. First, SIJs benefit with regard to statutory eligibility for adjustment of status. In general, an alien who entered without inspection is ineligible for adjustment of status and there are very few exceptions to this rule. *See* section 245(a) of the Act (requiring an adjustment of status applicant to be "inspected and admitted"). As noted above, this default rule created serious obstacles for many juvenile aliens prior to the creation of the SIJ classification. Now, however, SIJs are deemed to have been paroled into the country and are not barred from adjustment for having entered without inspection. Section 245(h)(1) of the Act; 8 C.F.R. § 1245.1(e)(3).

Another obstacle to legalization experienced by many aliens who previously entered without inspection is a 3- or 10-year period of inadmissibility triggered when they depart the United States after having been unlawfully present. Aliens who were unlawfully present for between 180 days and 1 year are inadmissible for 3 years, and aliens who were unlawfully present for over a year are inadmissible for 10 years from the date of their departure. Section 212(a)(9)(B)(i) of the Act. Therefore, aliens who entered without inspection and accumulated unlawful presence have a serious dilemma: they cannot adjust their status from within the United States, but if they depart the country they face a long period of inadmissibility. For juveniles, this is alleviated somewhat by the fact that they do not accrue unlawful presence while under 18 years of age. Section 212(a)(9)(B)(iii) of the Act. However, SIJs can bypass this dilemma entirely. *See* section 245(h) of the Act.

Many other grounds of inadmissibility are also inapplicable to SIJs, and waivers are available for many of the grounds that still apply. Section 245(h)(2) of the Act. For example, the ground of inadmissibility related to being a public charge is inapplicable. *Id.* As a practical matter, this means that the SIJ applicant need not file an affidavit of support. Additionally, there is a fee waiver available for SIJ applicants who are indigent. 8 C.F.R. § 103.7(c). Also, grounds of inadmissibility related to labor certification, misrepresentations, stowaways, documentation requirements, and prior removals are inapplicable. *See* section 245(h)(2)(A) of the Act.

In addition to the inapplicability of many grounds of inadmissibility, waivers are available for many others, although some national security and criminal grounds, including those based on a crime involving moral turpitude and a violation of a law relating to a controlled substance, are not waivable.[2] Section 245(h)(2)(B) of the Act; *see also* section 212(a)(2)(A) of the Act. Waivers are considered on an individual basis, and the factors to be considered in determining whether one should be granted are "humanitarian purposes,

family unity, or when it is otherwise in the public interest; however, the relationship between the alien and the alien's natural parents or prior adoptive parents shall not be considered a factor in a discretionary waiver determination." 8 C.F.R. § 1245.1(e)(3). Finally, even many criminal grounds will not pertain to an SIJ because juvenile offenses are not considered "convictions" for purposes of the immigration laws. *See Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981) ("It is settled that an act of juvenile delinquency is not a crime in the United States and that an adjudication of delinquency is not a conviction for a crime within the meaning of our immigration laws.").

Eligibility Requirements for SIJ Classification

There are several important eligibility requirements for SIJ classification. First, at the time of filing, the alien must be: (a) under 21 years of age; (b) unmarried (and remain so at the time of adjudication); and (c) physically present in the United States. In addition, the Secretary of the Department of Homeland Security ("DHS") must consent to the grant of SIJ status; and a U.S. juvenile court with jurisdiction over the child with respect to dependency, commitment, or custody must have issued an order making specific determinations, including that reunification with one or both parents is not viable and that returning to the country of nationality or last residence is not in the child's best interests. Section 101(a)(27)(J) of the Act; 8 C.F.R. § 204.11(c)-(d)(2).

Under 21 and Unmarried

The requirement that an applicant for SIJ status be unmarried and under 21 years old parallels the general definition of a "child" under the Act. *See* section 101(b)(1) of the Act; *see also* Memorandum from Donald Neufeld, Acting Assoc. Dir. of Domestic Operations, USCIS, to USCIS officials, at 3 (Mar. 24, 2009), *reprinted in* 86 Interpreter Releases, No. 16, Apr. 20, 2009, app. III at 1117 [hereinafter "Neufeld Memo"]. It has recently been clarified that the applicant must be under the age of 21 only at the time of filing. *See* USCIS Policy Memorandum, Implementation of the Special Immigration Juvenile *Perez-Olano* Settlement Agreement, at 2, 4 (Apr. 4, 2011), *reprinted in* 88 Interpreter Releases, No. 15, Apr. 11, 2011, app. VI at 992 [hereinafter "*Perez-Olano* Memo"]; Neufeld Memo, *supra*, at 2-3. The TVPRA amendments provided aging-out protections that explicitly prevent an alien who files before the age of 21, but surpasses that age prior to adjudication, from being denied SIJ classification on those grounds. *See* TVPRA § 235(d)(6), 122 Stat. at 5080; Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978, 54,980 (proposed Sept. 6, 2011) (Supplementary Information). Nonetheless, after attaining the age of majority under State law, which may be less than 21, obtaining the necessary predicate State court order becomes more difficult because the juvenile court may not have jurisdiction over the alien. The alien must remain unmarried, not just at the time of filing, but until the date of adjudication. 8 C.F.R. §§ 204.11(c)(2), 205.1(a)(3)(iv)(B).

