SECTION 7:

Special Immigrant Juvenile Status

In order to help certain undocumented children present in the United States obtain lawful immigration status, federal law established provisions for "Special Immigrant Juvenile" (SIJ) status. While life in the United States can be very difficult for anyone without lawful immigration status, unaccompanied juveniles are especially vulnerable. Many have been orphaned, abandoned, or suffered domestic abuse and receive no assistance in their country of origin. They may not have had access to a formal education. Many have been the targets of gang violence or exploitation by organized crime. Some of these children find their way to the United States and are apprehended by immigration or law enforcement officials and placed in removal proceedings. The SIJ provisions permit undocumented children who have been abused, neglected, or abandoned by their parents and come under the jurisdiction of a U.S. juvenile court to become lawful permanent residents.

INA § 203(b)(4) allocates a percentage of immigrant visas to individuals considered "special immigrant juveniles." The definition of a "special immigrant juvenile" was amended by Pub. L. No. 105-119, 11 Stat. 2440 (November 26, 1997) to include only those juveniles deemed eligible for long-term foster care based on abuse, neglect, or abandonment. Two provisions were added to require the consent of the Secretary of the Department of Homeland Security (DHS) (formerly the Attorney General) to allow jurisdiction to rest with the state dependency court for SIJ cases. Guidance is found in a 2004 "Memorandum #3 -- Field Guidance on Special Immigrant Juvenile Status Petitions." (page 7-**16**)

Eligibility for SIJ Status

A "Special Immigrant Juvenile" is an immigrant physically present in the U.S. who has been declared dependent on a juvenile court located in the United States or whom such court has legally committed to, or placed in the custody of, an agency or department of a *State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law*.[1]

[1] INA § 101(a)(27)(J)(i) as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).

For juveniles in immigration detention, they potentially need to go through a four-step process, meeting eligibility requirements at each stage.

The following is an overview of the eligibility requirements:

1. If required, U.S. Department of Health and Human Services (DHHS) grants consent for jurisdiction to be given to the state juvenile court prior to commencement of dependency proceedings by showing prima facie eligibility for SIJ status if your client seeks physical custody to be transferred from the federal to the state government.
2. Your client must meet state requirements for state "dependency" and obtain a court order stating this eligibility based on abuse, neglect, abandonment, or a similar basis found under State law, and finding that it is not in the child's best interest to return to his/her home country.
3. You must file an application for SIJ status with Citizenship and Immigration Services (CIS), showing that your client is under 21, currently dependent on a state court, and not prohibited from adjusting status to that of a lawful permanent resident.
4. You must file an application for Adjustment of Status with the Immigration Court showing that your client is not "inadmissible" under INA § 212(a), or that a waiver is available and the waiver application is included.

Overview of Affirmative Procedures

A juvenile who is physically present in the United States who is not in removal proceedings can affirmatively apply for SIJ status by filing an application administratively with CIS. This may arise with a juvenile who is not detained, has already been declared dependent on a state court, and is placed in foster care or under conservatorship on an individual prior to the BKC being contacted. Under this circumstance, you will follow a similar yet simpler procedure. You will file an application for SIJ status with CIS, showing that your client is under 21, currently dependent on a state court, and an application for Adjustment of Status to that of a lawful permanent resident. An interview will be conducted by CIS in San Antonio for both SIJ and Adjustment of Status. You should follow "Step 3" of this section (page 7-**8**) as a guideline for preparing the application for SIJ status and confer with the BKC on strategy for the application for Adjustment of Status.

Defensive Procedures:

Step 1: DHHS Consent for Juvenile Court Jurisdiction

If your client is in actual or constructive custody of Immigration and Customs Enforcement (ICE) and/or DHHS before beginning the juvenile court process, a juvenile court judge cannot make custody decisions about the child until DHHS has granted consent for the state court to have jurisdiction for the dependency process. Juvenile court orders made without DHHS consent are invalid for SIJ purposes. "Actual" custody means that the child is in a detention facility overseen by ICE and/or DHHS while

"constructive" custody means the child is housed in a special DHHS-sponsored foster care.[2] In those instances where a client is released by DHHS through a "family reunification packet"[3] and still qualifies for SIJ status, DHHS consent will not be necessary as the client is not considered to be in either actual or constructive custody.

In December of 2008, 8 U.S.C. § 1101(a)(27) was amended to provide that no state juvenile court has jurisdiction over an alien in immigration custody unless DHHS expressly consents. Following the amendment, three memoranda were issued providing guidance on requests. A previous INS memorandum sets forth the standard for determining whether requests should be granted, and states that consent to juvenile court jurisdiction should be given if:

1. It appears that the juvenile would be eligible for SIJ status if a dependency order is issued; and,
2. In the judgment of the district director, the dependency proceeding would be in the best interest of the juvenile.

On March 23, 2009, DHHS published interim guidelines for consent requests. The guidance states that those seeking specific consent must provide a brief statement concerning the basis for their request to change their placement or custodial arrangement. DHHS will then evaluate whether continued federal custody "is required to ensure a child's safety or the safety of the community, or to prevent risk of flight." However, DHHS will **not** make a determination on whether the child is eligible for SIJ status and will not evaluate any documentation for this purpose. The Interim Request for Specific Consent should then be sent electronically to DUCSconsent@acf.hhs.gov.

It will generally take DHHS approximately 30 days to respond to your request. If your client is 17, you should indicate that the request be expedited due to age-out considerations.[4] Also, if your client is scheduled for a hearing with the Immigration Court, please copy the Immigration Judge assigned to the case and ICE District Counsel.

Step 2: Texas Juvenile Court

Once jurisdiction has been granted, the second step for your client to obtain SIJ status is that he must be under the jurisdiction of a juvenile court. In Texas, the state court should have appointed a managing conservator and made the requisite SIJ findings.

Much of the terminology contained in the Texas Family Code does not "translate" well to the language contained in the federal statute. For example, there is nothing called "dependency" in the Texas Family Code. The Texas Department of Family and Protective Services, and specifically Child Protective Services (CPS), generally oversees

[2] ICE has recently attempted to argue that any juvenile in removal proceedings is in "constructive custody" and therefore requires consent. This is contrary to stated policy, and has generated a class action lawsuit in the Los Angeles federal court, *Perez-Olano v. Gonzalez*.

