Frequently Asked Questions – Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on Special Immigrant Juvenile Status (SIJS)

In the last few months, the Department of State's "Visa Bulletin," which signals when a visa is available for certain priority-based immigration categories, has advanced rapidly for those with approved SIJS petitions. This sudden eligibility for adjustment of status (AOS) to lawful permanent resident (LPR) has raised many questions for practitioners, as many children and young adults who have been waiting years are now eligible for "green cards" based on their Special Immigrant Juvenile Status.

CILA has analyzed the technical assistance questions we have received on this topic to determine what pressing issues have emerged for practitioners in the field working with clients who have SIJS and who are now ready to adjust that status. Using this knowledge, CILA presented a webinar addressing these pressing issues, "Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on SIJ Status," on January 27, 2020, which was recorded and can be viewed on our website. To accompany the webinar, CILA also created the following resources: CILA SIJ Status AOS Webinar - Additional Resources, CILA SIJ Adjustment of Status Inadmissibility Chart, and USCIS Policy Manual Discretion Chart.

To further assist advocates working on adjustment of status for these individuals, and to ensure that the excellent questions posed by webinar participants were answered as thoroughly as possible, CILA decided to create this practice advisory to accompany the information provided in the webinar. We hope that it will be a useful reference point when working with clients with SIJS that have current priority dates. If practitioners have additional questions not covered by this practice advisory, feel free to contact CILA for technical assistance.

Contents

I. The Basics

A. Legal Basis for Adjustment of Status for SIJS & Number of Visas Available

How are clients with Special Immigrant Juvenile Status (SIJS) able to adjust their status to Lawful Permanent Resident (LPR)?

INA § 245(h) allows Special Immigrant Juveniles to adjust status (rather than consular process) because they are deemed paroled for purposes of INA § 245(a)—the adjustment of status provision. INA § 245(a) states that:

> "The status of an applicant who was inspected and admitted or paroled into the United States…may be adjusted [using] discretion…to that of a person lawfully admitted for permanent residence if (1) the [person] makes an application for adjustment, (2) is

eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed."

INA § 245(h) also lists the grounds of inadmissibility that are automatically waived or waivable for individuals with SIJS under this provision. Section (h) also includes the grounds of inadmissibility that are not waivable under this provision but may be waivable under a different section of the INA. The INA § 245(h) SIJS waiver standard is broader than most other inadmissibility waivers, as it can be granted for "humanitarian purposes, family unity, or when it is otherwise in the public interest."

Please note that the regulation at 8 CFR §245.1(e)(3), which accompanies and interprets the SIJS adjustment statute, is outdated. It does not include all the grounds of inadmissibility that are waived or waivable with an SIJS specific waiver. However, it does make clear that SIJS applicants are paroled for purposes of adjustment regardless of how they entered the United States. And importantly, the regulation clarifies that SIJS applicants are not barred from adjustment under INA § 245(c)(2) for unauthorized employment.

Who determines when a visa is available for an SIJS recipient to adjust status to LPR, and how?

The Department of State is responsible for the allocation of visas to the preference categories and publishes the Visa Bulletin every month indicating who can apply to adjust status based on their priority date – the date their original petition was filed. Special Immigrants (including SIJs) are allocated visas under the fourth preference employment-based (EB-4) category, which is allocated 7.1% of the 140,000 visas available for employment-based visas per year, or 9,940 visas per year. INA § 203(b)(4). Immigrant visas, such as SIJS, are also limited to a 7% per country limit for each category. INA § 202(a)(2). For the SIJS classification this means that each country is allocated about 696 visas per year. There is some flexibility within the statute to allow for additional visas if there are unused visas in other categories. INA § 202(a)(3) For example, in fiscal year 2019 the per country limit for EB-4 was 705, which was exceeded by the following countries based on the availability of "otherwise unused" numbers: El Salvador (1,709), Guatemala (1,295), Honduras (1,293), and Mexico (801). Charlie Oppenheim at the Department of State provides regular updates on trends in the visa bulletin that are shared` with AILA members. In December 2019, he wrote "[s]ince 2016, Special Immigrant Juvenile cases averaged over 50% of the entire EB-4 limit each fiscal year." "Check-in with DOS's Charlie Oppenheim: December 19, 2019," AILA Doc. No. 14071499. (Posted 12/23/19). https://www.aila.org/File/Related/14071499bn.pdf.[1]

[1] Beginning in 2021, the Department of State is now making "Check-in with Charlie Oppenheim" a video broadcast on YouTube. The discussion of the May 2021 Visa Bulletin can be found here: https://youtu.be/0RqfhwLlHck

Why has there been so much movement on the visa bulletin recently? Is it expected that individuals with SIJS will continue to receive a higher percentage of EB-4 visas?

There are likely several reasons that visa availability in the EB-4 category progressed more rapidly for the past year. The closures of the consulates due to COVID-19 may have been one reason, as well as Presidential Proclamation 10014, signed by Trump on April 22, 2020, which effectively suspended immigrant visa processing at US consulates abroad and suspended the admission of immigrants (including those in the EB-4 category) with the exception of certain categories. This suspension meant that those visas available from April 2020 until the end of the fiscal year, September 30, 2020, would be rolled over to employment-based categories, including EB-4. INA §§ 203(b), 202(a)(5)(A), 201(d)(2)(C).[2] In July 2020, the Department of State announced a phased reopening of the consulates. The DOS website currently states the following:

> The provision of services to U.S. citizens abroad is the first priority of consular sections abroad. With respect to visa services, for consular sections that have the capacity, the processing of immigrant and fiancée visas, particularly for immediate relatives and other family-sponsored applicants, is our highest priority. U.S. Embassies and Consulates are also prioritizing the processing of immigrant visa cases previously refused under the rescinded Presidential Proclamations 9645 and 9983.

On February 24, 2021, President Biden rescinded P.P. 10014, so there is a reasonable expectation that the demand for visas will go up and the EB-4 category advancement will slow.

How do I determine how long the wait will be for a visa to become available for some of the frequently "oversubscribed" countries like Guatemala, El Salvador, Mexico, and Honduras?

It is tempting to look at the final action date for your client's SIJS petition and count the number of months between today's date and the final action date to calculate the wait time. The visa bulletin should not be used, however, to guess how long it will be before an immigrant visa is available because the availability of immigrant visas does not keep pace with the amount of SIJS petitions filed. About 5,000 SIJS visas are granted each year, but there has been a dramatic increase in the amount of SIJS petitions filed. Indeed, about 60,000 visas have been filed since 2018.[3] Some 39,745 SIJS petitions were granted by USICS in Fiscal Year 2020 alone. Since there is no limit to how many SIJS petitions are filed and granted each year, the Visa Bulletin is not an

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[2] For a more in-depth discussion *see* "Permanent Employment-Based Immigration and the Per-country Ceiling" William A. Kandel, Congressional Research Service, December 21, 2018. https://www.everycrsreport.com/files/20181221_R45447_e8769841f74192a52a13cd14317d8bd2593ac9e4.pdf

[3] For the latest data on SIJ petitions from USCIS, visit USCIS' *Immigration and Citizenship Data* portal at https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data and filter for "Special Immigrant Juvenile Status." The data as of September 30, 2020 can be accessed here: https://www.uscis.gov/sites/default/files/document/reports/I360_sij_performancedata_fy2020_qtr4.pdf.

accurate measure of when a visa will become available. If you would like more information about how to interpret the Visa Bulletin, read Charles Wheeler's article, *Backlogs in Family-Based Immigration: Shedding Light on the Numbers*.

B. Eligibility for Adjustment Based on SIJS

What are the eligibility requirements for AOS based on SIJS?

The applicant must be:

- Previously inspected and admitted/paroled into the United States;
- Physically present in the United States at the time of filing and adjudication;
- Eligible to receive an immigrant visa;
- Has an immigrant visa immediately available at the time of filing and final adjudication;
- Not subject to any applicable bars to adjustment of status;
- Admissible to the United States (or eligible for a waiver of inadmissibility); and
- Merits a favorable exercise of discretion by USCIS/the immigration judge.[4]

Under what circumstances will a Special Immigrant Juvenile's status be automatically revoked?