DHS Consent

Eligibility for SIJ classification also requires the consent of the Secretary of DHS. Section 101(a)(27)(J)(iii) of the Act. Post-TVPRA, this requirement, in practice, simply requires USCIS approval of the Form I-360 (Petition for Amerasian, Widow(er) or Special Immigrant). *See* Neufeld Memo, *supra*, at 3. Separate consent requirements apply in the case of an alien in the custody of the Department of Health and Human Services ("HHS"). *See* discussion *infra*.

Juvenile (State) Court Order

A very important component of any petition for SIJ classification is the predicate State court order. This order must contain the necessary explicit factual findings for the alien to be eligible for SIJ status. Most significantly, the child must be declared dependent upon the court or "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"; reunification with one or both parents must be found not viable because of abuse, abandonment, or neglect; and it must be found that it is not in the best interests of the child to return to the country of origin or last residence. Sections 101(a)(27)(J)(i)-(ii) of the Act.

Dependency, Commitment, or Custody

The first necessary element of the State court order is that it must demonstrate that the alien "has been declared dependent" upon the court or placed by the court into the custody of a State agency or State-appointed individual or entity. Section 101(a)(27)(J)(i) of the Act.

"Juvenile court" includes not only a juvenile court but also any other court with jurisdiction over the custody and care of juveniles. Although the phrase "declared dependent" may be used in summary, the statutory requirement encompasses not just dependency in the traditional sense, but all matters where a juvenile (or other relevant) court has jurisdiction over the child with respect to dependency, commitment, or custody and enters some order with respect to the child. *See* 76 Fed. Reg. at 54,980 (Supplementary Information). Additionally, even where the juvenile court order does not have continuing effect over the child if the child reaches majority, the order is still sufficient for purposes of establishing eligibility for SIJ status. *See Perez-Olano* Memo, *supra*, at 4; *see also* 76 Fed. Reg. at 54,980.

Reunification Not Viable

The juvenile or other State court must make an explicit finding that reunification of the child with one or both parents is not viable due to abuse, abandonment, neglect, or a similar basis under State law. This requirement arguably effectuates one of the primary purposes of the creation of the SIJ classification—providing relief to mistreated alien children. Pursuant to the TVPRA, the requirement is less stringent than under the previous standard. Prior to the TVPRA amendments, SIJ classification required a State court finding that the child was eligible for long-term foster care, which effectively meant that reunification was not viable with either parent. Under the current version of the statute, because it is only reunification with one parent that must be not viable, the alien child could potentially be living with one parent and still qualify for SIJ status. *See Perez-Olano* Memo, *supra*, at 4; Neufeld Memo, *supra*, at 2; *see also* 76 Fed. Reg. at 54,980 (Supplementary Information). Also, there is no requirement that the abuse, abandonment, or neglect occurred within the United States.

Removal Not in the Best Interests of the Child

Finally, the State court must explicitly find that it would not be in the best interests of the child to return to his or her country of nationality or last habitual residence. 8 C.F.R. § 204.11(c)(6). Because such factual findings are within the expertise of the juvenile court, they generally will not be disturbed by immigration officials. *See* 76 Fed. Reg. at 54,980 (Supplementary Information); 58 Fed. Reg. at 42,847 (Supplementary Information) ("[T]he decision concerning the best interest of the child may only be made by the juvenile court or in administrative proceedings authorized or recognized by the juvenile court . . . . The Service does not intend to make determinations in the course of deportation proceedings regarding the 'best interest' of a child for the purpose of establishing eligibility for special immigrant juvenile classification.").

Procedural and Other Special Considerations

This section addresses certain procedural issues. First, it will address the usual process for petitioning for SIJ classification and applying for adjustment of status, which includes two main steps: (a) obtaining the State court judgment, finding, or determination; and (b) submitting the appropriate forms, with supporting documents, to USCIS. Second, it will address some slight differences for juvenile aliens who are already in removal proceedings when they petition for SIJ classification. Finally, it will address the special rules that apply to children in the custody of HHS.

Obtaining a State Court Judgment—How and Why?

Congress has apparently left to juvenile and other State courts the authority to exercise their expertise in determining the best interests of the children within their respective jurisdictions. This task has historically been within the purview of the State courts. *See generally Troxell v. Granville*, 530 U.S. 57 (2000); *Nicholas v. Nicholas*, 967 N.Y.S.2d 419 (N.Y. App. Div. 2013). As noted above, these findings lie within the expertise of the State court in its application of State law. *See* 76 Fed. Reg. at 54,980 (Supplementary Information).

Another interesting procedural and practical issue is how the alien can obtain the necessary State court order. As mentioned, an SIJ petitioner is regarded as "dependent" upon a juvenile or other State court for as long as the court has the jurisdiction and authority to enter an order with respect to the alien's care or custody. Therefore, the alien can obtain the requisite order in a variety of ways. For example, the order can be incident to a custody or guardianship decision, or even a divorce. The specific options and associated procedures will vary by State.