[3] DHHS can release a child to any family member or other person authorized by the family if it appears to be in the child's best interest. Therefore, even if the child has no parents in the U.S., he could be released to a sibling, uncle, or even a non-relative who has a pre-existing relationship to the child. As such it may be possible for a child to be released from detention through a "family reunification packet" yet still qualify for dependency under the state statute.

[4] If your request is denied, it may still be possible to file in federal court and compel consent from DHHS.

the "dependency" process in Texas. Once consent has been obtained, you should proceed by filing a report with CPS concerning your client if there has been abuse, abandonment, or neglect in the United States.

However, it is unlikely that CPS will take custody of your client and you will probably need to file a private petition with the District Court where your client resides, or possibly the county where an identified custodian resides. Therefore, your second action will be to determine who has standing to file the petition under § 102.003. It may be possible to file for a prospective adoptive parent, if your client has a relative willing to take this step, or you may be able to file on behalf of your client himself through a "next friend".

Chapter 261 of the Texas Family Code defines abuse and neglect. At this stage, you will generally file a Petition in Suit Affecting the Parent-Child Relationship (SAPRC) and show that your client has suffered abuse and/or neglect as defined in Chapter 261 of the Texas Family Code. Applicable regulations are found at:

Title 4 - Protective Orders and Family Violence
- Chapter 81 General Provisions
- Chapter 82 Application for Protective Order
- Chapter 83 Temporary *Ex Parte* Orders
- Chapter 84 Hearing
- Chapter 85 Issuance of Protective Order
- Chapter 87 Modification of Protective Orders

Title 5 - The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship
- Chapter 107 Special Appointments and Social Studies
- Chapter 151 Rights and Duties in Parent-Child Relationship
- Chapter 153 Conservatorship, Possession, and Access
- Chapter 161 Termination of the Parent-Child Relationship
- Chapter 162 Adoption
- Chapter 261 Investigation of Report of Child Abuse or Neglect
- Chapter 264 Child Welfare Services

"***Abuse***" is defined under Chapter 261.001(1), Texas Family Code as:

(A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(B) causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(C) physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or

managing or possessory conservator that does not expose the child to a substantial risk of harm;

(D) failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;

(E) sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of indecency with a child under Section 21.11, Penal Code, sexual assault under Section 22.011, Penal Code, or aggravated sexual assault under Section 22.021, Penal Code;

(F) failure to make a reasonable effort to prevent sexual conduct harmful to a child;

(G) compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code;

(H) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by Section 43.21, Penal Code, or pornographic;

(I) the current use by a person of a controlled substance as defined by Chapter 481, Health and Safety Code, in a manner or to the extent that the use results in physical, mental, or emotional injury to a child;

(J) causing, expressly permitting, or encouraging a child to use a controlled substance as defined by Chapter 481, Health and Safety Code; or

(K) causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by Section 43.25, Penal Code.

"***Neglect***" if defined under Chapter 261.001(4), Texas Family Code as:

(A) the leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child;

(B) the following acts or omissions by a person:

(i) placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;

(ii) failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child;

(iii) the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused;

(iv) placing a child in or failing to remove the child from a situation in which the child would be exposed to a substantial risk of sexual conduct harmful to the child; or

(v) placing a child in or failing to remove the child from a situation in which the child would be exposed to acts or omissions that constitute abuse under Subdivision (1)(E), (F), (G), (H), or (K) committed against another child; or

(C) the failure by the person responsible for a child's care, custody, or welfare to permit the child to return to the child's home without arranging for the necessary care for the child after the child has been absent from the home for any reason, including having been in residential placement or having run away.

There is no separate definition of "***Abandonment***" in the Texas Family Code, and therefore the order should be based on either abuse or neglect.

Chapter 161.001(1), Texas Family Code establishes the criteria for involuntary termination of parental rights, a necessary step. Parental rights should be terminated if the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;

(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition.

It may also be possible in some cases to obtain an affidavit of voluntary relinquishment of parental rights under Chapter 161.001(3), however you should make certain that a separate finding of abuse or neglect is made concerning at least one of the parents.

Alternative routes in State Court

A "juvenile court" is defined as a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of

juveniles, as such term is defined in 8 CFR § 204.11(a). While the SAPCR will be the normal route in Texas for obtaining the requisite SIJ findings, the SAPCR may not always be possible. While not yet fully tested in the San Antonio CIS jurisdiction, you may want to consider additional options:

- Declaratory Judgments
- Guardianships
- Adult Adoptions

Delinquency Court

SIJ status is normally seen as an option only for those children in dependency proceedings. However, SIJ status is also available to children in other juvenile court proceedings when the juvenile court has legally committed him to, or placed him in the custody of, an agency or department of a State *or an individual appointed by a State*. Many children in delinquency proceedings have been granted SIJ status, and Title 3 of the Texas Family Code deals with these types of proceedings. Some local offices may be sympathetic to these children because many end up in delinquency proceedings due to abuse in the home. However, so far the delinquency court issue has not been addressed in writing by the DHS and the San Antonio CIS has not indicated their position on the issue.

As a result, it may be best for children in delinquency proceedings to also secure placement in dependency or concurrent dependency/delinquency status as permitted by state law. This will help eliminate any legal question with respect to eligibility for SIJ status.

However, be aware that some types of delinquency findings are dangerous when "grounds of inadmissibility" for immigration purposes may be triggered. For example, a finding of sale, or possession for sale, or delivery of drugs (as opposed to simple possession) renders an individual to be inadmissible to the U.S., and so your client may be ineligible for Lawful Permanent Resident status. A finding of prostitution can also be problematic. Some findings involving violence or theft may raise issues, but most do not.

Additional Requirements

The former Immigration and Naturalization Service (INS) developed regulations for SIJ status that were not written in the federal law. These regulations are found at 8 CFR § 204.11 and 8 CFR § 205.1(a)(3)(iv), and every attempt should be made to comply with them to ensure SIJ eligibility.

