Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on SIJS

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CHILDREN’S IMMIGRATION LAW ACADEMY (CILA)

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- Support at Emergency Reception Centers
- Technical Assistance
- Texas Specific Trainings & Resources
- Collaboration through Working Groups

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Today's Agenda
Adjusting Status to LPR Based on SIJ Status

- Back to Basics
- Jurisdictional Issues
- AOS before EOIR
- AOS before USCIS
- Inadmissibility
- Discretion
Yesenia Hypo

Yesenia travels from Honduras to escape abuse from mother. Yesenia is designated an unaccompanied child.

Released from ORR shelter to aunt. Aunt and uncle live in Fort Bend County, Texas.

Aunt obtains Texas custody order. Custody order contains all necessary SIJ findings.

SIJ petition approved. Yesenia’s next master calendar hearing is coming up.
Two Key Primary Sources

Start here

8 U.S. Code § 1255(h); Immigration & Nationality Act (INA) § 245(h)

Title 8 of the Code of Federal Regulations (CFR) § 245.1(e)(3); § 1245.1(e)(3)
SIJ Adjustment Law & Rules

**INA § 245(h)**

**ALLOWS SIJs TO ADJUST STATUS**
SIJ applicants are deemed paroled for purposes of INA § 245(a).

**APPLICABLE GROUNDS OF INADMISSIBILITY**
Lists grounds of inadmissibility that are waived and waivable.

**SIJ SPECIFIC WAIVER AVAILABLE**
Waiver is available for certain grounds of inadmissibility “for humanitarian purposes, family unity, or when it is otherwise in the public interest.”

**8 CFR § 245.1(e)(3)- *outdated***

**ADJUSTMENT PROVISION**
SIJ applicants paroled for purposes of adjustment, regardless of entry.

**UNAUTHORIZED EMPLOYMENT**
SIJ applicants are not barred from adjustment based on unauthorized employment.

**WAIVER FOR INADMISSIBILITY**
Requires revision to full list of exempted grounds of inadmissibility.
# Visa Bulletin

**Immigrant visa must be immediately available**

<table>
<thead>
<tr>
<th>Employment-based</th>
<th>All Chargeability Areas Except Those Listed</th>
<th>CHINA-maintained born</th>
<th>EL SALVADOR GUATEMALA HONDURAS</th>
<th>INDIA</th>
<th>MEXICO</th>
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**EB-4 Preference Category**

SIJs are considered “Special Immigrants” under the 4th preference employment-based categories, which is allocated 7.1% of the 140,000 visas available per year, or 9,940 visas per year. There is also a 7% per country limit so each country is allocated about 696 visas per year.
SIJ Adjustment Policy

- SIJ Classification
- Legal Authorities
- Eligibility Requirements
- Adjudication
Agency Guidance

Filings with the Immigration Court

- Delivery and Receipt
- Service on Opposing Party
- Order of Documents
- Filing Fees
Blank Space Policy

USCIS may no longer reject applications for blank spaces

Vangala v. USCIS (N.D. Cal.)
SIJS I-485 Form Tips

Part 1. Information About You (Person applying for lawful permanent residence) (continued)

24. What is your current immigration status (if it has changed since your arrival)?
   - [ ] Yes
   - [X] No
   - [ ] Special Immigrant Juvenile Status

Provide your name exactly as it appears on your Form I-94 (if any)

25.a. Family Name (Last Name)
25.b. Given Name (First Name)
25.c. Middle Name

Part 2. Application Type or Filing Category

1. I am filing this Form I-485 as a (select only one box):
   - [X] Principal applicant
   - [ ] Derivative applicant

When I last arrived in the United States, I:

22.a. [ ] Was inspected at a port of entry and admitted as (for example, exchange visitor; visitor, waived through: temporary worker; student);
22.b. [ ] Was inspected at a port of entry and paroled as (for example, humanitarian parole, Cuban parole);
22.c. [ ] Came into the United States without admission or parole.
22.d. [ ] Other:

Special Immigrant

4.a. Religious worker, Form I-360
4.b. [X] Special immigrant juvenile, Form I-360
4.c. Certain Afghan or Iraqi national, Form I-360
4.d. Certain international broadcaster, Form I-360
4.e. Certain G-4 international organization or family member or NATO-6 employee or family member, Form I-360
4.f. Certain U.S. armed forces members (also known as the Six and Six program), Form I-560
4.g. Panama Canal Zone employees, Form I-360
4.h. Certain Physicians, Form I-360
4.i. Certain employee or former employee of the U.S. Government abroad, Form I-360

INA Section 245(g)

11. Are you applying for adjustment based on the Immigration and Nationality Act (INA) section 245(g)?
   - [ ] Yes
   - [X] No

NOTE: If you answered “Yes” to Item Number 11, you must have selected a family-based, employment-based, special immigrant, or Diversity Visa immigrant category listed above in Item Numbers 2.a. - 8.e., as the basis for your application for adjustment of status. Fill out the rest of this application AND Supplement A to Form I-485 - Adjustment of Status Under Section 245(g) (Supplement A). For detailed filing instructions, read the Form I-485 Instructions (including any Additional Instructions that relate to the immigrant category that you selected in Item Numbers 2.a. - 8.e.) and Supplement A Instructions.

Information About Your Immigrant Category

If you are the principal applicant, provide the following information:

12. Receipt Number of Underlying Petition (if any)
13. Priority Date from Underlying Petition (if any) (mm/dd/yyyy)
Part 5. Information About Your Marital History

1. What is your current marital status?
   - Single, Never Married
   - Married
   - Divorced
   - Widowed
   - Marriage Annulled
   - Legally Separated

2. If you are married, is your spouse a current member of the U.S. armed forces or U.S. Coast Guard?
   - N/A
   - Yes
   - No

3. How many times have you been married (including annulled marriages and marriages to the same individual)?

Speak now, or forever hold your peace.
Jurisdictional Issues
Procedural Posture

Why does it matter?

**AFFIRMATIVE APPLICANT**
Client is not currently in removal proceedings

**DEFENSIVE APPLICANT**
Client is currently in removal proceedings
USCIS vs. EOIR

Who adjudicates the application?

USCIS

- 8 CFR 245.2(a)(1): Applicants not in removal proceedings
- 8 CFR 245.2(a)(1), 8 CFR 1245.2(a)(1): Arriving aliens, even if in removal proceedings

EOIR

- 8 CFR 1245.2(a)(1): Applicants in removal proceedings, except arriving aliens
Concurrent Filings with USCIS
Filing the SIJ petition and AOS application simultaneously

Affirmative applicant
+ current priority date
when filing I-360 petition

SIJ Petition & AOS Application Filed Together

Client not in removal proceedings or an arriving alien.
Cannot be from a backlogged country (Honduras, El Salvador, Guatemala, Mexico).
Adjudication Options
AOS application adjudicated by USCIS or EOIR

BEFORE USCIS - 2 STEPS
Client not in removal proceedings or an arriving alien. From backlogged country.

BEFORE USCIS - 2 STEPS
Client's case dismissed/terminated once the I-360 approved.

BEFORE EOIR - 2 STEPS
Client remains in removal proceedings.
This decision does not foreclose respondents, in appropriate circumstances, from requesting that DHS file an unopposed motion to dismiss proceedings under 8 C.F.R. § 1239.2(c).


8 CFR 239.2(c)

(c) Motion to dismiss. After commencement of proceedings pursuant to 8 CFR 1003.14, ICE counsel...may move for dismissal of the matter on the grounds set out under paragraph (a) of this section.

Exercising Prosecutorial Discretion To Dismiss Adjustment Cases

- ICE may join or file motion to dismiss proceedings
- Demonstration of prima facie eligibility
- Support discretionary determination
- No asylum application pending
Complicating Issues
It’s almost never easy

- **Relationship with ICE OCC**
  - Who files the motion? What are the local requirements?
  - How do you negotiate?

- **Application administratively closed with USCIS**
  - How do you reopen? Can the application be transferred to EOIR?