The USCIS Policy Manual, referencing 8 CFR 205.1(a)(3)(iv), states the following:

> An approved SIJS petition is automatically revoked as of the date of approval if any one of the circumstances below occurs before USCIS issues a decision on the petitioner's application for adjustment of status:
>
> - Marriage of the petitioner;
> - Reunification of the petitioner with one or both parents by virtue of a juvenile court order, where a juvenile court previously deemed reunification with that parent, or both parents, not viable due to abuse, neglect, abandonment, or a similar basis under state law; or
> - Reversal by the juvenile court of the determination that it would not be in the petitioner's best interest to be returned to the petitioner's, or his or her parents', country of nationality or last habitual residence.

If an SIJS adjustment applicant gets married but the marriage is then annulled before the AOS application is finalized, will the I-360 still be revoked?

If a youth with SIJS gets married after the I-360 is approved and before they have adjusted to LPR status, the I-360 is automatically revoked per 8 CFR §205.1(a)(3)(iv). The language is in the regulations is very clear that revocation occurs if one of the automatic revocation provisions is triggered "before the decision on his or her adjustment application becomes final." 8 CFR

[4] See the USCIS Policy Manual at Vol.7, Pt. F, Ch. 7, for a full discussion of eligibility requirements for SIJS-based adjustment of status.

§205.1(a)(3). Although the marriage was annulled, the event causing revocation (marriage) still occurred before the adjustment of status application was finalized.

If a marriage is ruled to be void *ab initio* by a court with a ruling *nunc pro tunc* to the day of the marriage, would that prevent automatic revocation based on marriage?

As mentioned above, marriage after the I-360 is approved is an automatic revocation provision per 8 CFR §205.1(a)(3)(iv). It is unclear whether the automatic revocation of the petition could be reversed. As a practical matter, USCIS only has knowledge of the marriage, and therefore is only able to revoke the petition when an applicant informs them of it (either on the adjustment application or another petition filed with USCIS). As a court has declared the marriage to be "invalid from the outset" the argument could be made that the client was never married, thereby potentially negating the need to inform USCIS of the marriage.

What are the consequences if, subsequent to I-360 approval, the child reunited with the parent with whom the juvenile court previously found he could not be reunited?

The USCIS Policy Manual, Vol. 7, Pt. F, Ch. 7.C.2, indicates that automatic revocation only occurs when the petitioner is reunified "by virtue of a juvenile court order" with the parent that was previously found to have abused, abandoned, or neglected the youth. Keep in mind that by the time an SIJS beneficiary applies for AOS, they may no longer be under the jurisdiction of the court if jurisdiction over the child terminated based on age. In a similar provision for SIJS eligibility, the USCIS Policy Manual specifically states that the requirement that juvenile court retain jurisdiction does not apply if "juvenile court jurisdiction ended solely because… [t]he petitioner was adopted, or placed in a permanent guardianship; or [t]he petitioner was the subject of a valid order that was terminated based on age before or after filing the SIJ petition." Vol. 6, Pt. J, Ch. 2.C.4.

The Policy Manual also indicates, in the same AOS provision, that USCIS can revoke a petition for "good and sufficient cause," citing INA § 205 and 8 CFR §205.2(a). The example listed in the Policy Manual is a situation where "the record contains evidence or information that directly and substantively conflicts with the evidence or information that was the basis for petitioner's eligibility for SIJ classification." Thus, the reunification could be a reason for USCIS to revoke upon notice, but it would be unlikely, and highly predicated on the specific facts of the case.

C. Other Related Questions

If, under INA § 245(h), a youth with SIJS is classified as paroled, can that parole status be used to apply for an Employment Authorization Document (EAD)?

According to the AOS statue, applicants are deemed paroled "for the purposes of adjustment of status." 8 CFR § 274a.12(c)(11) allows people who have been paroled into the United States temporarily for emergency reasons, urgent humanitarian reasons, or significant public benefit to apply for employment authorization. Practitioner experience over the last few years has indicated that approvals for EADs under the (c)(11) category are the exception, rather than the

rule. USCIS has generally argued that INA § 245(h) implies that youth with SIJS are paroled **only** for the purposes of adjustment of status. A federal district court in Missouri recently disagreed with USCIS and found that USCIS was reading the word "only" into the statute improperly. The court found that Congress intended SIJS to be a humanitarian status and left out the word "only" in the language of the statute so that those with SIJS could be paroled for additional purposes. The court indicated that this question was an issue of first impression, and there is no other case law from other jurisdiction that speaks to SIJS parole for EAD purposes. Therefore, it is unclear to us how USCIS will address this issue going forward.

Should a Form I-131, Application for Travel Document, be filed for an individual with SIJS with an adjustment pending, and if so, do they need to pay the filing fee?

If the SIJS beneficiary is in removal proceedings, a Travel Document should not be sought. USCIS Policy Memoranda and the Adjudicator's Field Manual[5] indicate that USCIS will not issue travel documents or advance parole to adjustment applicants that are in removal proceedings. For applicants adjusting before USCIS (and therefore not in removal proceedings), the application fee for the I-485 must have been paid to receive a Travel Document. Even if a fee waiver was requested and approved for the I-485, a filing fee for the I-131 is required, according to the instructions for the Form I-912, Request for Fee Waiver. Information regarding the filing fee for the travel document and advance parole is found on the USCIS website.

What additional steps need to be taken if a child receives their SIJS-based LPR card before the age of 14?

If a child receives Lawful Permanent Residence (green card) before turning 14 years old, a new LPR card must be requested after turning 14 using Form I-90. The regulation at 8 CFR §264.5(b)(8) states "[a] permanent resident shall apply for a replacement Permanent Resident Card . . . [w]hen the bearer of the card reaches the age of 14 years, unless the existing card will expire prior to the bearer's 16th birthday . . . ."

If an adjustment of status application is denied by USCIS, will an immigration judge be able to consider the application *de novo*?

Although 8 CFR § 1245.2(a)(5)(ii) indicates that if an adjustment application is denied by USCIS the applicant can renew their adjustment application in court, there is no clear guidance in the INA or the regulations as to the standard under which the immigration judge reviews that application. There is a reference in a case from a Federal District Court in Houston that indicates "the immigration judge has exclusive authority to consider the application under 8 U.S.C. § 1255 **de novo**." *Hinojosa v. U.S. Dep't of Justice*, CIV.A. H-10-437, 2010 WL 5419046, at *5 (S.D. Tex. Dec. 23, 2010) (citing 8 C.F.R. § 1240.11(a), 1245.2(a)(5)(ii); *Cardoso v. Reno*, 216 F.3d 512, 518

[5] The Adjudicator's Field Manual (AFM) was the precursor to the USCIS Policy Manual. USCIS has not fully updated all portions of their Policy Manual and link to relevant portions of the AFM when a section is not updated. See USCIS Policy Manual, Vol.11, Pt. E as the relevant example.

(5th Cir. 2000)) [emphasis added]. It can be assumed that the applicant, who is now the respondent in removal proceedings, will submit a new I-485 adjustment application, which should then be considered by the immigration judge. However, the OPLA attorney could always submit evidence from the A file as to why USCIS denied the original adjustment application.

Another unknown is whether and how an applicant whose adjustment was denied by USCIS will be able to seek review in removal proceedings if they had never been in removal proceedings. Under the Trump administration, there was a memo that required USCIS to issue a notice to appear (NTA) in all cases denied by USCIS, where the applicant did not have underlying immigration status. This memo has since been rescinded by the Biden administration, and the 2011 memo regarding NTA issuance is back in place. It is not clear under the 2011 memo whether an I-485 adjustment application based on SIJS denied by USCIS would be automatically referred to immigration court.

If an I-360 and I-485 were inadvertently filed concurrently with USCIS for a client in removal proceedings, will USCIS still consider the I-360? What happens to the I-485?