Under 8 CFR § 205.1(a)(3)(iv)(C), the child must remain under juvenile court jurisdiction and eligible for long-term foster care until the application for Adjustment of Status has been approved and the child is a Lawful Permanent Resident, unless the change in circumstances resulted from the child's adoption or placement in a guardianship situation. Under normal procedures, it may take quite some time for immigration proceedings to be completed after you have obtained the order from the state juvenile court. Therefore, the state juvenile court must maintain jurisdiction over older youth longer than they normally would. This can be problematic if your client is 17 or older. Normally, the state of Texas will only maintain jurisdiction until the child's 18th birthday. Chapter 101.003, Texas Family Code, defines “child” as a person under 18 years of age who is not and has never been married. Therefore, in practical terms you

should attempt to complete all SIJ processes, including adjustment of status, prior to your client's 18th birthday or he may not fulfill this requirement. However, if this is not possible, there is a legal argument that the Juvenile District Court retains jurisdiction until terminated by the Judge, and it may be possible to convince the judge to delay termination until the immigration process is complete. This is especially true if CPS is not involved and therefore not pressuring the judge for a termination order.

Step 3: Petition for SIJ Status with C.I.S.

Once you have the order from the state juvenile court, a Form I-360, Petition for Amerasian, Widow or Special Immigrant is submitted to CIS. Parts 1-4, 6, 8, and 9 must be completed. The juvenile applicant or "any person acting on the alien juvenile's behalf" must sign the application. If your client is 14 or older, we strongly recommend that the client sign the petition himself. If this is not possible or the child is under the age of 14, it may be signed by the child's foster parent or welfare worker.

You should prepare and file the following:

1. Form G-28, Notice of Appearance as Attorney or Representative
2. Form I-360, Petition for Amerasian, Widow or Special Immigrant
3. Fee Waiver request (or filing fee of $190.00)
4. Letter of Consent for Juvenile Court Jurisdiction
5. Juvenile court order
6. Proof of Age
7. Client's personal declaration (recommended)
8. Minutes from most recent juvenile court hearing to establish that he remains under juvenile court jurisdiction (recommended)

In order to establish eligibility for SIJ status, you must show that the reason the state court granted dependency and deemed your client eligible for long term foster care was "due to abuse, neglect, or abandonment." Some CIS offices have issued requests for evidence of the abuse, neglect, or abandonment beyond the language in the juvenile court order. However, if the juvenile court has included this specific language in the court order, it is best to supply only the order and the client's personal declaration when filing the I-360.

As immigration regulations have added language requiring CIS "consent to accept the judge's order" the CIS officer adjudicating the I-360 petition may make inquiries regarding the abuse, neglect, or abandonment. Should this become an issue, please advise the BKC and we will strategize the best way to respond to such an inquiry, and which documents will be most appropriate to disclose to CIS.

Proof of Age

You must submit some documentary proof of age. Ideally the client's birth certificate, passport, or official foreign identity document would be submitted. However, it will be uncommon that your client will actually have or be able to procure such documentation given the nature of your client's situation. You may provide any

"document which in the discretion of the director establishes the beneficiary's age" pursuant to 8 CFR § 204.11(d)(1). Please note that the requirement is for some proof of age, a much looser standard than the proof of birth. The statute recognizes that these children come from chaotic backgrounds and it does not impose the strict requirement of proof of birth.

Obtaining proof of age may still be a large hurdle, and it is best to begin tackling it as soon as possible. The best way to obtain a birth certificate for your client is generally through a contact in the home country who will inquire at the civil registry on behalf of your client. Unfortunately, your client may not have these connections. Alternately, it may be possible to send away for the birth certificate yourself. You can check the Foreign Affairs Manual of the Department of State for information on how to obtain foreign birth certificates from various countries. The BKC may be able to assist in obtaining a birth certificate if your client is from Honduras or El Salvador. Lastly, you may want to contact the consulate from your client's country and ask for their assistance, however **do not contact the consulate if you are also pursuing an asylum claim for your client**.

If you are unable to obtain a birth certificate, other options include early school records, a baptismal certificate, affidavits from people who are personally aware of the birth, or other proof of your client's age. You may want to prepare an affidavit to describe the efforts you made to locate the birth certificate. If these other documents are also not available, you can submit a state court order on a determination of the child's age, a doctor's evaluation especially with dental records, or the results of a bone density scan.

The TVPRA mandates the expeditious adjudication of Special Immigrant Juvenile applications, requiring that the Secretary of Homeland Security process these applications within 180 days after the application is filed. Requiring the Secretary of Homeland Security to more quickly adjudicate Special Immigrant Juvenile applications should resolve long delays in the handling of these cases and mandate that all USCIS offices prioritize Special Immigrant Juvenile cases.

The granting of SIJ status to a juvenile now confers a Federal Government duty or liability toward state child welfare agencies, and provides that the Federal Government shall reimburse the State in which the child resides for such expenditures by the State, subject to federal appropriations. Children in DHHS custody will receive federal funding for foster care from DHHS if the state does not accept financial responsibility.

Revocation of SIJ Status

Under 8 CFR § 205.1(a)(3)(iv) SIJ status can be automatically revoked at any point before your client completes final processing for Adjustment of Status. Under the regulations, SIJ status shall be revoked if, prior to obtaining permanent residency, your client:

1. Marries
2. Ceases to be under juvenile court jurisdiction; or
3. Is the subject of a determination in an administrative or judicial hearing that it is in his best interest to return to his or his parents' country of nationality or residence

If you are concerned that any of these grounds of revocation apply to your client, please confer with the BKC.

