# *REPRESENTING FOREIGN NATIONALS*
# *SOME BASICS IN IMMIGRATION LAW*

**Nieves Bonmati Lawrence**

In the course of representing your juvenile clients, you might encounter some foreign nationals who have no immigration status and are living in the United States unlawfully. This article is designed to aid the prudent practitioner in the juvenile court system in spotting issues that may arise where one or more of the parties involved is not a United States citizen. It is my hope that it will give you some basic ideas as to the different ways to acquire lawful status in the United States so you can guide your client. There are some instances where the non United States citizen may be able to obtain lawful status through a qualifying relationship. The article also explores the immigration relief available to a minor who has been abandoned, neglected or abused by parents or legal guardians.

## FAMILY BASED RELATIONSHIPS AND IMMIGRATION BENEFITS

The family based preference system is based on the priority that each classification is given in determining when certain family members of United States citizens (USC's) and Legal Permanent Residents (LPR's) are eligible to apply for immigrant visas to live and work in the United States. Please keep in mind that not all family relationships are qualifying relationships for immigration purposes. The degrees of separation that exist between the relatives play a crucial role as well as the immigration status of the petitioner. Not all relatives of USC's or LPR's are subject to the preference systems. Congress established certain categories of *Immediate Relatives* (IR's) who are not subject to extended waiting time and delays that is inherit with the preference system. IR's are not subject to numerical limitations and as soon as the legal relationship is created, they are eligible to make an application for an immigrant visa.

The issue of priority dates and visa allocation are very important to understand prior to filing. With the exception of IR's, all visa applicants are assigned a priority date.

This date is key in determining when a relative can apply for an immigrant visa. The priority date is the date on which the Immigration Service acknowledges that the application for a visa was made; in the case of family-based petitions; the date of filing the form I-130, the Immigration Petition for Alien Relative. It appears on the receipt notices and it is linked inextricably to the Visa Bulletin that

is issued by the United States Department on a monthly basis. The Visa Bulletin indicates which visas are being processed based on the current priority date and the country of the prospective applicant's origin. In certain cases, the priority date can be retained or recaptured based on an earlier filed petition.

The Attorney General allocates a certain number of visas each year for family-based immigration. The preference categories are based on supply and demand. No one can obtain permanent residence before a priority date becomes current. An attorney puts an individual at risk of deportation by applying for a benefit for which he/she is not yet eligible.

The following is a brief outline of the relationships which are considered qualifying relationships for family-based immigration and benefits may be sought from these relationships:

1. **Immediate relatives** (the best category) (INA §
    - Parents of a US citizen son or daughter who is at least 21 years old;
    - A child (person under 21 years old and unmarried at the time the petition is filed) of a U.S. citizen;
    - A widow or widower of a US citizen, provided that the marriage was in existence for at least two years before the US citizen died, and that the petition is filed within two years of the spouse's death;
    - A battered spouse or child, subject to extreme cruelty or battered by the U.S. citizen spouse or parent.

2. **Preference immigrants**
    - First preference – Unmarried son or daughter of US citizen (over 21 years old);
    - Second preference:
        - 2A – spouses or under 21 years old son or daughter of lawful permanent resident (LPR);
        - 2B – unmarried, over 21 years old son or daughter of LPR;
    - Third preference – married son or daughter of US citizen;
    - Fourth preference – brother or sister of US citizen where the petitioning US citizen is at least 21 years old;

Please keep in mind that, generally, severance of the relationship cuts off the eligibility for

the immigration benefit sought. Therefore, divorce, annulment, death, or legal separation from the petitioning party, will likely affect eligibility for the benefit sought.

Once it is determined that there is a visa available, It is very important to ascertain the status if any in which the non citizen entered the United States because this will dictate whether the individual can file for permanent residence in the United States (adjustment of status) or must return to the country of origin to pursue an immigrant visa through consular process.

Being an illegal alien in the United States is not necessarily a chronic condition! .Many, many foreign nationals present in the United States are here illegally because, although they entered legally, they overstayed the allowed time period. These folks are just as vulnerable to deportation as the foreign national who somehow made her way into the United States, disappeared below the legal radar, and is now working in what we have heard described as the "informal economy". This is an area that can be tricky even for Immigration Law practitioners, and before any paperwork is filed on behalf of an illegal alien, there must be a well-thought out plan in place!