USCIS should still adjudicate the I-360, but the I-485 will likely be administratively closed because USCIS does not have jurisdiction over the adjustment of status application if the applicant is still in removal proceedings. 8 CFR §245.2(a)(1).

If a client has an approved SIJS petition, is it possible to deny the charge of removability while taking pleadings (either written or during a master calendar hearing)?

For a child whose NTA charges them as being present in the United States without admission or parole, it is DHS's burden to prove alienage in removal proceedings. INA §240(c)(3)(A); 8 CFR §1240.8(c). Evidence of foreign birth, if lawfully obtained, creates a presumption of alienage. *Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008). Once alienage is established, the burden then shifts to the "respondent" to prove that they are "clearly and beyond a doubt entitled to be admitted to the United States and [are] not inadmissible as charged." 8 CFR §1240.8(c).

Advocates have inquired as to whether the parole individuals with SIJS receive under INA § 245(h) makes them "no longer inadmissible." Previously, DHS has taken the position that the parole granted by INA § 245(h) is only available when the person is actually adjusting their status. However, as discussed above (*supra* Section I.C.), at least one federal district court has found that DHS is reading the word "only" into the statute, and that the parole can be used for other purposes.

II. Where to adjudicate, USCIS or EOIR?

Who has jurisdiction over a client's application for adjustment of status?

Generally, if a person is in removal proceedings, only EOIR has jurisdiction to adjudicate their adjustment application. 8 CFR § 1245.2(a). The exception to this rule is if the individual's NTA indicates they are an arriving alien. USCIS has jurisdiction over adjustment applications for

arriving aliens, even if they are in removal proceedings. If a person is not in removal proceedings, or their proceedings have been terminated or dismissed, the adjustment application should be filed with USCIS.

What is the benefit of adjudicating adjustment of status before USCIS rather than in immigration court, if termination or dismissal of immigration court proceedings is possible?

The first, and possibly most significant, advantage is that the adjudication process in front of USCIS is intended to be non-adversarial. This same argument forms the basis for the TVPRA provision that allows children who are given the designation of unaccompanied to have their asylum applications adjudicated by the USCIS Asylum Office. There is not often an interview at USCIS for adjustment based on SIJS. In addition, it depends on the facts of your case, but there may be times when adjudication is faster at USCIS than with your assigned immigration judge.[6]

What is the benefit of filing the I-360 and I-485 concurrently for clients who are eligible to do that?

If the visa bulletin lists the client's country as current in the EB-4 category, it may be wise to file the SIJS petition and the adjustment application at the same time. If you have concerns about your client's admissibility; however, you will need to factor that into a decision to file concurrently. For example, a client with a recent arrest or conviction may be better suited by putting off consideration of their admissibility until they have had time for the criminal matter to be resolved and/or to show rehabilitation. Filing concurrently allows the process to go faster, as the practitioner does not have to wait for the approval of the I-360 to reach them before filing the I-485. USCIS says: "[w]hen adjudicating concurrent filings, we determine the eligibility for the immigrant visa petition first. If a visa number remains available for the immigrant classification and your Form I-485 is approvable (which in certain cases requires an interview), we will generally consider the adjustment application at the same time. We will mail separate decision notices for both forms." Filing concurrently allows your client to file an application for EAD with the I-485 sooner than if the application was filed after the I-360 approval.

For cases that were administratively closed by an immigration judge before the Attorney General issued *Matter of Castro Tum*, can a client seek adjudication of the AOS application at USCIS?

Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018), was recently overruled by Attorney General Garland in *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). Administrative closure is a form of docket management that immigration judges have used for decades. Under *Matter of Avetisyan* and *Matter of W-Y-U-*, cases where the respondent was waiting for USCIS to

[6] For information on the current immigration court backlog, see the following: "The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts," TRAC Immigration (Jan. 19, 2021), https://trac.syr.edu/immigration/reports/637/. "Judge Dana Marks On How The Biden Administration Can Address Immigration Backlogs," NPR Morning Edition (Mar. 26, 2021), https://www.npr.org/2021/03/26/981486753/judge-dana-marks-on-how-the-biden-administration-can-address-immigration-backlog

adjudicate an application or where the respondent had been granted deferred action, for example, could be granted administrative closure so that immigration judge's calendars and dockets were free to concentrate on other, more pressing cases. In *Matter of Castro-Tum*, former Attorney General Sessions determined that immigration judges lack general authority to administratively close cases. *Matter of Cruz-Valdez* overruled *Matter of Castro-Tum* and indicated that *Matter of Avetisyan* and *Matter of W-Y-U-* set the standard for when an immigration judge can use administrative closure.

It should be noted, for those cases administratively closed prior to *Matter of Castro-Tum*, that the cases were not dismissed, and the client is still in removal proceedings. 8 CFR §1245.2(a)(1)(i) awards the immigration judge (IJ) exclusive jurisdiction over an application to adjust status (Form I-485) when removal proceedings have been initiated (except for arriving aliens). The immigration court still has jurisdiction over an application for adjustment, even when a case has been administratively closed.

CILA is aware of situations where adjustment applications were approved by USCIS when the removal proceedings were administratively closed by the immigration judge. This is an error on USCIS's part and although the client may have received a "green card," they should not have. The green card could be rescinded because it was issued in error or cause a procedural mess for your client down the line, especially if the immigration judge declines to dismiss or terminate removal proceedings. For a detailed description of the consequences of adjusting in front of USCIS while removal proceedings are still open, see this CILA resource. The best course of action is to get the case re-calendared and request dismissal of the Notice to Appear as a matter of prosecutorial discretion from the ICE OPLA or seek a joint motion to dismiss the proceedings. ICE recently released Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities, which lists children who are prima facie eligible for SIJS as an example of circumstances in which prosecutorial discretion may be warranted.

Is there a procedural distinction between a "motion to dismiss" and a "motion to terminate"?

Yes. A motion to terminate is a request submitted to the court by the respondent because the NTA is either substantively or procedurally defective.[7] ICE OPLA can file a motion to dismiss to seek dismissal of the charge(s) due to one of the grounds listed under 8 CFR §239.2(a), including if the respondent is not deportable or admissible under immigration laws, or if continuation of

[7] For a more in-depth discussion of motions to terminate, *see* "Notices to Appear: Legal Challenges and Strategies," American Immigration Council (February 27, 2019) https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_practice_advisory.pdf

the case is no longer in the government's best interest. A motion to dismiss can be filed jointly with the respondent.[8]

If a client has an *in absentia* removal order, when is the most appropriate time to seek a motion to reopen and dismiss or a motion to reopen and recalendar?

INA § 240(b)(5)(C) indicates that there are two ways to reopen an *in absentia* removal order. First, if it has been less than 180 days since the immigration judge ordered the *in absentia* removal, it can be reopened by showing exceptional circumstances caused the client to fail to appear in court. If it has been more than 180 days, a motion to reopen can be filed if it can be shown that the client did not receive notice as required and that the failure to appear was through no fault of the client. INA § 240(b)(5)(C)(ii). These parameters are different if an order was not *in absentia*, and a removal order was issued after a hearing.[9]

Motions to reopen removal orders, not received *in absentia,* are limited in time and number. There is only one chance to file a motion to reopen and it must be filed within 90 days after the order from the immigration judge. 8 CFR §1003.23(b)(1). If the 90-day time limit has run to submit a motion to reopen, it must instead be sought as a joint motion with DHS or through the immigration judge's *sua sponte* authority. Per the same regulations mentioned above, DHS is not limited by time or number of motions. Earlier in 2021, new regulations went into effect limiting a judge's ability to reopen a case *sua sponte*. However, these regulations were enjoined in March 2021. Whether you are seeking a joint motion with DHS or a motion directly to the immigration judge asking them to exercise their *sua sponte* authority, it is best practice to have relief available (i.e. priority date current so client can adjust of status) before seeking reopening. Having relief available makes the motion stronger and will prevent the case going through the same hurdles of having to seek continuances and ward off another removal order.

What arguments and reasoning should be included in the motion to reopen?