Step 4: Adjustment of Status

Once your client has an approved I-360, you can proceed with an Adjustment of Status application with the Immigration Court. Once the Form I-485 is filed, he may also apply for employment authorization pursuant to the pending adjustment application. Juveniles who adjust status as a result of an SIJ classification enjoy all benefits of lawful permanent residence, including eligibility to naturalize after five years. However, they may not seek to confer an immigration benefit to their natural or prior adoptive parents.[5]

The first requirement for Adjustment of Status is that your client must be "admissible" to the United States. To establish that the client is admissible, you must show that there is no law preventing him from being admitted to the United States under 8 CFR § 212(a). The client will not be able to adjust status unless a waiver is granted if any of the following apply:

1. Determination that he aided another person to enter the U.S. illegally;
2. Commission of document fraud to obtain an immigration benefit;
3. Health-related condition including certain diseases, or a physical or mental disorder;
4. False claim to U.S. citizenship.

Congress provided a special waiver at INA § 245(h)(2)(b), available only to applicants for SIJ status, of many of the grounds of inadmissibility. Unlike other waivers, the SIJ waiver does not require your client to have a qualifying relative with lawful status. The Attorney General is authorized to waive the designated grounds for "humanitarian purposes, family unity, or when it is otherwise in the public interest."

As all SIJ applicants are deemed paroled in, they are exempted from the grounds of deportability that relate to unlawful presence found in INA § 237(h). They do not need to qualify under INA § 245(i) or pay a penalty fee.

It is possible, however, that your client can obtain SIJ status yet be ineligible to adjust to become a Lawful Permanent Resident - for example because the government denies an HIV waiver or has "reason to believe" he was a drug trafficker and therefore inadmissible. In these cases, your client cannot be deported for unlawful status and should be able to remain in the U.S. until SIJ status is revoked.

Grounds of inadmissibility that cannot be waived under INA § 212(a) include:

1. Conviction of certain crimes[6] or formal admission of a drug offense or a "crime involving moral turpitude" unless it meets the petty offense exception;
2. Multiple criminal convictions (2 or more offenses), for which the aggregate sentences to confinement was 5 years or more;
3. People who DHS has "reason to believe" are or have been drug traffickers;
4. Security risk to the United States;
5. Terrorist activities; and

[5] INA §101(a)(27)(J)(iii)(II)

[6] However, you should be aware that juvenile convictions are not considered "convictions" for immigration purposes.

6. Serious adverse foreign policy consequences

Filing the Application While In Proceedings

Filing for adjustment of status in removal proceedings is a three-step process.

1. Your client must appear at a Master Calendar hearing (preliminary hearing) at which removability is formally denied, and your client requests the adjustment of status.
2. The court provides a deadline for submitting an adjustment application, Form I-485 and supporting documents. The original submission and a Certificate of Service are to be submitted to the Court; one copy with Certificate of Service is to be provided to the Trial Attorney. (Remember to maintain copies of all submissions for your files).
3. Your client is scheduled for a Merits hearing to present his case before an Immigration Judge.

The Master Calendar Hearing

The preliminary hearing during which the person pleads to the charges on the Notice to Appear (NTA) and formally requests cancellation is called the master calendar hearing. It functions much like an arraignment in criminal proceedings. Unless there are complications in the case, the master calendar hearing is a routine proceeding, usually taking a few minutes to complete.

Clients (or their attorneys, if an appearance has been filed) receive written notice of the date and time for the master calendar hearing. Because of the nature of BKC cases, volunteer attorneys usually have short notice of these hearings, but little preparation is required.

Master calendar hearings for the juvenile docket are held at the Immigration Court located at 800 Dolorosa St., San Antonio, Texas. Currently, Judge Dean conducts the calendar for the detained juvenile docket, with master calendar hearings on Wednesday afternoon at 1:30. Should your client be released, your case will be heard by a different Immigration Judge, and not Judge Dean.

The client must be at all hearings before the Immigration Court, including the master calendar hearings; the attorney cannot appear alone unless previously approved by the judge. You may ask the Immigration Judge to waive your client's presence at future hearings as long as they are represented, but the waiver is discretionary and not automatically granted. If your client is detained, ICE is responsible for having him available for the master calendar hearing. If for some reason they fail to do so, notify the Court that your client is detained and ask to have the hearing rescheduled.

For all languages and dialects, the Immigration Court provides contract interpreters, whose quality and reliability vary. If a contract interpreter fails to appear for a master calendar, you may request a continued hearing. Also, if the contract interpreter is clearly not making himself understood to the client, you can request a continuance on that basis. You will want to remind the Immigration Court to have an interpreter in your client's most proficient language at future hearings. For master calendar hearings, the

Immigration Court will sometimes utilize a telephonic interpreter, while individual merits hearings require the interpreter be present in the courtroom. It is advisable to bring your own interpreter with you to the merits hearing (if you do not speak your client's language) to note any material discrepancies in the interpretation.

You should arrive at the Immigration Court at least a few minutes before your scheduled time. On the wall in the hallway a list will be posted containing your name, your client's name, and his alien registration number ("A-number"). There are usually many booked for the same time, so it is wise to arrive early and be among the first. If you have not already filed an appearance, do so at this time by obtaining two copies of form E-28 from the clerk's window or from the Judge's clerk, filling them out, and serving one copy to the Trial Attorney and the other to the Immigration Judge. You will also want to give a G-28 to the Trial Attorney and have a copy ready for the Immigration Judge in case she would like a copy of it.

The Master Calendar Hearing Process

1. The Beginning of the Hearing

When your case is called, using the last three digits of the individual's A#, the Judge may talk with you off the record to determine your intentions and to address any procedural problems. Through an interpreter when necessary, the Judge will state the nature of the proceedings and ask your client if he understands what is happening.

2. Determining Representation by Counsel

Your client will first be asked if you are his representative. If an individual appears without legal counsel, the Immigration Judge will usually ask the individual if he would like a continuance to seek legal counsel.

3. Establishing Receipt of the Notice to Appear

You or your client will be asked if he has received a copy of the NTA. If not, he should say so and ask for a copy. The Immigration Judge will often grant a continuance so that you can go over the NTA with your client to determine whether the charges are correct—and if there is any question, even remotely, about their accuracy, then a continuance should be sought.