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CIRCUIT COURT DECISIONS FOR DECEMBER 2013 AND CALENDAR YEAR 2013 TOTALS

by John Guendelsberger

The United States courts of appeals issued 242 decisions in October 2013 in cases appealed from the Board. The courts affirmed the Board in 222 cases and reversed or remanded in 20, for an overall reversal rate of 8.3%, compared to last month's 9.8%. There were no reversals from the First, Fifth, Sixth, and Tenth Circuits.

The chart below shows the results from each circuit for December 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	9	9	0	0.0
Second	18	13	5	27.8
Third	7	6	1	14.3
Fourth	16	15	1	6.3
Fifth	13	13	0	0.0
Sixth	3	3	0	0.0
Seventh	5	4	1	20.0
Eighth	5	4	1	20.0
Ninth	148	138	10	6.8
Tenth	6	6	0	0.0
Eleventh	12	11	1	8.3
All	242	222	20	8.3

The 242 decisions included 117 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 52 direct appeals from denials of other forms of relief from removal or from findings of removal; and 73 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	117	105	12	10.3
Other Relief	52	48	4	7.7
Motions	73	69	4	5.5

The 12 reversals or remands in asylum cases involved credibility (6 cases), past persecution, well-founded fear, particular social group, the persecutor bar, and the Convention Against Torture (2 cases). Reversals in the "other relief" category covered issues related to application of the categorical approach, ineffective assistance of counsel, retroactive application of the section 212(a)(9)(C) ground of inadmissibility, and a remand for fact-finding. The motions cases addressed changed country conditions (two cases), an in absentia order of removal, and evidentiary issues.

The chart below shows the combined numbers for calendar year 2013 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	74	55	19	25.7
Eleventh	135	113	22	16.3
Ninth	1107	953	154	13.9
Tenth	44	39	5	11.4
First	57	51	6	10.5
Third	200	183	17	8.5
Second	348	321	27	7.8
Eighth	48	45	3	6.3
Sixth	97	94	3	3.1
Fourth	138	134	4	2.9
Fifth	160	157	3	1.5
All	2408	2145	263	10.9

Last year's reversal rate for calendar year 2012 was 9.3% with 2711 total decisions and 253 reversals.

The numbers by type of case on appeal for calendar year 2013 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1190	1041	149	12.5
Other Relief	561	490	71	12.7
Motions	657	614	43	6.5

As the chart below indicates, over the last 8 calendar years we have seen a significant downward trend in both the number of circuit court decisions each year and the number and percentage of reversals or remands.

	2006	2007	2008	2009	2010	2011	2012	2013
Total Cases	5398	4932	4510	4829	4050	3123	2711	2408
Reversals	944	753	568	540	466	399	253	263
% Reversals	17.5	15.3	12.6	11.2	11.5	12.8	9.3	10.9

The reversal rates by circuit for the last 8 calendar years are shown in the following chart.

Circuit	2006	2007	2008	2009	2010	2011	2012	2013
First	7.1	3.8	4.2	5.6	8.6	19.0	10.4	10.5
Second	22.6	18.0	11.8	5.5	4.9	4.9	4.8	7.8
Third	15.8	10.0	9.0	16.4	10.7	11.3	6.7	8.5
Fourth	5.2	7.2	2.8	3.3	5.2	5.2	4.6	2.9
Fifth	5.9	8.7	3.1	4.0	13.5	2.9	7.5	1.9
Sixth	13.0	13.6	12.0	8.6	8.7	6.8	6.6	3.1
Seventh	24.8	29.2	17.1	14.3	21.0	19.4	8.5	25.7
Eighth	11.3	15.9	8.2	7.7	8.1	7.5	7.5	6.3
Ninth	18.1	16.4	16.2	17.2	15.9	18.6	14.4	13.9
Tenth	18.0	7.0	5.5	1.8	4.9	9.5	6.3	11.4
Eleventh	8.6	10.9	8.9	7.1	6.5	6.8	5.8	16.3
All	17.5	15.3	12.6	11.2	11.5	12.8	9.3	10.9

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RECENT COURT OPINIONS

First Circuit:

Perez v. Holder, 740 F.3d 57 (1st Cir. 2014): The First Circuit denied the petition for review of the Board's denial of a motion to reopen. The petitioner had been denied withholding of removal to Guatemala, where he feared harm from gang members. The petitioner had suffered three incidents in Guatemala involving threats or harm by gang members. He believed that he was targeted because, as a high school teacher, he had advised students to avoid joining gangs. In upholding the Immigration Judge's denial of relief, the Board held that the petitioner had not established past persecution and had not shown a nexus between his past harm and a protected ground, because he had not demonstrated that the gang's criminal acts were motivated by his political opinion or purported membership in a particular social group of teachers who publicly oppose gang membership. The Board found the petitioner's claimed likelihood of future persecution on account of his activities as a teacher to be "highly speculative," adding that the record did not contain evidence of similarly situated individuals being targeted for persecution in Guatemala on account of a protected ground. The petitioner did not appeal from the Board's decision. Instead, he moved to reopen 2 months later, based on new evidence that he claimed demonstrated the persecution of teachers who publicly dissuaded their students from joining gangs. The circuit court upheld the Board's denial of the motion to reopen. The court found no support for the petitioner's claim that the Board did not consider all of his original evidence and found that the new evidence submitted with the motion was not material to the question of nexus to a protected ground. The court observed that the Board found the new evidence to be similar to evidence previously submitted, which indicated widespread violence in Guatemala and did not mention whether the teachers harmed by gangs had publicly opposed gangs. The court found this conclusion to be "neither irrational nor arbitrary," concluding that the new evidence did not "fill the gap" regarding nexus that existed in the original record, thus rendering it immaterial.