There are many considerations when seeking a motion to reopen, such as type of order, whether final or *in absentia*, and statutory deadlines. In general, a motion to reopen must "state the new facts that will be proven at a hearing to be held if the motion is granted," and "be supported by affidavits or other evidentiary material." INA § 240(c)(7)(B); 8 C.F.R. § 1003.23(b)(3); 8 C.F.R. § 1003.2(c)(1). For an *in absentia* order, evidence of a lack of notice and that the failure to appear was not the fault of your client should be included. If the client is a child or was at the time of the *in absentia* order, in addition to other pertinent evidence, it can be useful to include an affidavit from the parent, sponsor, or other relevant caretaker attesting to not having received

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[8] *See* "Exercising Prosecutorial Discretion to Dismiss Adjustment Cases," William J. Howard, U.S. Immigration & Customs Enforcement (Oct. 6, 2005). https://www.ice.gov/doclib/foia/prosecutorial-discretion/pd-dismiss-adjustment-cases.pdf

[9] CILA is aware that clients have received removal orders despite pending SIJ applications due to the fast pace of proceedings in recent years coupled with the Attorney General decisions and EOIR policy memos that have limited or increased the burden for continuances and/or administrative closure.

the notice and showing that the child was under their care and supervision at the time and therefore could not have appeared in court without their assistance and cooperation.

Practitioners whose client's removal order resulted from a hearing at which they were present are most likely to be seeking a motion to reopen sought jointly with DHS or *sua sponte* before the immigration judge. In both of these cases, as they are discretionary, it is important to include evidence of the relief for which the client is now eligible and evidence of positive equities in favor of the client.

Another argument that can be made is that equitable tolling applies. Equitable tolling is a common law principle that allows for an extension of non-jurisdictional filing deadlines if the respondent acted diligently in pursuing their rights but are nonetheless prevented from timely filing by some extraordinary circumstance.[10] A commonly used scenario for equitable tolling is the necessity of waiting for a visa number to come available before becoming eligible to adjust status, as long as the client, and their practitioner, is diligent in pursuing reopening and preparing the application to adjust as soon as the priority date is current.

What impact does a pending asylum application have on an application for adjustment based on SIJS in removal proceedings?

A 2005 ICE memo lists a pending asylum application as one of the reasons for ICE OPLA to not exercise prosecutorial discretion. If an SIJS adjustment applicant with a pending asylum application wishes to have their case dismissed so as to adjust in front of USCIS, they often need the ICE OPLA to exercise their discretion and agree to join a joint motion to dismiss. However, as a practical matter, we do not know whether immigration judges are requiring withdrawal of asylum applications to grant a motion to dismiss. It is unclear what happens to the asylum application, procedurally, once the immigration case is closed.

If a client is pursuing both SIJS and asylum and ultimately the asylum application is withdrawn and the case is dismissed by the immigration judge, is the client foreclosed from applying for asylum subsequently?

INA § 208(a)(2)(C) indicates that a previously denied asylum application is a bar to applying for asylum. However, as it is not a denial, withdrawing an asylum application that was pending either with the immigration court or at the asylum office does not mean that the client will no longer be able to apply for asylum. Once an asylum application has been withdrawn, it can be re-filed as long as the one-year deadline does not apply, either because the client retains their unaccompanied child status, it has been less than one year from entry, or there are exceptional circumstances, including a change in country conditions. INA §§ 208(a)(2)(B), (D), & (E).

[10] *See, e.g., Holland v. Florida*, 560 U.S. 631 (2010).

What is the best way to communicate, and negotiate, with ICE OPLA regarding issues such as prosecutorial discretion and joint motions to dismiss?

As with many situations in immigration matters, persistence is key. Practitioners can call, email, or send a letter to the relevant ICE OPLA office. Dedicated email addresses have been created for prosecutorial discretion requests under the recent ICE OPLA Interim Guidance. CILA also recommends reaching out the local AILA ICE liaison to ask for more tips and surveying practitioners in the area as to what has been successful for them. The local AILA chapter may have a list of the email addresses for the Assistant Chief Counsels, or at least the general duty attorney email address, or you can call and leave a message on their voicemail.

If a client has a removal order, which agency has jurisdiction over the adjustment application, EOIR or USCIS? Does it matter if the removal order has been executed or not?

8 CFR §1245.2(a)(1)(i) awards the immigration judge exclusive jurisdiction over the application to adjust status when removal proceedings have been initiated (except for arriving aliens). Therefore, if a client has an unexecuted removal order, removal proceedings need to be reopened in front of the immigration judge, as discussed above. However, if the removal order has been executed, there are two common scenarios: first, the client has been deported and is currently outside the United States, or second, the client has been deported and has re-entered the United States (usually without permission).

Until recently, for clients in the first scenario, the Foreign Affairs Manual (FAM) indicated that there was a possibility of consular processing for individuals SIJS. That has now been changed in the FAM: "The Department of State and Related Agencies Appropriations Act, 1998 changed the definition of a Special Immigrant Juvenile (SIJ) and divested consular officers of the authority to issue SIJ visas. Due to this change, since November 26, 1997 SIJ has been an adjustment-only category as reflected in 22 CFR §42.11. Under no circumstances should you issue an SIJ visa." 9 FAM 502.5-7(B). This guidance makes it clear that consular processing is not an option for SIJS beneficiaries, and therefore USCIS does not have jurisdiction because the person it outside the United States.

In the second scenario, the client is now inadmissible under INA § 212(a)(9)(C), which is waivable per INA § 245(h) (see the discussion of inadmissibility *infra* at V.B.). The client should be able to adjust in front of USCIS with an I-601 waiver based on humanitarian purposes, family unity, or when it is otherwise in the public interest. INA § 245(h)(2)(B).

If the client has an order of removal, when is the waiver filed?

See above. If the client has an unexecuted order of removal, they are still under the jurisdiction of the immigration court, which means only the immigration judge has jurisdiction to adjudicate the adjustment application. 8 CFR § 1245.2(a)(1); USCIS Policy Manual Vol. 7, Pt. A, Ch. 3.D. This requires the case to be reopened in order to adjust, which rescinds the prior removal order. At this point the client no longer has a removal order that needs to be waived.

However, if a client received a removal order, subsequently left the United States (either through ICE returning them to their home country or through self-deportation), and then returned without permission or inspection, they are now inadmissible under INA § 212(a)(9)(C). As their removal order was executed, USCIS has jurisdiction over the application to adjust status, and the I-601 waiver authorized by INA § 245(h) can be filed along with the adjustment application.

What happens if ICE OPLA is unwilling to join a motion to reopen and the immigration judge is unwilling to grant the motion otherwise?

As discussed above, unless a removal order has been executed (the individual left the country), USCIS does not have jurisdiction over the client's adjustment application. It may be best to ask ICE OPLA to join a joint motion to reopen again, as movement on this issue has been reported under the Biden administration. Nevertheless, if that does not work and the immigration judge still refuses to grant a motion to reopen, the client may file a petition for other immigration relief over which USCIS has jurisdiction and can be granted regardless of an outstanding removal order (such as U or T visas, if the client qualifies).

As was also discussed above, if the client is outside the U.S., the Department of State has recently clarified that consular officers cannot issue SIJS immigrant visas.[11] Therefore, the client would need to re-enter the U.S in order to adjust status and become a LPR based on their SIJS status. ICE recently announced revised policy Using a Victim-Centered Approach with Noncitizen Crime Victims, including SIJS beneficiaries, that contemplates the use of parole.

III. Court Specific Issues

A. Generally

Is it possible to file an adjustment of status application with the immigration court before the priority date is current?

8 CFR §1245.2(a)(2)(i)(A) says that an adjustment application cannot be filed until there is a visa number available. If the priority date is not current, you may seek prosecutorial discretion from ICE OPLA to dismiss proceedings or request continuances or administrative closure in immigration court until the priority date is current. It is also important to object to any scheduling orders the client may receive.