4. Admitting or Denying the Charges and Conceding Removability

If you have the NTA, you will be asked whether your client either admits or denies the specific factual allegations and charges in the NTA—namely, that he entered without inspection on a certain date and is removable. If your client concedes the allegations and/or removability, he can request asylum as a defense to removal. However, if there is more than one charge of removability or any question as to how to plead, discuss it with your client and with the BKC.

5. Designating a Country of Removal

Next, the Immigration Judge will ask if your client wishes to designate a country of removal. In adjustment cases, you are free to identify the client's home country as the country of removal **unless you want to preserve the option for an asylum claim for your client** should the adjustment be denied.

6. Stating the Client's Desire to Pursue Special Immigrant Juvenile Status

You or your client will then state for the record that your client wishes to apply for Special Immigrant Juvenile status. The judge will probably want to know the status of your application and the anticipated timeframe to receive a decision on the SIJ.

7. Continuances in SIJ cases

Initially, you will want to request a continuance of 90 days to allow for a decision on ICE consent. Once consent is obtained, you will want to request another continuance to await the decision on dependency by the state court. After dependency has been granted, you must ask for another continuance in order for CIS to issue a decision on your application for SIJ status. Generally, the judge will grant continuances as long as you demonstrate forward progress on the SIJ. It may require numerous Master Calendar hearings which serve as "status conferences". As long as the sole purpose of the Master Calendar hearing is to provide the judge with a status update and request another continuance, you may wish to file a Motion to allow you to appear telephonically. However, you will need to appear in person for the initial Master Calendar hearing where you plead to the charges, and again once you have received a decision from CIS on your SIJ application.

8. Setting a Date for Submission of the Application

Once the SIJ has been approved, the Immigration Judge will set a date for submission of the completed I-485 adjustment of status application. In San Antonio, Immigration Judges generally grant 2 to 3 weeks to submit the written application. Alternately, if the Trial Attorney agrees, you may be able to request administrative closure or termination of the removal proceedings.

Checklist of Documents to be Submitted for Adjustment of Status (SIJ)

For the Immigration Judge:

1. ☐ Table of Contents
2. ☐ Fee receipt or written request for fee waiver
3. ☐ Original Form I-485, Application for Adjustment of Status
4. ☐ One copy of G-325A (biographical information)
5. ☐ One Copy of the SIJ Approval
6. ☐ Minutes from most recent juvenile court hearing to establish that he remains under juvenile court jurisdiction (recommended)
7. ☐ Certificate of Service to show the Trial Attorney received documents

For the Trial Attorney:

1. ☐ One copy of fee receipt for request for fee waiver
2. ☐ One copy of Form I-485, Application for Adjustment of Status
3. ☐ Original G-325 (biographical information)(with all four pages)
4. ☐ One Copy of the SIJ Approval
5. ☐ Copy of Minutes from most recent juvenile court hearing to establish that he remains under juvenile court jurisdiction (recommended)
6. ☐ Copy of Certificate of Service

For CIS:

1. ☐ Written request for fee waiver
2. ☐ Original Form I-765, Application for Employment Authorization
3. ☐ One copy of Form I-485, Application for Adjustment of Status **with received stamp**
4. ☐ One copy of an identity document

Please note that all documents in a foreign language must be accompanied by a translation of the document in English. The translation should be properly certified. Certification can be accomplished by attaching a "Certificate of Translation" which affirms that the translator was competent to perform the service.

If your client is in removal proceedings, all original documents that will be submitted in support of the application should be made available to the Trial Attorney. Original documents should also be available during the Merits hearing for the Judge's inspection.

All applicants for Adjustment of Status must complete a medical exam performed by an approved civil surgeon. If your client has been released from detention, he must arrange for the medical exam which will then be given to him by the doctor in a sealed envelope. If your client is detained, you will be responsible for arranging a medical exam in coordination with the social worker (at this point your client will generally have been placed in foster care). **DO NOT OPEN THE ENVELOPE**. You will submit the sealed envelope to the court, and the judge will open the envelope during the merits hearing.

9. Setting the Date and Time for the Merits Hearing

The date of the merits hearing will generally be three or four weeks after the master calendar hearing. The Immigration Judge usually asks how much time will be necessary to complete the hearing. Adjustment hearings usually do not require more than 30 minutes to complete, unless the Trial Attorney indicates an issue such as criminal convictions. Once the hearing date is set, the master calendar is adjourned. Either the clerk or the Immigration Judge will give you the hearing notice.

Biometrics

If your client is 14 or older, he must be fingerprinted. Fingerprints remain current for a period of 15 months. You will need to complete and file a new form entitled "**INSTRUCTIONS FOR SUBMITTING CERTAIN APPLICATIONS IN IMMIGRATION COURT AND FOR PROVIDING BIOMETRIC AND BIOGRAPHIC INFORMATION TO U. S. CITIZENSHIP AND IMMIGRATION SERVICES**." This form should be filed with the Nebraska Service Center as soon as the Form I-485, Application for Adjustment of Status is **prepared**. The I-485 does not need to be filed with the court in order to initiate the biometrics process, and the BKC recommends that you file this request prior to your hearing with CIS for adjudication of the application for Special Immigrant Juvenile status.

The Merits Hearing

Merits hearings are formal, adversarial, evidentiary hearings on the record. Trial Attorneys act as "prosecutors," attempting to disprove the applicant's eligibility for relief.

Witnesses are sworn, and both sides have the opportunity for direct and cross-examination. However, adjustment cases rarely involve much direct and cross-examination, and generally the testimony is concluded in about 15 minutes.

Typically, the Immigration Judge will issue an oral decision immediately at the close of the case. She may simply discuss what the decision would be and on what grounds she has decided, or she may recess the hearing for half an hour and return with a decision which will be read into the record. When the Immigration Judge issues her decision, whether favorable or unfavorable, your client receives only a minute order form filled out and signed by the Immigration Judge. If your client is granted adjustment of status in proceedings, he will then need to process the lawful permanent resident card (known as a "green card") separately through CIS, and obtain temporary proof of residence in the form of an I-551 stamp in his passport.