Orabi v. Att'y Gen. of U.S., 738 F.3d 535 (3d Cir. 2014): The Third Circuit granted the petition for review, reversing a Board decision finding the petitioner removable as an alien convicted of an aggravated felony based on his 2010 Federal conviction for conspiracy to commit fraud (relating to counterfeiting devices and identity theft). The Immigration Judge believed that the petitioner's appeal of his criminal conviction to the Second Circuit had been withdrawn; the Third Circuit concluded that the criminal appeal remained pending. The issue before the Third Circuit was whether the district court conviction was a final judgment for immigration purposes in light of the pending appeal. The court observed that prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, a conviction was not final for immigration purposes until direct appeal had been exhausted or waived, citing *Matter of Ozkok*, 19 I&N Dec. 546, 552 n.7 (BIA 1988). The court noted that the IIRIRA amended the definition of the term "conviction" contained in section 101(a)(48)(A) of the Act, and the new definition did not refer to appeals. However, the court did not agree with the circuits that have interpreted the statutory

change to have eliminated *Ozkok*'s finality rule from the definition of a conviction. *E.g.*, *Planes v. Holder*, 686 F.3d 1033 (9th Cir. 2012). The court stated that Congress sought to expand the scope of what constitutes a conviction to address provisions designed to ameliorate the consequences of a conviction, specifically pointing to the inclusion of "deferred adjudications" under the new definition. The court observed that IIRIRA's definition adopted most of the Board's definition in *Matter of Ozkok* but explicitly eliminated the finality requirement for deferred adjudications. The court interpreted the statute's silence regarding exhaustion of appeal as a lack of intent by Congress to alter the existing finality rule for convictions not involving deferred adjudication. The court clarified that its ruling applies to direct appeals only, agreeing with other circuits that it would not retain jurisdiction for immigration purposes in the case of a collateral appeal. The decision was by a three-judge panel and included a dissenting opinion.

Fourth Circuit:

Temu v. Holder, No. 13-1192, 2014 WL 169932 (4th Cir. Jan. 16, 2014): The Fourth Circuit granted the petition for review of a decision of the Board denying an application for asylum from Tanzania. The petitioner claimed that he suffered past persecution based on his membership in a particular social group comprised of individuals with bipolar disorder who exhibit erratic behavior. The petitioner testified that his severe bipolar disorder caused him to spend years in asylums and prisons in Tanzania, where he was subjected to violent physical abuse. An expert testified that in Tanzania, the erratic behavior caused by such illness is viewed (even by medical professionals) as a sign of demonic possession, which is believed to be contagious. As a result, the petitioner found himself abandoned by family and friends. He was subjected to severe beatings and other inhumane treatment by nurses and prison guards, who referred to the petitioner as being "demon possessed." In denying asylum, an Immigration Judge found that (1) the petitioner's proposed social group lacked the requisite elements of immutability, particularity, and social visibility; and (2) even if the group was viable, the petitioner had not demonstrated that his persecution was motivated by his group membership. The Board adopted the Immigration Judge's findings in affirmance. The circuit court rejected the Immigration Judge's second finding because of unequivocal evidence of nexus. The court pointed to the nurses' specific statement that "this is how we treat people who are mentally ill like you"; the fact that the nurses and guards referred to the petitioner as "demon possessed"; and evidence that the prison guards beat the petitioner more severely than other prisoners, but the same as other prisoners with mental illness. The court also noted that despite finding no nexus in the asylum analysis, the Immigration Judge specifically stated that the petitioner "was singled out for more frequent beatings because he was mentally ill" as a basis for granting alternative protection under the Convention Against Torture in the same decision. Addressing the Immigration Judge's first finding, the court concluded that the proposed social group satisfied the requirements of the Board's decisions in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), and *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). The court found that the Immigration Judge's analysis erroneously referenced visibility in the ocular sense, noting, for example, that individuals exhibiting visibly erratic behavior might be targeted, irrespective of whether they suffer from bipolar disorder, instead of using the formulation applied in Board precedent decisions, where social visibility is used to mean "recognizable by others in the community." The court found this correct standard to have been satisfied, because evidence of record established that Tanzanians appear to view the mentally ill as a group. The court further found legal error in the Board's analysis of the particularity requirement. In finding that "bipolar disorder" (which covers a wide range of severity) and "erratic behavior" both lacked sufficient particularity, the Board considered each part of the group separately, rather than as a whole. The court concluded that bipolar disorder is not overly broad within the proposed group because, viewing the two elements together, membership is limited only to those with mental illness severe enough to be "visibly, identifiably disturbed." Regarding immutability, the court did not agree with the Board's conclusion that because the erratic behavior can be controlled with medication, the group was not immutable, since the record also established that the petitioner would lack consistent access to such medication if returned to Tanzania. Furthermore, the court observed that the record established that bipolar disorder itself is not curable, even if its symptoms can be controlled. The Board's decision was vacated, and the record was remanded.