Marriage to a United States citizen or Legal Permanent Resident who filed immediate relative paperwork with the CIS prior to April 30, 2001, and where the foreign national was physically present in the United States on December 21, 2000,95 can eventually "cure" an entry without inspection, or an overstay, with a $1,000 fine. That means that as of the date of the writing of this article, that particular provision is not in place, and that particular relief is not available for any Forms 1-130 initially filed after the April 30, 2001 deadline. Notably, even if a previously filed Form 1-130 is revoked, denied or withdrawn (absent a marriage fraud finding), the alien beneficiary may be "grandfathered", and allowed to adjust status to legal permanent resident within the United States at a later date, if otherwise admissible to the United States, and so long as the petition was properly filed, and approvable when filed.

However, in the event of a divorce, that illegal alien remains vulnerable to deportation. The protection given to foreign nationals who apply for adjustment of status under INA 245(i) is not "stand-alone" protection, and will require the support of another timely filed immigrant visa petition to truly provide some security to the foreign national, and to allow application for his/her adjustment of status to that of legal permanent resident.

Finally, regarding any foreign national, any past immigration violations must be

screened carefully to avoid the unexpected occurrence of anything untoward. A practitioner may have to delve deeply into the past of the foreign national to discover this, as information of this nature is usually well concealed, or "off-limits". At a minimum, the attorney must ask the appropriate questions regarding immigration history.

A practitioner must be also aware that some individuals not born in the United States might already be eligible to become United States citizens. Watch out for someone who appears to be a non-citizen when in fact might be a United States citizen. In addition to those born on U.S. soil (principle of jus solis) there are other categories of individuals who may be eligible to obtain citizenship or in some cases are citizens at birth, even though born outside the U.S.(principle of jus sanguinis).

Those who are naturalized after becoming lawful permanent residents. They must meet certain residency, physical presence, good moral character, history, civics, and English language requirements (language may be waived in certain cases).

- Some foreign individuals born to U.S. citizens become citizens at birth if the U.S. Citizen parent lived in the country before the birth of the child for a sufficient number of years.
- Some children become citizens upon the naturalization of the parent(s) if it takes place while the child is under 18.

## ALTERNATIVE FORMS OF RELIEF

An unaccompanied minor who has been abandoned, neglected, or abused by parents or legal guardians may have other immigration relief available such as Special Immigrant Juvenile Status, the “T” visa for victims of trafficking, a “U” visa or protection under the Violence Against Women Act (VAWA).

### *Special Immigrant Juvenile Status*

Another narrow exception for abused, neglected or abandoned children is the Special Immigrant Juvenile Status (SIJS). In INA §101(a)(27)(J), Congress created a special visa that permits certain abused, neglected or abandoned children to avoid returning to their country of origin. Although Congress set out multiple bureaucratic and legal hurdles which make this visa laborious to obtain, the special immigrant juvenile visa provides hope- and a viable route- for some

practitioners attempting to keep children from returning to violent family households or to a life on the streets. One of the requirements to obtain this visa is that the juvenile must pass through state court to obtain a "dependency order" from a state judge.

To qualify for SIJS, the child must be declared dependent on a juvenile court or be placed under the custody of an agency or department of a state. The court must also deem the child eligible for long-term foster care due to abuse, neglect, or abandonment. Finally, there must be a finding that it would not be in the child's best interest to be returned to his or her home country or last country of residence.

The process to obtain a dependency order varies from state to state. In some states, probate courts issue dependency orders; in others, it is the family courts. The findings necessary to obtain SIJS are not necessarily the same as those for dependency proceedings. Therefore, some state judges resist issuing an order that contains the language that the INA wants. Working with an experienced family law attorney can be helpful in obtaining the order that meets both the state and federal immigration requirements. An order missing the required language will not work.

After obtaining the state dependency order a Special Immigrant Juvenile Petition must be filed with the USCIS and once that is approved the child can file for permanent residence. The Special Immigrant Juvenile Petition must be accompanied by the following documents:

- Court order declaring dependency on the juvenile court or placing the juvenile under the custody of an agency or department of the state;
- Court order determining the juvenile eligible, for long-term foster care due to abuse, neglect or abandonment;
- Determination from an administrative or judicial proceeding that it is in the juvenile's best interest not to be returned to his or her country of nationality or last habitual residence; and
- Proof of the juvenile's age (approval of an SIJS petition may be revoked if the child reaches 21 before the approval of lawful permanent resident status, marries, ceases to be eligible for long-term foster care, or ceases to be under the juvenile court jurisdiction).