[11] "The Department of State and Related Agencies Appropriations Act, 1998 changed the definition of a Special Immigrant Juvenile (SIJ) and divested consular officers of the authority to issue SIJ visas. Due to this change, since November 26, 1997 SIJ has been an adjustment-only category as reflected in 22 CFR §42.11. Under no circumstances should you issue an SIJ visa." 9 FAM 502.5-7(B) Certain Juvenile Court Dependents (CT:VISA-1180; 12-08-2020)

If the priority date is current, can an adjustment application be preemptively filed with the immigration court before a merits hearing is scheduled?

Yes, an adjustment application can be filed before the merits is scheduled, as long as the priority date is current. Given the number of steps to complete when filing an adjustment of status application in immigration court, it is best to do so as early as possible.

Can a practitioner ask an immigration judge to adjudicate an adjustment application by submission?

CILA has not found definitive evidence of statutory or regulatory authority for adjudication by submission in immigration courts. 8 CFR §1003.25 gives instructions for stipulated requests for orders and waivers of hearing, but it refers exclusively to orders of removal, not grants of relief. Nevertheless, it appears at least theoretically possible to have an adjustment application adjudicated by submission (which means relying solely on the documentation in the court's file). EOIR's Immigration Court Practice Manual at 5.10(x) indicates that motions not specifically authorized can be filed: "[t]he Immigration Court entertains other types of motions as appropriate to the facts and law of each particular case, provided that the motion is timely, is properly filed, is clearly captioned, and complies with the general motion requirements." Several standing orders from immigration courts around the country have recommended resolving matters through submission, including grants of relief. Additionally, the recent Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities encourages ICE OPLA attorneys to join in motions to grant relief. CILA is aware, through requests for technical assistance, that other practitioners have asked for adjudication by submission; however, we do not have any knowledge of the results.

What happens when the immigration judge, during the adjustment process in immigration court, is questioning whether USCIS correctly approved the I-360?

An immigration judge does not have the authority to review or revoke visa petitions. By creating the Department of Homeland Security (DHS) in the Homeland Security Act of 2002, Congress granted USCIS, through 8 USC 1101(a)(27)(J) and 8 C.F.R. 204.11, the sole authority to review and grant SIJS. Therefore, only USCIS can revoke the I-360. However, the immigration judge may ask the ICE OPLA attorney to request that USCIS review the approved petition, as both ICE and USCIS are agencies of DHS. It may be best to wait and see if ICE OPLA moves forward with a request to USCIS to revoke approval of the I-360 and, if not, to request that the judge move forward with adjudication of the I-485.

What normally forms the basis of ICE OPLA's cross examination at a merits hearing for adjustment of status based on SIJS?

Generally, ICE OPLA would be able to cross examine a respondent on any of the factors that go into determining eligibility for adjustment based on SIJS, including discretion. As many of the bars and other impediments to adjustment are waived for those with SIJS by INA § 245(h),

practitioners report that ICE OPLA will usually have questions regarding any admissibility issues, real or perceived, which can also go towards discretion.

Is it required to withdraw an asylum application pending in front of the immigration judge if the client choses to adjust based on SIJS in immigration court?

When a judge grants relief at a merits hearing or grants a motion to dismiss, the written decision (which is often on a standard template from EOIR) has a space to address other relief pending and the judge usually indicates that the application for those forms of relief are withdrawn. Generally, at a merits hearing, it is permissible to put on evidence for multiple forms of relief, should the practitioner believe their client is eligible for them. For example, a practitioner could put forward testimony for an asylum claim, a withholding claim, and a cancellation claim if you feel your client has both potential claims. If the judge decides to grant one form of relief, all the other forms are withdrawn on the order.

Should we withdraw representation as a matter of regular practice after the immigration court case has been completed, either through dismissal or a grant of adjustment?

If the representation of the client is ending upon their grant of adjustment, it is best practice to withdraw representation after the matter is concluded. Otherwise, it is possible that the practitioner will be served as the attorney of record if the client finds themselves back in removal proceedings at a later date.

What are the procedures to move an adjustment application currently on file with USCIS to EOIR for adjudication?

It would be unusual to ask for USCIS to refer jurisdiction over an AOS application to EOIR because an application for adjustment should not be filed with USCIS if the applicant is in removal proceedings. However, prior to the retrogression of the EB-4 category in 2016, many practitioners did file concurrent petitions for SIJS and adjustment applications with USCIS for their clients even if they were in removal proceedings. CILA is unaware of an established mechanism to send an application from USCIS to EOIR. EOIR may be able to forward an adjustment of status application to USCIS locally, but it is unclear whether the same procedures apply for USCIS Service Centers. For SIJS adjustment of status, the application is adjudicated at the National Benefits Center. We recommend asking the court administrator.

Can the denial of an adjustment application in immigration court be appealed, even though it is based on discretion?

Under 8 CFR §245.2(a)(5)(ii) an adjustment application denied by USCIS is not appealable, although the denial is without prejudice so the applicant can submit a new application. 8 CFR §1245.2(a)(5)(ii) indicates that EOIR is not restrained by this prohibition of appeal. There is a long history of case law that establishes that the BIA can consider adjustment applications and review discretion. 8 CFR §1003.1(d)(3)(ii) indicates that the BIA reviews an immigration judge's discretionary determinations *de novo*.

What happens when SIJS clients are part of a combined family removal case (sometimes known as riders) for a lead respondent who does not have relief from removal? What happens when the lead respondent and the child have a prior removal order, but no relief for the lead?

If a child respondent/rider is eligible to adjust status based on SIJS, practitioners can request that the case be severed from the parent/lead respondent following the guidelines in 4.21(b) of the EOIR Policy Manual. If the child respondent/rider was ordered removed along with the lead respondent, a motion to reopen along with a motion for severance can be filed with the BIA or the IJ if the family was removed *in absentia*.

What can a client do if they were ordered removed by the immigration judge and the case is subsequently pending with the BIA, but now their visa number is current?

A request to remand can be submitted to the BIA. In December 2020, the new rules regarding the appellate procedure, which included remands, became final. They went into effect on January 15, 2021. However, on March 10, 2021 the judge in Centro Legal de *La Raza et al v. EOIR et al*,. a case brought in the Northern District of California to challenge the new regulations for the BIA and administrative closure, enjoined the regulations. A motion to remand is subject to the same substantive requirements as a motion to reopen, but it is not subject to the time and numerical restrictions of motions to reopen.[12]

B. Fee waivers

Can fees be waived in immigration court, and, if so, what needs to be shown to merit a fee waiver in immigration court.

If you are asking for a fee waiver on a form that is promulgated by DHS (i.e. Form I-485), an immigration judge can waive the fee, at their discretion, as long as DHS would be able to waive the fee. Fees for motions in front of the immigration court can also be waived at the immigration judge's discretion. The EOIR Policy Manual indicates that "[t]he 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."

Can the EOIR-26 form constitute the unsworn declaration regarding the party's inability to pay?

Generally, the form EOIR 26 is for use at the BIA. The EOIR Policy Manual indicates that in immigration court you should file a motion to request a fee waiver. CILA recommends following the EOIR Practice Manual's guidance on motions at Ch. 5.2. The EOIR practice manual, at Ch. 3.4(d), also requires that "[t]he 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."

[12] *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992); *see infra* for discussion of motions to reopen. *See* BIA Practice Manual 5.8(c) Motions to Remand Limitations found at justice.gov/eoir/eoir-policy-manual/iii/5/8.

If requesting a fee waiver from the immigration judge, when should a practitioner submit to USCIS proof of filing to generate a receipt and biometrics notice?

It is best practice to wait until the immigration judge has ruled on the motion for fee waiver before filing a copy of the application, and the immigration judge granted fee waiver, with USCIS for receipt and biometrics. The Pre-Order Instructions require the appropriate application fees or an order from the immigration judge granting the fee waiver.

Does an order from the immigration judge granting a fee waiver for an I-485 application also include a waiver of the biometrics fee?

The Pre-Order Instructions state that the biometrics fee is mandatory, which implies that no waiver is available.

C. Pre-hearing issues

If adjusting status in immigration court, what paperwork needs to be filed with which entity?