When the Immigration Judge is orally rendering her decision, pay careful attention and make note of the grounds for the decision and any areas where the Immigration Judge misstates, misinterprets, or overlooks evidence or matters of law. If your client loses, the Notice to Appeal that is filed must state specific grounds justifying the appeal.

After the decision has been issued orally, each side will be asked whether they choose to reserve appeal. If you and your client are granted, the Trial Attorney will usually waive appeal in adjustment cases involving juveniles.

After the merits hearing, please provide the BKC with a copy of the order. Your client should keep the original order because he may need to present it to various government agencies to show proof of status. If relief is denied to your client, please notify us immediately as to whether or not you will be representing the client in his appeal before the Board of Immigration Appeals (BIA).

If you are unable to represent your client for his appeal, please prepare a timely Notice of Appeal and statement explaining the reasons for appeal. The Project will file the Notice of Appeal with an accompanying Form EOIR-27. Please note that should you file the Notice of Appeal with an accompanying Form EOIR-27, you will then be obligated to represent the client before the BIA.

If you will be representing the client before the BIA, the BKC strongly encourages attorneys to consult with us early to strategize about the appeal and/or any potential motions to reconsider or reopen proceedings. Also, in Special Immigrant Juvenile cases there is the added concern of a child “aging out” while the issue is on appeal at the BIA.

SECTION 6.

"T" and "U" Visas

Introduction

In October 2000, the President signed into law the Victims of Trafficking and Violence Protection Act (VTVPA), creating the "T" and "U" visas. The T visa is available to victims of human trafficking. The U visa is available to immigrants who are the victims of certain listed crimes and are material witnesses in the investigation and/or prosecution of the perpetrator of the crime. In addition to providing services for trafficking victims and creating a system of incentives and sanctions designed to reduce trafficking worldwide, the law increased criminal penalties for existing offenses and created new offenses, including forced labor; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor; and sex trafficking of children.

Unfortunately, the T visa has suffered from lack of identification by law enforcement officials, and the processing of the U visas has been disorderly at best. First, although the U visa took effect upon enactment of the law, interim regulations were not implemented until September, 2007 and January, 2009. Second, adjudications of U visa petitions have only proceeded at a snail's pace, with less than ½ of 1% having been adjudicated. Furthermore, many deserving applicants have been unable to obtain the Law Enforcement Agency certification, which is a requirement under the regulations.

"T Visas" - for Victims of Human Trafficking

Alien smugglers, like human traffickers, exploit the desire of aliens to enter the United States. In recent years, there have been a series of tragic deaths of aliens who were piled into airless compartments. The Washington Post has reported that more than 2,000 aliens have died in the last five years attempting to cross the border. A substantial portion of these deaths is due to traffickers.

According to a U.S. government estimate, annually approximately 14,500-17,500 people are trafficked into the United States.[1] Therefore, in the first eight years following the passage of the U-visa legislation, it can be estimated that around 130,000 trafficking victims were brought to the U.S. However, in that same timeframe, less than 2,300 T visa principal applications were filed.

The T visa protects victims of "severe forms of trafficking." This includes victims of sex trafficking, defined as recruitment, harboring or transportation of a person for the

[1] U.S. Customs and Border Protection News Release, "CBP, ICE Launch Effort to Raise Awareness of Human Trafficking" (Sept. 9, 2008) citing to information from DOS.

purpose of commercial sex acts such as prostitution. It may also include the recruitment, harboring or transportation of a person for labor services, involuntary servitude, slavery or debt bondage through the use of force, fraud or coercion.

To be eligible for a T visa the applicant must show the following:

1. Victimization, either past or present, under a severe form of trafficking;
2. Presence in the United States on account of such trafficking;
3. Compliance with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or age under 15 years; and
4. Likelihood of suffering extreme hardship involving unusual and severe harm if removed from the United States.

The VTVPA awards 5,000 T visas each year. The VTVPA also provides that detained victims of trafficking should not be housed in correctional facilities. It also mandates the Department of Homeland Security provide protection from the traffickers and necessary medical care.

Requesting the T Visa in Removal Proceedings

All T visa applications are adjudicated by the Vermont Service Center, so the application should be prepared and submitted as soon as possible. You should file an I-914, Application for T Nonimmigrant Status with the VAWA unit of Citizenship and Immigration Services (CIS) in Vermont. The application should be sent to:

U.S.CIS Vermont Service Center
75 Lower Welden Street
St. Albans, VT 05479-0001
ATTN: T-Visa Unit

Generally, the Vermont Service Center will find the T Visa application bona fide if, upon initial review, your client qualifies for a T visa and will issue a determination stating such in approximately two to four weeks. If your client receives T visa approval or determination of a bona fide T Visa application, you should submit this as evidence that your client's proceedings should be terminated, or request that the proceedings be administratively closed. You still must prove the elements to the Immigration Judge, but a determination of a bona fide T Visa application allows you ask the Trial Attorney to stipulate that your client has proved eligibility for T Visa status.

Persons eligible for T visas can request that proceedings be administratively closed only if the Trial Attorney concurs. While Immigration Judges normally have the authority to administratively close proceedings regardless of the Trial Attorney's actions, T visa guidelines specifically require that the Trial Attorney concur with the Immigration Judge's decision to administratively close or terminate removal proceedings. Requiring the Service's concurrence therefore complicates the T visa application process.

The regulations provide that applicants for a T visa who are inadmissible are not eligible for T status unless they can obtain a waiver. INA section 212(d)(3) gives the DHS general authority to waive most of the grounds of inadmissibility for

nonimmigrants. In addition, INA section 212(d)(13) gives the attorney general additional authority to waive most grounds of inadmissibility for victims of trafficking where he or she finds it to be in the national interest to grant a waiver. It is to be expected that many victims of trafficking will need waivers because of the very circumstances that make them victims. With respect to the public charge ground, the supplementary information to the interim rule notes that, "[f]or the purposes of receipt of public benefits, Congress has recognized that victims of trafficking are in much the same position as refugees, and therefore has provided specific authority for the Service to exempt them from the ground of inadmissibility for aliens who are likely to become a public charge." The rule requires applicants who need a waiver to submit Form I-192, Application for Advance Permission to Enter as Nonimmigrant, with its $545 fee or a request for a fee waiver, at the time they file their I-914 application.