Sixth Circuit:

Hanna v. Holder, No. 12-4272, 2014 WL 184500 (6th Cir. Jan. 17, 2014): The Sixth Circuit granted the petition for review, reversing the Board's decision regarding the

petitioner's removability but affirming its finding that the petitioner is ineligible for asylum. The petitioner, a Chaldean Christian, had been granted landed immigrant status in Canada as a minor. He subsequently followed his family to the U.S., where he obtained lawful permanent resident ("LPR") status in 1998. The following year, he was convicted of felonious assault under section 750.82 of the Michigan Compiled Laws and of driving with a suspended license. The petitioner was convicted in State court, assigned to Youthful Trainee Status, and sentenced to 30 days' imprisonment and 2 years of probation. As a result of the conviction, he was placed into removal proceedings and his first counsel conceded the petitioner's removability for having been convicted of a crime involving moral turpitude ("CIMT"). Although the petitioner was initially denied all relief, proceedings were later reopened based on changed conditions in Iraq impacting Chaldean Christians. Represented by new counsel, the petitioner sought to withdraw his prior pleadings. However, the Immigration Judge held that the petitioner was bound by his prior counsel's concession of removability. The judge found the petitioner ineligible for asylum because he had been firmly resettled in Canada but granted his application for withholding of removal to Iraq. The Board affirmed. The circuit court concluded that the petitioner should be relieved of the admission of prior counsel because he established that his prior admission would lead to an unjust result. The court agreed with the petitioner's contention that the record did not establish that he pled to facts that would constitute a CIMT. The court observed that the Immigration Judge determined that the petitioner had not committed a particularly serious crime, finding credible his testimony that he was never in close proximity to his victim and did not intend to attack him. Furthermore, the court pointed to a subsequent change in law in the form of an unpublished circuit decision finding that the statute under which the petitioner was convicted is likely divisible. Noting that the Board had focused on whether prior counsel's concession was binding, the court remanded for the Board to consider for the first time whether the conviction was for a CIMT. However, the court upheld the Board's firm resettlement determination, finding the petitioner ineligible for asylum. In doing so, the court held that the petitioner's testimony that he had received permanent residence in Canada satisfied the Government's burden of presenting evidence of firm resettlement under *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), and that substantial evidence supported the conclusion that he was firmly resettled. The court held that the Board did not abuse its discretion in finding that an exception under 8 C.F.R. § 1208.15(a) did not apply where the petitioner remained in Canada for 1 year and 10 months, during which time he attended school and church and his family opened a business and returned to Canada from travel abroad. The court also noted that the petitioner traveled intermittently to Canada from 1993 (when he emigrated with his family to the U.S.) until 1998 (when he obtained LPR status), and that he has a sister who is a Canadian citizen residing in that country. The court was not persuaded by the petitioner's alternative argument that his firm resettlement should not be relevant where he did not apply for asylum until he had obtained LPR status in the U.S., observing that section 208(b)(2)(A)(vi) of the Act "contains no suggestion that events" occurring after entry to the U.S. have any bearing on determining firm resettlement prior to entry.

Seventh Circuit:

Darif v. Holder, 739 F.3d 329 (7th Cir. 2014): The Seventh Circuit denied a petition for review of the Board's decision denying all claims for relief from removal. The petitioner had been granted conditional residence as the spouse of a U.S. citizen. However, the qualifying marriage was later revealed to be a sham. The petitioner was convicted of marriage fraud, conspiracy to commit marriage fraud, and witness tampering. As a result, the petitioner's conditional status was revoked by the Department of Homeland Security and he was placed in removal proceedings. The petitioner continued to claim that his marriage was bona fide; his wife filed a second Form I-130 (Petition for Alien Relative) on his behalf, and the couple also filed a second Form I-751 (Petition to Remove Conditions of Residence) based on their continuing marriage. The petitioner additionally filed his own Form I-751 claiming that his removal would result in extreme hardship. The Immigration Judge denied the latter petition, finding the petitioner ineligible for such waiver while he was still legally married. The petitioner appealed to the Board; during the pendency of the appeal, he filed a motion to reopen based on the fact that he had now divorced. The Board jointly considered the appeal and the motion. In denying the Form I-751 in the exercise of its discretion, the Board found that the marriage fraud conviction outweighed the claimed hardships. The Board alternately found that the petitioner had not established that any of the hardships were extreme. The circuit court stated that it had no jurisdiction to review discretionary forms of relief, including extreme hardship waivers. While the

court noted that the petitioner had raised a constitutional claim that the Immigration Judge had denied him of due process, the court held that the right to due process "does not extend to discretionary forms of relief from removal." The court noted that it has jurisdiction to consider whether the proceedings before the Immigration Judge satisfied all statutory and regulatory procedural requirements, but that in this case, the petitioner had waived this claim, raising it for the first time in his reply brief. The court alternately found that even if the petitioner had timely raised it and was able to establish such procedural shortcomings before the Immigration Judge, he could not establish prejudice, because the Board's discretionary denial was based on its own independent review, without reliance on the Immigration Judge's decision.