The full I-485 application to adjust status, with accompanying documentation and evidence,[13] is submitted to the immigration court. A copy of just the I-485 form (not the accompanying documents) is then submitted to USCIS along with the fee payment or the fee waiver granted by the immigration judge so that USCIS can generate the receipt notice and biometrics appointment that is required to complete before the adjustment hearing. The Pre-Order Instructions explain the process.

If the adjustment application was initially filed with USCIS but will now be adjudicated by the immigration court, is it still necessary to submit a copy of the Form I-485 to USCIS in order to get biometrics?

Yes, a new Receipt Notice from USCIS is required for defensive applications.

How are medical exams handled when a client is adjusting status in front of the immigration judge?

The medical exam will need to be filed with the immigration court. EOIR follows the guidance in the USCIS Policy Manual regarding medical exams (Form I-693). One of the issues practitioners have come across, given the backlog in both immigration court and USCIS, is the expiration of the medical exam before the adjustment application is adjudicated. In response, USCIS made several changes to the policy. First, USCIS determined that it was acceptable to file an I-485, application to adjust status, without the medical exam attached. Second, they altered the validity period of the medical exam. Generally, an I-693 is now valid for two years from the date it is signed by the civil surgeon. However, the I-693 cannot have been signed by the civil surgeon more than two months before the I-485 is submitted. It is a judgement call for the practitioner

[13] A sample checklist of what documentation and evidence should accompany an application to adjust based on SIJS can be found on the USCIS website. But please note that additional or different documentation could be required depending on the individual client's case.

as to when to file it—with the I-485 adjustment application packet or after. Given the delay in immigration court, it may be best to submit the medical exam at the merits hearing.

Can a client apply for employment authorization if they are adjusting in immigration court?

Applicants with a pending adjustment application can apply for an employment authorization document (EAD) under category (c)(9) on the I-765, application for employment authorization document, regardless of where they are adjusting. If the client is adjusting in front of the immigration judge, it will be necessary to submit the I-485 receipt notice along with the I-765 application to prove that there is an adjustment application pending. Therefore, the practitioner must first file the adjustment application in immigration court, file a copy of the application with USCIS, receive the receipt notice for the adjustment application from USCIS, and then submit the EAD application to USCIS with the required documentation.

If the fee for the adjustment application was paid to USCIS upon filing the I-485, no separate fee is required to file for the initial or renewal EAD based on a pending adjustment. However, if the fee for the I-485 adjustment application was waived by the immigration judge, a separate fee waiver must then be filed with USCIS for the initial and any renewal EADs.

What are the Pre-Order Instructions?

Pre-Order Instructions, also called "Instructions for Submitting Certain Applications in Immigration Court and For Providing Biometric and Biographic Information to U.S. Citizenship and Immigration Services," are instructions that must be followed if the respondent files an application for relief or protection in immigration court. They are typically given to the respondent by the OPLA attorney at a master calendar hearing when a practitioner indicates their client (or the respondent if they were pro se) intends to "file certain applications for relief that, if granted, would lead to the alien's attaining permanent residence, asylum, withholding of removal, or certain other benefits."

What if the client has not received his biometrics appointment notice and therefore has not completed his appointment by the date of his hearing?

It is the responsibility of the respondent to comply with the DHS instructions on biometrics provided in the pre-order instructions. The pre-order instructions state that "[i]f you do not receive this notice in 3 weeks, call (800) 375-5283." If the Pre-Order Instructions were followed, but a biometrics appointment was not issued within three weeks, ICE OPLA should be contacted immediately to troubleshoot the issue. However, keep in mind USCIS indicated in an August 2011 Q&A, "DHS Procedures for Implementation of EOIR Background Check Regulations for Aliens Seeking Relief or Protection from Removal" that "[i]f you submitted copies of your application for asylum or withholding and your FBI fingerprint results are current (i.e., provided within the past 15 months) because you filed an affirmative I-589 with USCIS that was later referred to EOIR, USCIS will not send you another ASC appointment notice. So if the client has provided biometrics in the past, you can also contact ICE OPLA to ask them if it is possible to

"refresh" the prints. More information can be found at: https://www.uscis.gov/laws-and-policy/other-resources/immigration-benefits-in-eoir-removal-proceedings.

IV. USCIS Specific Issues

A. General

Can an I-765 Application for Employment Authorization be filed along with an application to adjust status at USCIS if the practitioner is requesting a fee waiver for the I-485?

It is standard procedure for a practitioner to file the application for employment authorization at the same time at the application for adjustment when adjusting in front of USCIS, even if a fee waiver is being requested. Practitioners report that recently they have had the employment authorization application rejected in that scenario. It is possible that the lockbox that receives the I-485 application to adjust based on SIJS with an attached employment authorization application is following the I-765 EAD filing instructions literally. The instructions say the following: "If you did not pay the appropriate Form I-485 filing fee because your filing fee was waived or you are exempt from paying it, you must pay the Form I-765 filing fee or request that the filing fee be waived." Therefore, it is important to indicate that a fee waiver for both the I-485 and I-765 is requested in part 3 of the I-765 application. It may also be prudent (although not strictly necessary) to file two copies of the I-912 fee waiver, one for the I-485 and one for the I-765, as would be done when filing the forms separately.

What happens if the adjustment application was filed with USCIS when it was still using the Dates for Filing chart from the Visa Bulletin and the EB-4 category for the child's country was current, but USCIS subsequently rejected the application after USCIS switched to Final Action Date chart in the Visa Bulletin.

The Department of State, which tallies the amount of immigrant visas available and used each year and publishes the Visa Bulletin, is responsible for visas issued at consular posts outside of the United States. Therefore, USCIS must use the information from the Visa Bulletin to tell those applicants able to adjust status when they can file their application so that it coincides with an available visa. If USCIS determines there are more immigrant visas available for the year than there are applicants in certain categories, then they follow the "Dates for Filing" chart in the Visa Bulletin for that month. Otherwise, USCIS will require applicants to use the "Final Action Dates" chart to determine when to file their adjustment of status application. USCIS usually posts which chart to use on their website.

If a practitioner believes that an adjustment application was incorrectly rejected due to a change from the "Dates for Filing" chart to the "Final Action Dates" chart, it may be helpful to try refiling, including the USCIS visa bulletin information and proof of the date the application was sent by the practitioner and received by USCIS, and request supervisor review or email the lockbox at lockboxsupport@dhs.gov with the same information. The lockbox scans all applications before rejecting or accepting them, so it is possible for USCIS to adjudicate with the scan of the application.

If a client has a pending adjustment application based on SIJS and one of their family members has another application, such as an asylum or I-130 petition, pending with USCIS, are those being compared?

Assume that any petition, application, or other document that can form part of the client's A-file will be compared. When it is a family member, this assumption is not as strong, but practitioners report that it has happened before. It will most likely depend on what information about each person is listed on the other's petition/application.

What can be done if at the start of an adjustment interview based on SIJS, the USCIS officer indicates that the applicant understands enough English and therefore does not need an interpreter?

It has not been definitively established that there is a right to interpretation in immigration proceedings.[14] This is generally framed as a due process issue, which requires the applicant for an immigration benefit to show prejudice due to the lack of an interpreter. Generally, if the officer will not agree to a translator, you can ask to speak to a supervisor. However, if the supervisor also refuses, then it is important to make a record of the fact in preparation for appeal if there is a negative decision.

B. Cases that were administratively closed by USCIS

What is the best way to reopen an adjustment application based on SIJS that was administratively closed by USCIS?

When an I-485 application is administratively closed by USCIS, a letter is sent to the attorney of record. In that letter, USCIS will explain why the case was administratively closed and how to go about providing additional evidence to show it should not be, or should no longer be, administratively closed. Since 2016, all SIJS based I-360s and I-485s have been adjudicated by the National Benefits Center. Before November 2016, SIJS petitions and adjustment applications were adjudicated at the USCIS local field office. If there is no response to the request to reopen an administratively closed adjustment of status application, you may be able to email the NBC SIJS email (NBCSIJ@USCIS.DHS.GOV) for further information or follow up with the local field office. If you do not have success with that email, nor after calling the USCIS customer service number, you can then contact the USCIS Ombudsman for case assistance.