"U Visas" - for Victims/Witnesses of Crimes

The U visa is designed for noncitizen crime victims who have suffered physical or mental abuse resulting from criminal activity and who have agreed to cooperate with government officials investigating or prosecuting such criminal activity. Victims of a broad range of criminal activity listed in the legislation may qualify for U visas.

To qualify for a U visa, your client must[1]:

1. Show that he has suffered substantial physical or mental abuse as the result of one of the following forms of criminal activity (or "similar" activity):

   "rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes;"[2]

2. Show that he possesses information concerning the criminal activity;[3] and
3. Provide a certification from a federal, state, or local law enforcement official, prosecutor, judge, or authority investigating criminal activity designated in the statute that states that the U visa applicant is being, has been or is likely to be helpful to the investigation or prosecution of designated criminal activity.[4]

Family members (spouses, children, parents of juveniles, and minor siblings of juveniles) of principal applicants mentioned in §101(a)(15)(U)(ii) may qualify as derivatives.

[2] INA §101(a)(15)(U)(iii), added by VTVPA §1513(b)
[3] INA §101(a)(15)(U)(i)(II), added by VTVPA §1513(b)
[4] INA §101(a)(15)(U)(i)(III) & INA §214(o)(1), added by VTVPA §1513(b) & (c)

The Trafficking Act provides a generous waiver for all grounds of inadmissibility with the sole exception of the Nazi and genocide grounds pursuant to §212(a)(3)(E).[5] Inadmissibility for all other grounds may be waived in the "public or national interest." No other grounds of inadmissibility should apply to U visa holders upon application for adjustment of status.[6]

The Application Process

In October, 2003, interim U visa processing was centralized at the Vermont Service Center. In September, 2007, "final interim" regulations, including the application form I-918, were published and in October, 2007 the Vermont Service Center ceased accepting interim relief requests. The "final interim" regulations were further amended in January, 2009. Therefore, all U visa applicants must now file under the new regulations.

The law enforcement certification is essential to the U visa application. It is best to obtain the certification during the investigation or prosecution of the criminal activity. The certification must come from a federal, state, or local law enforcement official, prosecutor, or judge investigating or prosecuting the criminal activity. The Vermont Service Center requires the law enforcement certification to be executed on form I-918B for any applicant who was not granted interim relief.

The application for U visa status should be sent to:

U.S.CIS Vermont Service Center
75 Lower Welden Street
St. Albans, VT 05479-0001
ATTN: VAWA U-Visa Unit

All requests should be clearly marked in large letters: DO NOT OPEN IN THE MAILROOM. The filing fee has been waived for U visa applicants, however you must include an $80 biometrics fee or fee waiver with the application.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") provides that the applicant may submit an I-765, Application for Employment Authorization, and seek employment while the U visa application is pending. Unfortunately, no regulations have been published and attorneys are experiencing significant problems with these applications and many are rejected. Still, we suggest that you file the I-765 with Vermont Service Center. An applicant must submit the appropriate filing fee with the I-765, unless an appropriate request for a fee waiver accompanies the application.

A U visa recipient is generally eligible to apply for lawful permanent residency after three years from the date of admission as a U Nonimmigrant.[7] Also, the Violence Against Women and Department of Justice Reauthorization Act of 2005 allows the granting of U visas status to be "backdated" to the date deferred action was initially

[5] INA §212(d)(13). added by VTVPA §1513(e)
[6] INA §245(l) as amended by VTVPA, § 1513(f)
[7] 8 CFR 245.24(b)(3)

granted under interim guidelines. Adjustment is available to an applicant who continues to hold U nonimmigrant status at the time of application, or accrued at least 4 years in U interim relief status and files a complete adjustment application within 120 days of the date of approval of the Form I-918. The adjustment application will be denied if you do not affirmatively establish that the U visa holder did not unreasonably refused to assist with a criminal investigation or prosecution.

Information included in the U visa application may not be disclosed or used by anyone other than sworn officers of the Department of Homeland Security (DHS). Confidentiality protections extend to U visa applicants prohibiting DHS from contacting abusers or perpetrators.[8]

The Master Calendar Hearing

The preliminary hearing during which the person pleads to the charges on the Notice to Appear (NTA) and formally requests relief is called the master calendar hearing. It functions much like an arraignment in criminal proceedings. Unless there are complications in the case, the master calendar hearing is a routine proceeding usually taking a few minutes to complete.

Clients (or their attorneys, if an appearance has been filed) receive written notice of the date and time for the master calendar hearing. Because of the nature of the BKC's cases, volunteer attorneys sometimes have short notice of these hearings.

Guidance states that noncitizens "identified as possible victims in the above categories [U or T] should not be removed from the United States until they have had the opportunity to avail themselves of the provisions of the VTVPA. INS personnel should keep in mind that it is better to err on the side of caution than to remove a possible victim."[9]

Master calendar hearings are held at the Immigration Court located at 800 Dolorosa Street, Suite 300 in San Antonio. For detained clients, the Immigration Judge holds hearings with you present. Depending on the facility in which he is detained, your client may appear either in person or via televideo conference.

It should be noted that your hearing strategies and your client's chances of success depend in large part on which Judge hears your case. In San Antonio, there are currently six Immigration Judges, each with a different personality, view of the law, and "track record." Please confer with the BKC about the Immigration Judge who has your case. The Immigration Judge may ask you to summarize what type of evidence you plan to present and what your theory of the case is at the master calendar hearing.