Ninth Circuit:

Negrete-Ramirez v. Holder, No. 10-71322, 2014 WL 211768 (9th Cir. Jan. 21, 2014): The Ninth Circuit granted the petition for review of a decision of the Board upholding an Immigration Judge's order of removal and finding the petitioner ineligible for a section 212(h) waiver. The petitioner initially entered the United States in 1996 as a B-2 visitor. She later obtained lawful permanent residence by adjusting her status. Four years later, she was convicted of two counts of committing a lewd act upon a child. When she subsequently traveled abroad, she was paroled upon return and placed into removal proceedings. The Government charged the petitioner with inadmissibility under section 212(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude. At her removal hearing, the Immigration Judge found that her conviction was for an aggravated felony and held that she was ineligible for a section 212(h) waiver because her conviction occurred after she had adjusted her status. The circuit court examined the language of section 212(h), which bars those admitted to the United States as LPRs if *since the date of such admission*, they were convicted of an aggravated felony. The court found that deference under *Chevron* was not warranted because the statutory language was unambiguous. The court further held that the statutory term "admission" "does not encompass a post-entry adjustment of status." Rather, the court found that it means "passage into the country from abroad at a port of entry." Although the court had interpreted the statutory terms "admitted" and "admission" to include adjustment of status in three of its prior decisions, it stated that none of those cases involved "statutory language that is divisible into two distinct phrases, each with its own term of art, like that in § 212(h)." The court pointed to the statute's requirement that the alien had (1) previously been admitted (2) as an alien lawfully admitted for permanent residence. The court concluded that if Congress had intended to bar all LPRs (whether admitted or adjusted), it would have omitted the first phrase. The court cited the basic principle of statutory construction that a statute should not be interpreted to render a provision superfluous. The court also cited to precedent decisions of the Third, Fourth, Fifth, Seventh, and Eleventh Circuits that are consistent with its holding, noting that some of those circuits have opined as to why Congress may have chosen to bar certain LPRs but not others. The court itself concluded that regardless of the reason, such a result was permissible and that since the statute's language is unambiguous, judicial inquiry is complete. The court remanded the record to allow the petitioner to apply for section 212(h) relief.

BIA PRECEDENT DECISIONS

In two companion cases, *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), and *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), the Board revisited its test for defining a "particular social group" and clarified that the "social visibility" element was never intended to require on-sight visibility. To avoid confusion, the Board renamed the test "social distinction."

The Board noted that its definition of a "particular social group" had been widely, though not universally, adopted by the circuit courts. The two main critics—the Third and Seventh Circuits—both interpreted social visibility as requiring "ocular" visibility, focusing on the literal meaning of the term "visible," and rejected it for that reason. *See Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc); *Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582 (3d Cir. 2011). The Third Circuit had also rejected the Board's particularity requirement, reasoning that it was "hard-pressed" to identify a difference between it and social visibility.

After reviewing its precedent decisions, the Board concluded that the determinative factor for purposes of social visibility is, and has always been, whether a group is meaningfully *distinct* in the society in question. For instance, in *Matter of Toboso-Alfonoso*, 20 I&N Dec. 819 (BIA 1990), the Board found that a group comprised of homosexuals in Cuba was a particular social group.

The fact that homosexuality is an internal trait not observable to the naked eye did not prevent homosexuals, as a group, from being regarded as a discrete segment of Cuban society. The Board also pointed to *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), and *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988), as being consistent with this understanding.

To properly focus the inquiry, the Board adopted a new phrase—"social distinction"—to identify the test. Emphasizing that this was simply a change in terminology, and not a change in approach, the Board stated that its past decisions on the topic remain good law.

Moreover, answering the Third Circuit's criticism regarding the overlap between the particularity and social distinction requirements, the Board pointed out in *Matter of M-E-V-G-* that particularity is a stand-alone requirement. The Board stressed that an applicant claiming membership in a "particular social group" must prove *three* elements: the group must be (1) comprised of persons with a common immutable characteristic, (2) defined with sufficient particularity, and (3) socially distinct within the society in question.

Matter of W-G-R- and *Matter of M-E-V-G-* both addressed another issue in the "particular social group" analysis: whose perspective controls for purposes of assessing whether a proposed group is socially distinct. The Board disagreed with the Ninth Circuit's recent suggestion in *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1089 (9th Cir. 2013) (en banc), that "the perception of the persecutors may matter the most," finding that group recognition (or "distinction") is appropriately measured from the perception of the society in question. Whether it is that of the national society or one of a secluded segment or region, the Board explained, depends on the circumstances of each case, including whether the persecution itself is geographically confined.