[14] For a good discussion of the right to interpretation, although focused on asylum, *see* "'Speak Anglish:" Language Access and Due Process in Asylum Proceedings," Grace Benton, Georgetown Immigration Law Journal, Volume 34, Number 3 (Spring 2020). https://www.law.georgetown.edu/immigration-law-journal/wp-content/uploads/sites/19/2020/05/GT-GILJ200005.pdf.

If a client has an I-485 that has been administratively closed by USCIS, are they still able to renew their EAD based on that application?

As the adjustment application is still pending with USCIS, it has not been denied, making the client still eligible for an EAD based on a pending adjustment. The EAD would be renewed under the (c)(9) category on the I-765. However, keep in mind the changes USCIS has recently implemented around EADs. If the adjustment application was originally filed with a fee waiver, the new I-765 instructions say: "If you did not pay the appropriate Form I-485 filing fee because your filing fee was waived or you are exempt from paying it, you must pay the Form I-765 filing fee or request that the filing fee be waived."

C. Cases where NTA has not been filed with court

If a client is from a country where the Visa Bulletin is current for the EB-4 category, would it be possible to file the I-360 and I-485 concurrently if the client's NTA has yet to be filed with the immigration court?

Filing with USCIS when the NTA has not been filed is appropriate. According to 8 CFR § 1239.1(a), "[e]very removal proceeding conducted under section 240 of the Act (8 U.S.C. 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court." Thus, the child is not in removal proceedings until the NTA has been filed, which means USCIS has jurisdiction. Filing the concurrent applications will not necessarily prompt ICE to file the NTA, as there is no requirement that USCIS or the child inform ICE that the child has filed. To avoid any issues, it may be prudent to ask ICE OPLA whether they intend to file the NTA and document the response for USCIS if the issue of whether or not they have jurisdiction comes up.

V. Form Questions

A. General

Does USCIS have a specific policy when it comes to adjudicating fee waivers for applicants for adjust based on SIJS?

The instructions for the I-912 fee waiver form, Pt. 5, Item 5, No. 6, states what appears to be a fairly generous fee waiver for SIJS adjustment applicants: "SIJ Applicants seeking adjustment of status based on such classification are not required to complete Parts 4. - 6. of Form I-912 nor show proof of income." However, it is important to note that according to 8 C.F.R. §103.2 the form instructions have force of law:

> 8 C.F.R. §103.2 Submission and adjudication of benefit requests.
> (a) Filing. (1) Preparation and submission. Every form, benefit request, or other document must be submitted to DHS and executed in accordance with the form instructions regardless of a provision of 8 CFR §chapter I to the contrary. The form's instructions are hereby incorporated into the regulations requiring its submission.

Therefore, the regulations say that the I-912 form instructions supersede anything in the regulations, indicating that the generous waiver policy for SIJS adjustment applications should be followed. It might be worthwhile to provide a copy of that page of the instructions with the fee waiver.

With the new injunction in *Vangala*, should "N/A" still be filled in for blanks on USCIS forms just in case?

USCIS announced on April 1 that the "Blank Space Policy" has been rescinded. USCIS still warns that:

> applicants should be aware that we may reject these forms, or it might create delays in their case, if the applicant:
>
> - Leaves required spaces blank;
> - Fails to respond to questions related to filing requirements; or
> - Omits any required initial evidence.
>
> For more information about filing requirements and required initial evidence, consult the filing instructions for each form.

To learn more about the *Vangala* litigation, here is an FAQ: https://www.nwirp.org/wp-content/uploads/2021/01/Vangala-FAQ-and-Updated-USCIS-Guidance.pdf

How should Part 1, Q 22 on the I-485 be answered if the child was classified as an "arriving alien" on the NTA?

The answer to this question depends more on the facts of the case rather than the NTA. Assuming that the child arrived at the border and was neither issued parole, nor had a visa, nor was waived through without one, you would select 22c.

Does Part 8, Q 14 on the I-485, asking if the applicant has ever been denied admission to the United States, refer to a formal process of denial?

Not necessarily. If someone was turned around at the border (i.e. Mexican citizens that do not have the appropriate paperwork are often returned immediately, often referred to as "voluntary return"), this is not necessarily a formal process, but the CBP officer denied that person admission to the U.S. Nevertheless, there will usually have been some sort of formal process, especially for unaccompanied children who are not from Mexico that present themselves at the border, as the TVPRA requires them to be placed in the custody of ORR along with being placed into INA § 240 proceedings.

Given that many older clients have worked without permission due to the difficulty getting employment authorization documents (EADs) if their only form of relief was SIJS, how should Part 8, Q16 on the I-485, which asks if the applicant as ever worked in the United States without permission, be answered?

INA § 245(c) says that those that are adjusting based on INA § 101(a)(27)(J), or SIJS, are exempt from the bar on adjustment due to working without authorization. The question should be marked "yes" if the client has indeed worked without an EAD, but you can then explain in Part 14 of the I-485 that your client has SIJS, which exempts them from the usual bar on adjustment for working without authorization, citing INA § 245(c) and The USCIS Policy Manual, Vol. 7, Pt. B., Ch.6.

B. Inadmissibility Issues

What are the inadmissibility grounds?

The inadmissibility grounds are enumerated in INA § 212 and fall into these general categories: health grounds, criminal grounds, security related grounds, public charge grounds, immigration violation grounds, and other miscellaneous grounds. The questions in Part 8 of the I-485 are aimed at inadmissibility, and the heading for each section of questions indicates what area of inadmissibility is being considered.

Which inadmissibility grounds are waived for SIJS under INA § 245(h)?

INA § 245(h) splits the inadmissibility grounds into three categories: 1. Grounds that are inapplicable to adjustment applicants with SIJS; 2. Grounds that are waivable for adjustment applicants with SIJS, either under INA § 245(h) itself or under INA § 212; and 3. Grounds that cannot be waived for adjustment applicants with SIJS, and which prevent them from adjusting their status to lawful permanent resident. CILA prepared an inadmissibility chart that lists all the grounds of inadmissibility and what category they fall into for adjustment applicants with SIJS.

Where can the definition of "crime" be found?

"Crime" as a concept is not defined by the Immigration & Nationality Act. Neither is "crime involving moral turpitude." Black's Law Dictionary defines crime as "[a]n act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding." A crime involving moral turpitude is defined by caselaw. *Matter of Tejwani* defined it as "conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed to other persons." 24 I. & N. Dec. 97 (BIA 2007). *Matter of Silva-Treviño* boiled this definition down to reprehensible conduct plus a culpable mental state (intent). 26 I&N Dec. 826 (BIA 2016).

How can a practitioner determine if a client is inadmissible under the criminal grounds?

For an adjustment applicant to be inadmissible under INA § 212(a)(2)(A)(i), they must have been convicted of, or admitted to committing, acts which constitute the essential elements of a crime

involving moral turpitude. A conviction is defined as a formal judgment of guilt entered by a court or when a person has admitted sufficient facts and had a restraint on his/her liberty imposed. INA § 101(a)(48)(A). It is important to note, especially in SIJS adjustment cases, that juvenile delinquencies are not convictions for inadmissibility purposes. *See Matter of Devison,* 22 I&N Dec. 1362, 1365 (BIA 2000).[15]

For SIJS based adjustments involving juvenile offenses that have been sealed, what sort of criminal history documentation should we include with the adjustment?

USCIS may require copies of the juvenile record, even if it has been sealed. Practitioners have informed us that they often must go to the judge in the juvenile court and ask for access to the records. Some judges will agree to unseal for that purpose, and some will not. The practitioners have also had mixed results upon sharing the juvenile judge's refusal to unseal records with USCIS. There is a helpful resource from the ILRC and Public Counsel on sealed records, Frequently Asked Questions: Deferred Action for Childhood Arrivals (DACA) and Juvenile Delinquency Adjudications and Records." It was written for the DACA context, but still useful for SIJS based questions.