- **Other pending applications**
  - What about the asylum application?

- **Previous removal order**
  - What type of removal order does the child have? Is it executed or unexecuted?
Making the Final Call
Which path is best for the client?

Considerations
- Viable options
- Timeline
- Client preference
- Local practice

Steps to take
- Map it out
- Talk to colleagues
- Talk to your client
Yesenia Hypo

Continued...

EOIR

- Quick hearing
- File AOS immediately
- COVID closures

USCIS

- Non-adversarial setting
- May not require interview
- Must coordinate with ICE
Choose Your Adventure—
Option 1!

Yesenia decides to move forward with Immigration Court
Adjudication before EOIR

It's a process

STEP 01
Follow Pre-Order Instructions

STEP 02
File AOS Application with the Immigration Court

STEP 03
Prepare for Merits Hearing

STEP 04
Present Case at Merits Hearing

STEP 05
Follow Post-Order Instructions
Follow Pre-Order Instructions
Steps to take before filing the application

Motion to Waive Fee
- EOIR Policy Manual guidance
  - Must be allowable by DHS
  - "The request for a fee waiver must be accompanied by a properly executed affidavit or unsworn declaration made pursuant to 28 U.S.C. § 1746, substantiating the filing party’s inability to pay the fee."

USCIS Notices
- Receipt Notice(s)
- Biometrics Appointment Notice
  - Preparing for your biometric services appointment

Additional Applications
- Should not file I-131, Application for Travel Document

STEP 1
Pre-Order Instructions
✓ Copy of the application(s)
  ✓ Fee or fee waiver
  ✓ $85 biometrics fee
  ✓ Form G-28
  ✓ Copy of instructions
File AOS Application
Filing with the Immigration Court

(A) Applications for relief - An application package should comply with the instructions on the application. The application package should contain (in order):

- Form EOIR-28 (if required)
- Cover page
- If applicable, fee receipt (stapled to the application) or motion for a fee waiver
- Application(s)
- Proposed exhibits (if any) with table of contents
- Proof of Service

Exhibits
- Medical exam, Form I-693
- Photos
- Criminal history chart
- Proof of positive equities
STEP 3

Preparing for Immigration Court

Prepare for Merits Hearing
Preparing to go to court

Background check
• Ensure that client attends biometrics appointment
• Follow up with ICE Counsel to confirm background check complete
• Fingerprint Check Update Request

Client preparation
• Review documents and exhibits
• Practice direct examination
• Practice cross examination

Negotiating with ICE Assistant Chief Counsel
• ICE position on application
• Stipulation
Present Case at Merits Hearing

Presenting the case to the Immigration Judge

STEP 4

Remote hearings
- WebEx or phone hearing
- Addressing concerns

Adjudication by submission
- ICE Counsel stipulation
- Complete record

Contested hearing
- Trial advocacy skills
- Appeal

The final hearing
Post-Order Instructions

Filing with the Immigration Court

STEP 5

**Post-Order Instructions**

- Call USCIS
- Attend appointment
- Submit final order

Production of Lawful Permanent Resident card
- Work with USCIS
- Copy for the file

Closing letter
- Copy of file to client
- Clear instructions for next steps

Withdraw from representation
- Confirm next steps with client
- Motion to Withdraw after final hearing hearing
Chose Your Adventure
Option 2!

Yesenia decides she wants to submit her I-485 with USCIS
Dismissal of Removal Proceedings

To allow for adjustment before USCIS

Contact OCC

Ask for joint motion (prosecutorial discretion)
Show priority date is current
Support discretionary determination

Motion to Dismiss

8 CFR 239.2(c)

Immigration Court

OCC will submit to Court if joining, submit if not
IJ will decide to dismiss or not
Yesenia Hypo

Continued...

ORR file contains mental health evaluation indicating gang involvement.
Yesenia denies it.

Fight with another girl in high school.
The campus police involved assault mentioned.

In car with people smoking marijuana, did not participate.
Driver pulled over, all taken to the police station.
Uncle came to pick her up very late.