Applying this understanding, the Board determined in *Matter of W-G-R-* that the proposed group—former members of the Mara 18 gang in El Salvador who have renounced their gang membership—lacked social distinction. The Board found no evidence that Salvadoran society considered such individuals to be a meaningfully distinct segment within the community. Concluding that the group was also too diffuse and subjective to satisfy the particularity requirement, the Board dismissed the respondent's appeal.

The Board remanded *Matter of M-E-V-G-* for the Immigration Judge to apply the "particular social group" rubric, as clarified in this decision.

REGULATORY UPDATE

79 Fed. Reg. 3214 (Jan. 17, 2014)

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2011–0108]

RIN 1601–ZA11

Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs

AGENCY: Office of the Secretary, DHS.
ACTION: Notice.
SUMMARY: Under Department of Homeland Security (DHS) regulations, U.S. Citizenship and Immigration Services (USCIS) may approve petitions for H–2A and H–2B nonimmigrant status only for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the **Federal Register**. That notice must be renewed each year. This notice announces that the Secretary of Homeland Security, in consultation with the Secretary of State, is identifying 63 countries whose nationals are eligible to participate in the H–2A and H–2B programs for the coming year.
DATES: *Effective Date:* This notice is effective January 18, 2014, and shall be without effect at the end of one year after January 18, 2014.

Special Immigrant Juveniles *continued*

The Petitioning and Adjustment Process

After obtaining the necessary State court order, the alien can commence the petitioning process with USCIS. A petition for SIJ classification is made on a Form I-360. In conjunction with the petition, the petitioner must submit the requisite State court order and proof of age. 8 C.F.R. § 204.11(d). Although certain grounds of admissibility under section 212(a)(7)(A) of the Act related to documentation requirements do not apply to an SIJ applicant, the alien must still prove his or her age in order

to establish eligibility for SIJ status. Section 245(h) of the Act; *see also* 8 C.F.R. § 204.11(c)(1). Generally, a birth certificate and/or passport will suffice for this purpose. *See* Yates Memo, *supra*, at 3 n.6.

Along with the Form I-360, the petitioner will generally also concurrently file a Form I-485 (Application to Register Permanent Residence or Adjust Status), because approval of the Form I-360 entitles the alien to adjust status to that of a permanent resident. Section 245(h) of the Act. To support the application for adjustment of status, the alien must submit proof of identity, two passport photos, a medical examination, certified copies of the dispositions of any arrests (including juvenile),[3] any relevant applications for waivers of inadmissibility, and, if the applicant is over 14 years old, a Form G-325A (Biographical Information). *See* Yates Memo, *supra*, at 3.

The TVPRA amended the statute to provide that USCIS is required to adjudicate the SIJ petition within 180 days. TVPRA § 235(d)(2), 122 Stat. at 5080. A petitioner can be required to attend an interview with a USCIS officer. However, the interview can be waived if it is unnecessary or if the petitioner is under 14 years of age. 8 C.F.R. § 245.6; *see also* Neufeld Memo, *supra*, at 4. During the interview, the petitioner cannot be forced to contact an alleged abuser. Section 287(h) of the Act, 8 U.S.C. § 1357(h).

Juveniles Already in Removal Proceedings

The SIJ petition and adjustment procedures differ slightly for aliens already in removal proceedings at the time of filing. USCIS has exclusive jurisdiction over adjudication of the Form I-360, so in cases where a petition for SIJ classification is pending, termination, administrative closure, or a continuance may be appropriate. *See generally Matter of Avetisyan*, 25 I&N Dec. 688, 696 (BIA 2012) (discussing factors relevant to determine if administrative closure is appropriate); *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009) (setting forth factors to determine if good cause exists to continue a case involving an application for adjustment of status premised on a pending visa petition); Office of the Chief Immigration Judge ("OCIJ"), U.S. Dep't of Justice, OPPM 13-01: *Continuances and Administrative Closure* (Mar. 7, 2013). On the other hand, once an alien is placed in removal proceedings, the Executive Office for Immigration Review has exclusive jurisdiction to adjudicate applications for adjustment of status, except those of arriving aliens, who must, with very limited exception, file with USCIS. *See* 8 C.F.R. § 1245.2(a)(1)-(2). If a case has been administratively closed pending the adjudication of the SIJ petition, the parties may file a motion to recalendar after USCIS makes a decision on the petition, so the Immigration Judge can adjudicate the adjustment of status application, terminate, or otherwise decide the case.

Special Rules for Children in Custody of the Department of Health and Human Services

The statute provides that children in the custody of HHS must obtain consent before seeking a change or determination of custody by a juvenile or other State court. Section 101(a)(27)(J)(iii)(I) of the Act; *see also* Neufeld Memo, *supra*, at 3. By way of explanation, when children are apprehended and detained by Customs and Border Patrol or Immigration and Customs Enforcement, if they are deemed "unaccompanied," they are placed in the custody of the Office of Refugee Resettlement, which is within HHS. *See* OCIJ, U.S. Dep't of Justice, OPPM 07-01: *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, at 3 (May 22, 2007), *reprinted in* 84 Interpreter Releases, No. 22, June 4, 2007, app. IV at 1203 [hereinafter "OPPM 07-01"].[4] For these children, HHS must consent to the exercise of jurisdiction by the juvenile court. Section 101(a)(27)(J)(iii)(I) of the Act. Recent developments, however, have made clear that consent is not necessary if the court does not render an order determining or altering custody. *Perez-Olano* Memo, *supra*, at 4; Neufeld Memo, *supra*, at 3.