Children applying for SIJS are eligible to adjust status in the United States even if they entered without inspection or have failed to maintain status in the United States.

### *The "T" visa*

In 2000 Congress created the T visa to protect victims of "severe forms of trafficking". When Congress created the T visa it estimated that approximately 50,000 women and children are trafficked into the United States annually. Traffickers often employ a broad range of techniques to coerce abused, neglected or abandoned children to escape from their misery to a promised land. The Trafficking Protection Act of 2000 is replete with vivid language explaining that vulnerable victims including hundreds of children, fall prey to "rape, and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion" to perform profitable services for another.

The T visa protects women and children who are held hostage, raped, beaten, or otherwise brutalized by someone hired to assist them in crossing the United States border as long as the woman or child can demonstrate that this someone used "force, fraud or coercion" to induce the performance of the woman or child's services. With the exception of child prostitution, if the woman or child cannot demonstrate that someone used "force, fraud or coercion" to induce the woman or child's performance of the services, the woman or child is not victim of "human trafficking". In addition, the woman or child must demonstrate compliance with reasonable requests for assistance in the investigation or prosecution of the acts of trafficking in order to obtain a T visa. Trafficking also protects a woman or child who must perform sexual or labor services to pay off a debt; this is known as peonage.

### *The "U" visa*

In October of 2000, the Victims of Trafficking and Violence Prevention Act (VTVPA) introduced a new type of nonimmigrant visa, the "U" visa. In December of 2005, improvements to the U visa statute were included in the Violence Against Women and Department of Justice Reauthorization Act (VAWA 2005). Congress mandated the issuance of U visas to encourage victims of crime to cooperate with law enforcement. The U visa is a nonimmigrant visa with the possibility of securing lawful permanent residence status for certain victims and witnesses of serious crimes. When a victim applies for a U visa and is approved, the victim will receive such immigration benefits as deferred action, employment authorization, parole and stays of removal.

To obtain a U visa, an immigrant must demonstrate that he or she:

- Is the victim of criminal activity occurring in the United States or abroad;

- Suffered substantial physical or mental abuse as a result of the crime;
- Has or has been helpful in the investigation or prosecution of the criminal activity unless the victim is a child under the age of 16. A child under the age of 16 only need to show that a parent, guardian, or next friend, has or has been helpful in the investigation or prosecution of the criminal activity.

***Violence Against Women Act (VAWA) Self-Petitions***

Twenty years ago, an immigrant victim of family violence who was being sponsored for lawful permanent resident status by a family member, could do very little in pursuing immigration status on his/her own. Today, after years of legislative amendments to the Immigration and Nationality Act (INA), victims of domestic violence, spouses, children and in some cases parents who suffer abuse at the hands of a USC or LPR family member have options that allow them to pursue immigration status on their own.

A VAWA self petition is a variation on a relative petition. Instead of allowing a USC or LPR family member to control the process, a non citizen herself may act independent of familial involvement and go through the entire process without the involvement of the abusive family member. The goal is to put the non citizen in the same place in the immigration process as he/she would have been had her USC or LPR family member not been abusive.

The following individuals can file a VAWA self-petition:

- Parents, spouses and unmarried children under 21 of USC's; and
- Spouses and unmarried children under 21 of LPR's.

The criteria for filing a VAWA self-petition can be summarized as follows:

- Good faith marriage to a USC of LPR(for marriage based cases not parent/child based one);
- Qualifying relationship
  - Legally valid marriage to a USC or LPR;
  - Qualifying bigamy to a USC or LPR;
  - Recognized parent/child relationship were abusive parent is USC or LPR;
  - Recognized parent/son or daughter relationship where abusive son or daughter is USC;
- Abuse (physical battery or extreme cruelty)
- Joint residence; and

- Good moral character.

The Violence Against Women Act offers protection for many children victims of family violence. A child may be eligible if:

1. The child was the victim of the abuse or
2. the child has a parent who was a victim of spousal abuse, and the child obtains benefits as the derivative of his or her abused parent.

The same criteria listed above applies in children's VAWA cases. The child must have resided with the abusive parent in the United States but there is no requirement that the abuse occurred in the United States.