Necessity of filing taxes on earned income.
Inadmissibility
INA § 212

**HEALTH**
- Communicable diseases, physical or mental disorder

**CRIMINAL**
- Conviction for CIMT or controlled substance, vice

**NATIONAL SECURITY**
- Terrorism, espionage, Nazi, genocide

**ECONOMIC/EMPLOYMENT**
- Public charge, labor certification

**IMMIGRATION RELATED**
- Unlawful presence, removal order, misrepresentation

**MISCELLANEOUS**
- Polygamy, international child abduction, unlawful voting
INA § 245(h)(2)(A)

Inadmissibility grounds inapplicable to SIJS

- Public Charge (212(a)(4))
- Labor Certification (212(a)(5)(A))
- Present without admission or parole (212(a)(6)(A))
- Misrepresentation (212(a)(6)(C))
  *Includes false claim of citizenship
- Stowaways (212(a)(6)(D))
- Lack immigration docs (212(a)(7)(A))
- Unlawful Presence (212(a)(9)(B))
INA § 245(h)(2)
Inadmissibility Grounds WITHOUT Waiver

INA § 212(a)

(2)(C) Controlled Substance Trafficker

(2)(H) Traffickers in Persons

(2)(I) Money Laundering

(4) National Security Related*

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Yesenia remembers that in high school she got into a fight with another girl. The campus police got involved and someone mentioned assault but she's not sure what happened.
Yesenia’s Story
Triggers for Inadmissibility

Criminal grounds of inadmissibility

01 Convicted or admits committing acts which constitute the essential elements of a crime involving moral turpitude

02 Convicted?
Formal judgment of guilt entered by a court

OR

Admitted sufficient facts + restraint on liberty imposed

03 Crime Involving Moral Turpitude?
Reprehensible conduct + culpable mental state (intent)
Categorial Approach
Crimmigration - a complicated subject area

01. **Determine Generic Offense**
   Usually from the federal definition of the offense

02. **Compare State vs. Federal**
   Look at the elements of the crime, do the definitions in the statutes match

03. **Divisible?**
   A statute is "divisible" if it includes multiple separate crimes, and not all match

04. **Modified Categorical**
   Can look at the criminal record

**ANALYSIS**
Categorial approach prevents judge or adjudicating officer from looking at the actual facts of the conviction, only look at the elements of the statutes.
Assault
Under INA § 245(h)

INA § 212(a)(2)(A)(i)(I)
Not waivable under 245(h)

CIMT
Is assault in Texas a crime involving moral turpitude?

Analyze
Gomez-Perez v. Lynch says no, in most circumstances

Juvenile?
Juvenile delinquency does not count as a conviction
Yesenia also mentions that she was in a car with some friends who were smoking marijuana, but she didn't join them.

The driver got pulled over and the police took them all to the police station. She remembers her uncle came to pick her up and take her home, but not much else.
Marijuana Offense
Under INA § 245(h)

INA § 212(a)(2)(A)(i)(II)
Not waivable under 245(h)*

UNLESS
except for...a single offense of simple possession of 30 grams or less of marijuana

Waiver
“humanitarian purposes, family unity, or when it is otherwise in the public interest.”

Charged?
Was she actually charged and what about INA § 212(a)(2)(C)
READ QUESTION CAREFULLY

THINK ABOUT THE ELEMENTS

DON’T FORGET DELINQUENCY

25. Have you EVER been arrested, cited, charged, or detained for any reason by any law enforcement official (including but not limited to any U.S. immigration official or any official of the U.S. armed forces or U.S. Coast Guard)?
   - Yes  
   - No

26. Have you EVER committed a crime of any kind (even if you were not arrested, cited, charged with, or tried for that crime)?
   - Yes  
   - No

27. Have you EVER pled guilty to or been convicted of a crime or offense (even if the violation was subsequently expunged or sealed by a court, or if you were granted a pardon, amnesty, a rehabilitation decree, or other act of clemency)?
   - Yes  
   - No

NOTE: If you were the beneficiary of a pardon, amnesty, a rehabilitation decree, or other act of clemency, provide documentation of that post-conviction action.