If a client reveals that he used marijuana when he was a minor, how should this be reflected in the I-485?

It is important to read the I-485 instructions and the questions extremely carefully, especially when the client has never been arrested, charged, etc. for that crime. Question 26 on Part 8 of the I-485 asks: "have you EVER committed a crime of any kind (even if you were not arrested, cited, charged with, or tried for that crime)?" It would be prudent for a practitioner to determine if the client's behavior met each and every element of the crime that your client may have committed. One could also look at whether that crime has immigration consequences. The use of marijuana can also come up during the civil surgeon visit for the medical exam, where it could be used for health-related grounds of inadmissibility.

If child is between 17 and 18 and commits a crime that would render them inadmissible if they were and adult, does it count for USCIS?

This will depend on the state. If a child is charged as a juvenile with a juvenile offense that leads to a delinquency, rather than a conviction for a crime, this juvenile delinquency will not count as a conviction for immigration purposes. However, even if the child is under the age of 18, if they are charged as an adult with a crime and convicted, this is a conviction for inadmissibility purposes. Keep in mind that juvenile delinquency, although not attributed for inadmissibility grounds, can still be considered in the discretionary analysis.

[15] *See* "What Are the Immigration Consequences of Delinquency?" Rachel Prandini, ILRC, March 2020.

What is the best practice when it comes to answering questions regarding waivable offenses?

Generally, this is a judgement call that needs to be made by the attorney, in consultation with the client. An example can be found in Part 8, Q16 of the adjustment application, where it asks if applicant has worked without authorization. Many practitioners report that their clients work without an EAD and they struggle to know how much information should be included in the application. It is important to read the I-485 instructions and form very carefully. Part 8 of the form requires an "explanation" if a question is marked "yes." As Part 3 of the form requires that employment history be listed, it should be apparent that the client worked without permission. A concise explanation is usually best, referring to the fact that the particular ground of inadmissibility is waived for individuals with SIJS by INA § 245(h).

What are the implications for a SIJS-based adjustment application where the applicant worked with a social security number that was either not theirs or fake?

This potentially triggers several inadmissibility grounds, but as was advised above, read the I-485 questions very carefully. This may mean that the client worked without authorization, which needs to be included on the application, but is waived. The act of purchasing a social security number belonging to someone else could be considered a crime, but as previously mentioned, it would need to meet all the elements of whatever crime is appropriate. The fraud or misrepresentation ground could also be a concern here, but the fraud or misrepresentation usually has to be material and made to an immigration official for an immigration benefit. Generally, behavior only needs to be disclosed if it meets one of the inadmissibility grounds and/or is covered by the questions posed by the I-485.

If a client has a juvenile delinquency finding for drug trafficking from another country, how should an issue like this be addressed in the application and any subsequent interview or hearing?

The drug trafficking ground of inadmissibility does not even require a conviction, just a "reason to believe." Prior to questions 24-45 in Part 8, the form language explicitly requires disclosure of behavior abroad. INA § 212(a)(2)(C), which is the inadmissibility ground for drug trafficking, lists "any alien," and does not mention "conviction" as a requirement, thereby including juveniles. However, the substance trafficked does have to be on the list of controlled substances or chemicals found at section 802 of Title 21. Therefore, it may be worthwhile to compare the foreign juvenile delinquency documentation and the country's relevant statute with the U.S. list to see if they match. If they do not match there could be an argument made that it is not the same crime.

If there is a possible inadmissibility issue but the practitioner is not sure if USCIS or ICE will raise it (for example, a mental health diagnosis that could raise a health-related inadmissibility ground), what is best practice for filing a waiver?

This is a judgement call that needs to be made by the attorney, in consultation with the client. If there is a documented diagnosis, for example in the client's ORR file or used in another

application filed with USCIS (i.e., asylum, U, or T), this will be fairly easily discoverable by USCIS or ICE and it may be better to head it off by addressing it at the beginning—either why it does not qualify for that inadmissibility ground and/or why the ground should be waived. A determination can also be based on what the client reports happening at the civil surgeon appointment. If the civil surgeon makes note of the diagnosis, a waiver will be required. It is best to request that the civil surgeon give the client a copy of the form they sealed in the envelope for USCIS so the practitioner knows what issues may have come up.

Can a child be inadmissible if found to be a danger to self or has mental illness? For example, suicide/homicide ideation/hallucination and previous suicide attempt?

The health-related grounds of inadmissibility under INA § 212(a)(1)(A)(iii) do apply to SIJS petitioners but they are waivable under the SIJS specific waiver in INA § 245(h).

When would we file an I-601 waiver?

As discussed above, this is judgment call and/or strategy decision for the attorney. If it is decided that the inadmissibility ground needs to be addressed no matter what, the Form I-601 application for a waiver can be filed along with the I-485. If the practitioner feels there is uncertainty as to whether the behavior or situation fits within an inadmissibility ground that is waivable, the practitioner may choose to wait to see if USCIS requests the waiver/sends an RFE and file it at that point. USCIS policy issued in June 2021 reverses the Trump era policy of denying applications that are missing "initial evidence," returning to a 2013 policy requiring USCIS officers to "issue RFEs in cases involving insufficient evidence before denying such cases unless the officer determined that there was no possibility that the benefit requestor could overcome a finding of ineligibility by submitting additional evidence."

What is an OBIM FOIA?

OBIM stands for the Office of Biometric Identity Management and it is a part of DHS. They are the agency that stores all of your client's biometric information. An OBIM FOIA request can be made using the Form G-639 or by submitting an online request, but both need to be accompanied by an FBI fingerprint card. Generally, OBIM will probably have more data regarding a client's entries and exits and immigration related data, although they have access to the FBI data. An FBI fingerprint request may be the easier way to get information on criminal activity for your client.[16]

[16] ILRC has produced two guides that are useful in explaining FOIAs and access to criminal records. The first is "A Step-By-Step Guide to Completing FOIA Requests with DHS, September 2020 and the second is "How to Check if You Have a Criminal Record," November 2019. The latter resource is aimed more at California residents but it is still a useful resource and gives ideas as to where to look for criminal records.

If the client received an *in absentia* removal order but the attorney moved to reopen the case and it was granted and the case dismissed, does a waiver need to be submitted with the adjustment application?

When a case is reopened by the immigration judge, any previous removal order is rescinded. A waiver is not required, and in any case, generally unavailable for unexecuted removal orders. As stated previously, the case needs to be reopened in immigration court before the application can be adjudicated.

VI. Discretion

What are the factors considered by USCIS during the discretionary part of the adjudication of an adjustment application?

Immigration officers adjudicating benefits applications subject to discretion must balance all positive factors against the negative factors, using a totality of the circumstances approach. Generally, "[a]ny facts related to the alien's conduct, character, family ties, other lawful ties to the United States, immigration status, or any other humanitarian concerns may be appropriate factors to consider in the exercise of discretion." USCIS Policy Manual, Vol. 1, Pt. E, Ch. 8.C.2. CILA has recreated a chart from the USCIS policy manual as a reference for practitioners as to what factors USCIS considers in the discretionary analysis.

Is it recommended to submit letters of support or evidence of positive equities along with the I-485 in a typical SIJS adjustment?

If the client has no negative discretionary factors, it is not necessary to submit evidence of positive equities. The USCIS Policy Manual states the following: "[i]f there is no evidence that the applicant has negative factors present in his or her case…the officer generally may exercise favorable discretion and approve the application." Vol. 7, Pt. A, Ch. 10.B.1.

For submitting positive equities before USCIS, do practitioners normally submit sworn declarations or just letters from client's community/school/counselor?

If possible, it is preferable to have affidavits or self-attesting jurats to demonstrate positive equities, if it is a personal account. The USCIS Policy Manual, when discussing the discretionary analysis adjudicators undertake, encourages "[e]vidence regarding respect for law and order, good character, and intent to hold family responsibilities (for example, **affidavits** from family, friends, and responsible community representatives)." Vol. 1, Pt. E, Ch. 8.C.2