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UPDATE ON SPECIAL IMMIGRANT JUVENILE CLASSIFICATION
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Special Immigrant Juvenile (SIJ) classification has long been a pathway for undocumented children and youth in state care to regularize their immigration status and, in doing so, facilitate permanency, stability, and independence. In recent years, there have been substantial changes to the process by which youth¹ qualify for SIJ classification. This update is intended to provide an overview of current best practices with regard to securing this important benefit for youth and young adults, age 18 – 21, who are in DCF continued responsibility through a Voluntary Placement Agreement and/or PYA case.

1. What is Special Immigrant Juvenile Classification?

Under immigration laws, non-citizens require permission from the Department of Homeland Security (DHS) to visit, live, and work in the United States. There are many different categories of immigration status. SIJ classification is a status that allows a youth, formerly without status, to apply for legal permanent residence (commonly known as a “green card”). To qualify for the classification, the individual must be:

- under 21;
- unmarried;
- declared dependent on a juvenile court or be committed to or placed under the custody of an agency or department of the State, or an individual or entity appointed by the court;
- the subject of a judicial determination that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; and,

¹ Because SIJ classification is available to children and youth up until the 21st birthday, this practice advisory refers throughout to “youth,” rather than child, minor, or juvenile.

- the subject of a judicial determination that it would not be in the child’s best interest to be returned to the country of nationality or last habitual residence of the child or the child’s parents.

Once classified as a “special immigrant juvenile,” the youth may apply for a green card, a separate process that involves an entirely different set of eligibility criteria. If a SIJ youth qualifies for a green card, he or she receives permission to live and work permanently in the United States, and qualifies for additional benefits, such as eligibility for federal student loans. The benefits of legal permanent residence, especially the authorization to work and permanent nature of the status, are indispensable for attaining permanency goals of immigrant youth who have come in contact with the child welfare system.

2. What is child counsel’s role in securing SIJ classification for a client, age 1 - 21?

In order to apply to federal immigration officials for SIJ classification, a youth must first secure a predicate order from a juvenile or probate court that makes specific findings as to their eligibility for the classification. A motion for a predicate order (commonly known as a “Motion for Special Findings”) may be made in any proceeding before the Juvenile or Probate and Family courts, including C&Ps, CRAs, PYAs, guardianships, and delinquencies. Child’s counsel is indispensable in determining whether a client is eligible for SIJ classification, in counseling a youth about the risks and benefits of seeking the classification, and in ensuring that a predicate order is secured prior to the end of the Court’s jurisdiction over the youth or the youth turning 21. If the youth is in DCF custody, counsel should work together with DCF to make sure that the youth’s progress towards immigration status is part of DCF’s permanency planning for the youth. Counsel should also make sure that a judge reviews DCF’s efforts and progress at all permanency planning hearings and foster care reviews.

Once counsel finds out that their child client in DCF custody is undocumented and eligible for SIJ classification, counsel must work with DCF to make sure that the necessary motions and request for findings are filed as soon as possible, hopefully well before the youth turns 18 and may leave DCF care or custody. Either counsel for DCF or counsel for the child may file a motion for special findings, and often will need to work cooperatively in order to do so. In particular, child’s counsel is best positioned to assist with the drafting of a child’s supporting affidavit when such an affidavit is necessary to establish certain facts in a case. Counsel should make sure that DCF refers the youth’s immigration case to the private immigration attorney with whom the agency contracts to work on SIJ matters. The contracted immigration lawyer will then file the appropriate motions and pursue SIJ status with immigration authorities.

For a child client not in DCF custody, or for a child client who is in DCF custody and DCF has decided not to pursue SIJ status for the youth, counsel will need to take a more active role. Due to limited resources, the Department chooses to focus on assisting certain categories of youth. Where DCF will not pursue SIJ status for a client, counsel must contact the CPCS IJU to discuss how to file for the predicate order. Counsel will then need to find pro bono or legal services counsel to file and pursue SIJ status in immigration court proceedings.

If the youth does not gain SIJ classification before age 18, and the youth “signs on” with DCF after 18, DCF can continue to seek SIJ classification for that youth. Thus, SIJ classification should be part of the conversation and advice counsel gives to the youth about whether to continue in DCF responsibility after age 18. If the youth chooses to “sign on,” counsel must advocate with DCF to continue to provide services, including placement, to the youth after age 18, and make sure that DCF continues to seek SIJ classification for the youth. As with youth under age 18, counsel should continue to advocate for the youth and make sure that SIJ status is part of DCF permanency planning and judicial review at permanency planning hearings for the youth after age 18 up to 21.

3. What does the Predicate Order need to Establish?

A motion for special findings must be accompanied by a detailed, proposed, predicate order. Over the years, federal immigration officials have become more exacting about the language and level of detail in predicate orders. As child’s counsel, it is important to understand the federal immigration requirements in order to draft, or assist DCF’s counsel in drafting, a legally sufficient proposed order. Immigration officials are no longer accepting pro forma orders with conclusory language reciting required elements.