Other Forms of Relief Available to Juveniles

To fully appreciate the benefits afforded by SIJ classification, it is helpful to contrast it with other forms of immigration relief also frequently sought by juvenile aliens. One such form of relief is the Deferred Action for Childhood Arrivals ("DACA") administrative program. *See* Memorandum from Janet Napolitano, U.S. Sec'y of Homeland Sec., to DHS officials (June 15, 2012), *reprinted in* 89 Interpreter Releases, No. 24, June 25, 2012, app. I at 1194 [hereinafter "Napolitano Memo"]. The other is the exercise of prosecutorial discretion pursuant to the guidelines of the "Morton memo." Memorandum from John Morton, Dir., USCIS, to USCIS officials (June 17, 2011), *reprinted in* 88 Interpreter Releases, No. 24, June 27, 2011, app. I at 1542 [hereinafter "Morton Memo"].

Among the qualifications required for DACA eligibility, an alien must, as of June 15, 2012, be under the age of 31, have arrived in the United States before the age of 16 and continuously resided here for at least 5 years prior to reaching 16 years of age; be in unlawful immigration status; and not have been convicted of certain offenses. *See* Napolitano Memo, *supra*, at 1.[5] If an alien is granted DACA, he or she will not obtain any legal immigration status, and immigration enforcement can be initiated at any time. In short, unlike SIJ status, DACA is not a path to legalization or naturalization. Nonetheless, under certain limited circumstances, the alien may apply for advanced parole in order to leave the United States with the opportunity to reenter the country. Additionally, the alien can apply for work authorization, which provides eligibility for a Social Security number and possibly a driver's license, depending on State law. *See* 8 C.F.R. § 274a.12(c)(14); U.S. Soc. Sec. Admin., Social Security Number—Deferred Action for Childhood Arrivals, *available at* http://www.socialsecurity.gov/pubs/deferred_action.pdf (last visited Dec. 31, 2013).

Juveniles may also seek prosecutorial discretion to avoid removal. The Morton memo addresses factors to be considered by DHS attorneys and other officials in determining whether or not to proceed with enforcement methods against certain aliens. Many of these factors are pertinent to juveniles, particularly those who have been abused, abandoned, or neglected.[6] Prosecutorial discretion, however, only provides relief to an alien against whom removal proceedings or other enforcement methods have been initiated. Its effect is that enforcement will cease, although it can be reinstated at any time. *See* Morton Memo, *supra*, at 2-3. The benefits of prosecutorial discretion are much more limited than those enjoyed by recipients of DACA or SIJ status. An alien who receives a favorable exercise of prosecutorial discretion is not eligible for adjustment of status, work authorization, or advanced parole; the only benefit is that the Government is no longer seeking to enforce the immigration laws against the alien at that time. *Compare* Morton Memo, *supra*, *with* Napolitano Memo, *supra*.

Conclusion

Since 1990, SIJ classification has served a critical purpose under our nation's immigration laws. Its eligibility requirements are complicated and constantly evolving. Nonetheless, its basic purpose of providing relief to some of the most vulnerable aliens within our borders has remained unaltered. Adjudicators will find it helpful to stay apprised of the continuing developments in this area of law and to maintain familiarity with the statutory, regulatory, and administrative guidance regarding SIJ status.

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1. As noted by the Supplemental Information to the rule:

> No method existed for most court-dependent juvenile aliens to regularize their immigration status and become lawful permanent residents of this country, even though a United States juvenile court had found them dependent upon the court and eligible for long-term foster care, and it had been determined that it was not in the children's best interests to be returned to their home countries or the home countries of their parents.

58 Fed. Reg. at 42,844.

2. The grounds of inadmissibility that cannot be waived relate to convictions for certain crimes, multiple criminal convictions, and controlled substance trafficking, *see* sections 212(a)(2)(A)-(C) of the Act, as well as security risks, terrorist activities, foreign policy concerns, and participation in Nazi persecution, genocide, torture, or extrajudicial killing, *see* sections 212(a)(3)(A)-(C), (E) of the Act.

3. This is true even though juvenile offenses are not considered "convictions" for purposes of determining inadmissibility.

4. An "unaccompanied child" is defined as "a person under 18, without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is available to provide care and physical custody." OPPM 07-01, *supra*, at 3.

5. For the exact DACA requirements, see USCIS, DHS, *Consideration of Deferred Action for Childhood Arrivals Process*, *Frequently Asked Questions* (updated on Jan. 18, 2013), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

6. Some relevant factors listed in the memo include whether the alien came to the United States as a child, past or present schooling in the United States, age ("with particular consideration given to minors and the elderly"), physical or mental illness, and whether the alien is cooperating with law enforcement officials. *See* Morton Memo, *supra*, at 4.