28. Have you EVER been ordered punished by a judge or had conditions imposed on you that restrained your liberty (such as a prison sentence, suspended sentence, house arrest, parole, alternative sentencing, drug or alcohol treatment, rehabilitative programs or classes, probation, or community service)?
   - Yes  
   - No

29. Have you EVER been a defendant or the accused in a criminal proceeding (including pre-trial diversion)?
   - Yes  
   - No
Criminal Records
How to get them

FBI Fingerprint Check
Frequently, your initial font choice is taken out

State Criminal Records
Frequently, your initial font choice is taken out
Conduct-based Inadmissibility
INA § 212(a)(1)(A)

Not inadmissible for CIMT or drugs

Magic...

Danger
To self or others
Waivers
For inadmissibility

INA § 245(h)(2)(B)
“humanitarian purposes, family unity, or when it is otherwise in the public interest.”

INA § 212(h)
discretionary waiver of one or more CIMTs, show extreme hardship to spouse, parent, or child.
Yesenia’s ORR file contains a mental health evaluation indicating that she may have been involved with a gang.
Gang Membership
Problematic, but why?

Inadmissibility
Gang membership is not a direct inadmissibility ground.

Discretion
Gang membership does go towards discretion.
## Discretion in SIJS I-485 Adjudication

### Summary of Adjudication Involving Discretion

<table>
<thead>
<tr>
<th>Has Applicant Otherwise Met Eligibility Requirements?</th>
<th>Does Applicant Warrant a Favorable Exercise of Discretion?</th>
<th>Decision</th>
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<tbody>
<tr>
<td>Yes</td>
<td>Yes, the positive factors outweigh the negative factors.</td>
<td>Approve the application. Eligibility requirements are met, including that a favorable exercise of discretion is warranted.</td>
</tr>
<tr>
<td>Yes</td>
<td>No, the negative factors outweigh the positive factors.</td>
<td>Deny the application. Eligibility requirements are otherwise met but a favorable exercise of discretion is not warranted. The officer should explain the reasons why USCIS is not exercising discretion in the applicant’s favor. The officer should clearly set forth the positive and negative factors considered and why the negative factors outweigh the positive factors.</td>
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### ELIGIBILITY

### NEGATIVE FACTORS

### POSITIVE FACTORS
Negative Factors

Think “inadmissibility”

1. **Family & Community Ties**
   Absence of family or ties.

2. **Immigration Status & History**
   Violation of Status, removal orders, fraud.

3. **Business, Employment, Skills**
   Unemployment, unauthorized employment, illegal sources of income.

4. **Community Standing & Moral Character**
   Criminal tendencies, lack of rehabilitation, safety and/or security threat. Failure to pay taxes/child support.

5. **Other**
   Other indicators adversely reflecting the applicant’s character and undesirability as an LPR of this country.

Other indicators adversely reflecting the applicant’s character and undesirability as an LPR of this country.

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Positive Factors

1. Family & Community Ties
   Hardship to applicant and close relatives if application is denied.

2. Immigration Status & History
   Compliance with immigration laws, approved humanitarian petition.

3. Business, Employment, Skills
   Education, skills, training in U.S., employment history and type.

4. Community Standing & Moral Character
   No criminal record, rehabilitation, cooperation with authorities, compliance with tax laws, non court ordered community service.

5. Other
   Absence of significant undesirable or negative factors and other indicators of good moral character in the United States and abroad.
Positive Factor Examples

Religious Involvement
Letter from pastor/priest/rabbi/imam, other congregation members

Community
Letters from those in community that know client and have favorable things to say

School
Letter from teacher/principal, transcripts, extracurricular activities

Family
Letters from family members about client caring for them or others (i.e. client’s own children)

Rehabilitation
Completion of rehab, community service, counselor letter

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Filing Process
For I-485 with USCIS

Step 1
Fill out I-485

Step 2
Collect supporting documentation, medical exam*

Step 3
Fill out I-765

Step 4
Determine filing fees or complete fee waiver request

Step 5
Send to Chicago Lockbox
Thank you!
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