In October 2019, federal immigration officials “clarified” the requirements for SIJ classification through three Administrative Appeals Office decisions.² Two decisions—*Matter of A-O-C* and *Matter of E-A-L-O*—involved orders that had been issued by the Probate and Family Court in Massachusetts for youth over the age of 18. Together these decisions establish that the SIJ predicate order must:

- Explicitly contain the three principle findings regarding

² For more information regarding the three Administrative Appeals Office decisions, see the CLINIC and ILRC Practice Alert: <https://cliniclegal.org/sites/default/files/resources/2019-1106-practice-alert-SIJS-policy-update.pdf>

- 1) dependency or custody,
 - 2) viability of parental reunification, and
 - 3) best interest of the child;
- Recite the specific factual basis for each of the three above findings; and
 - Cite to specific state law for each of the three SIJ findings.

Importantly, it is now clear that the juvenile court is not required to make a determination regarding legal custody of the youth or to have jurisdiction to place a youth in the custody of a parent prior to making a finding about parental reunification. A juvenile court may, for example, make the determination in a CRA that a youth cannot reunify with a deceased parent even when the legal custody of the living, fit parent is not in question. In such a case, it is sufficient for the juvenile court to find that a youth is “dependent” on the court. Pursuant to a recently enacted statute, “dependent on the court” in Massachusetts means “subject to the jurisdiction of a court competent to make decisions concerning the protection, well-being, care and custody of a child, for findings, orders or referrals to support the health, safety and welfare of a child or to remedy the effects on a child of abuse, neglect, abandonment or similar circumstances,” where “court” is defined to include the probate and family court and the juvenile court departments of the trial court. M.G.L. c. 119 s. 39M. In other words, any youth before a juvenile court in Massachusetts, whether for a C&P, CRA, delinquency or PYA, can be found to be “dependent on the Court” and the juvenile court may issue a legally valid predicate order for these youth until the youth reaches the age of 21 where the court maintains jurisdiction over the youth past the age of majority.

The clarifying decisions also make clear that the emphasis in a predicate order should be state child welfare law and not federal immigration law. Indeed, it is best practice not to cite to federal immigration law but to focus on relevant state law when moving for and establishing special findings. So, for example, a proposed order with a finding that parental reunification is not viable due to “neglect” should cite to relevant Massachusetts case law and DCF regulations defining “neglect.” Further, federal immigration officers will look at the “nature and purpose” of the state court proceedings and require that the proceedings were not brought for the sole purpose of securing an immigration benefit. For this reason, it is important for predicate orders to explain why the proceeding was initiated (ex: to remove a child from an abusive parent or to ensure permanency goals are met after a child ages out) and to highlight how the state court proceedings ensure, not just an immigration benefit, but rather the youth’s overall well-being.

4. What is M.G.L c 119 sec. 39M?

In 2018, as part of the FY 2020 Budget, Governor Baker signed into law an amendment to M.G.L. c. 119 called 39M. The statute creates a new cause of action for 18-21 year olds in Probate and Family Court that allows these youth to establish the findings necessary for SIJ classification and clarifies that the Probate and Family Court has jurisdiction to make decisions concerning the protection, well-being, care and custody of a youth between ages 18-21.³ In addition to creating a statutory cause of action in Probate and Family Court, the new statute helps clarify the jurisdiction and role of the Juvenile Court with regards to SIJ findings and, as mentioned above, defines what it means for a youth to be “dependent” on the court. In addition, the statute makes clear that upon the filing of a motion for special findings, the Court is required to hear, adjudicate, and issue findings of fact and ruling of law as soon as administratively feasible and prior to the child reaching the age of 21 (whether favorable or unfavorable to the youth).

5. Who can I contact if I have questions about the SIJ process?

The CPCS Immigration Impact Unit (IIU) is a resource of expert immigration information for all court-appointed attorneys, including those appointed in CAFL cases. We recommend you contact the IIU (iiu@publiccounsel.net) for sample motions for special findings and sample proposed orders.

IIU has also created a CAFL-specific intake form to facilitate CAFL attorneys’ access to and communication with the unit. If you are a CAFL staff attorney or a private bar attorney appointed in a CAFL case, please fill out and submit the form to receive assistance analyzing or understanding an immigration issue relevant to your CAFL case. You can find the IIU CAFL Intake Form online at <https://www.publiccounsel.net/iiu/>. The CAFL Immigration page on MyGideon includes Practice Advisories, sample motions, and other practice aids for counsel to use in consultation with the IIU and/or an immigration attorney.

³ For more on the implementation of 39M in Probate and Family Court, see the GBLS and MLRI Practice Advisory: available on MyGideon