The client must be at all hearings before the Immigration Court, including the master calendar hearings; the attorney cannot appear alone unless previously approved by the judge. Your client can be ordered removed in absentia if he fails to appear. Also, every person who has been issued an NTA must attend. This applies to small children as well; their parents cannot attend for them. You may ask the Immigration Judge to waive the presence of children at future hearings as long as they are represented, but the waiver

[8] VAWA 2000 Se. 1513(d)

[9] Cronin, Office of Programs, Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 - "T" and "U" Nonimmigrant Visas, Memorandum to Michael Pearson, Office of Field Operations, INS Memo. HQINV 50/1 (Aug. 30, 2001)

is discretionary and not automatically granted. If there is a compelling reason why a client cannot appear in person, the attorney can file a motion to waive appearance in advance of the hearing, but there is no guarantee that such a motion will be granted. It is not advisable to do so, except perhaps in the case of children. If possible, clients should avoid bringing infants to court if they are not required to be there (i.e. U.S. citizen children).

For all languages and dialects, the Immigration Court provides contract interpreters, whose quality and reliability vary. If a contract interpreter fails to appear for a master calendar, you may request a continued hearing. Also, if the contract interpreter is clearly not making himself understood to the client, you can request a continuance on that basis. You will want to remind the Immigration Court to have an interpreter in your client's most proficient language at future hearings. For master calendar hearings, the Immigration Court will sometimes utilize a telephonic interpreter, while individual merits hearings require the interpreter be present in the courtroom. It is advisable to bring your own interpreter with you to the merits hearing (if you do not speak your client's language) to note any material discrepancies in the interpretation.

You should arrive at the Immigration Court at least a few minutes before your scheduled time. On the wall in the hallway a list will be posted containing your name, your client's name, and his alien registration number ("A-number"). We also recommend that you check in with the clerk in the waiting room to your right. The Judge's clerk will tell you which courtroom to go to. There are usually many booked for the same time, so it is wise to arrive early and be among the first. If you have not already filed an appearance, do so at this time by obtaining two copies of form E-28 from the clerk's window or from the Judge's clerk, filling them out, and serving one copy to the Trial Attorney and the other to the Immigration Judge. You will also want to give a G-28 to the Trial Attorney and have a copy ready for the Immigration Judge in case she would like a copy of it.

If your client is detained, ICE is responsible for having him available for the master calendar hearing. If for some reason they fail to do so, notify the Court that your client is detained and ask to have the hearing rescheduled.

The Master Calendar Hearing Process

1. The Beginning of the Hearing

When your case is called, the Immigration Judge is likely to talk with you off the record to determine your intentions and to straighten out any procedural problems. At that time, you can advise the Immigration Judge that you are a pro bono attorney with the BKC. On the record, through an interpreter where necessary, the Immigration Judge will state the nature of the proceedings and ask your client if he understands what is happening.

2. Determining Representation by Counsel

Your client will first be asked if you are his representative. If an individual appears without legal counsel, the Immigration Judge will usually ask the individual if he would like a continuance to seek legal counsel.

3. Establishing Receipt of the Notice to Appear

You or your client will be asked if he has received a copy of the NTA. If not, he should say so and ask for a copy. The Immigration Judge will often grant a continuance so that you can go over the NTA with your client to determine whether the charges are correct-and if there is any question, even remotely, about their accuracy, then a continuance should be sought.

4. Admitting or Denying the Charges and Denying Removability

If you have the NTA, you will be asked whether your client either admits or denies the specific factual allegations and charges in the NTA-generally, that he entered without inspection on a certain date and is removable. If your client concedes the allegations, you can provide evidence of eligibility for the T or U visa as a defense to removal stating that the VTVPA and the DHS Policy Memorandum #2 relating to T and U visas protect your client from removal. However, if there is more than one charge of removability or any question as to how to plead, discuss it with your client and with the BKC first.

5. Designating a Country of Removal

Next, the Immigration Judge will ask if your client wishes to designate a country of removal. In T and U visa cases, it is acceptable to designate a country of removal. However, if your client has any fear of returning to his home country (especially in T visa cases), you may decline to designate a country of removal.

6. Stating the Client's Eligibility for the T or U Visa and Requesting Administrative Closure, or Continuance

You or your client will then state for the record the client's eligibility and desire to apply for a T or U visa. Alternate grounds of relief, such as asylum and voluntary departure, should also be stated if eligible.

At this time, you may request that the Trial Attorney agree to administrative closure or termination of the proceedings. Although unlikely at this stage, administrative closure may be possible if the Trial Attorney is aware of the particular circumstances of your client's case through information obtained by the local ICE Investigations Unit. If the Immigration Judge does not administratively close the proceedings, you should then request a continuance to allow your client to receive a determination of a bona fide T or U visa application.

Please note that, unlike other forms of relief, the Immigration Judge does not have the authority to grant your client T or U visa status. The objective in these proceedings will be for the Immigration Judge to find that your client appears eligible for T or U visa status and therefore terminate removal proceedings.

Adjustment of Status to Lawful Permanent Resident

The T and U visa provisions create a special avenue of adjustment for those approved: INA § 245(l) and INA § 245(m). Applicants for adjustment under these provisions generally must have been physically present in the United States for at least three years since receiving their visa, unless your client received a T visa and you obtain

a law enforcement certification that the investigation and prosecution of the traffickers is concluded. In the case of U visa recipients, humanitarian grounds, family unity, or the public interest must justify their continued presence in the United States.[10] Other requirements require that the applicant has continuous physical presence for 3 years since the date of admission as a U nonimmigrant, is not inadmissible under INA 212(a)(3)(E), has not unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the applicant was granted U nonimmigrant status based on affirmative evidence, and establishes to the satisfaction of the Secretary that the applicant's presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest.

Absences greater than 90 days or an aggregate of 180 days will generally terminate continuous presence, with limited exceptions for U visa recipients.

T and U Visa Reference Chart[1]

Source: National Immigration Project, with modifications by the Bernardo Kohler Center
Note: This chart is intended as a generalized reference guide only.

	Provision	T Visas	U visas
1	Eligibility requirements - Physical presence in U.S.	➢ Victim must be physically present in U.S., American Samoa, or Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of the trafficking. -- INA 101(a)(15)(T)(i)(II).	➢ Physical presence in the United States is not required. Applicants may be in or outside of the United States when filing; but the criminal activity that forms the basis for the visa must have violated the laws of the U.S., or must have occurred in the US, its territories or possessions. – INA 101(a)(15(U)(i)(IV).
2	Eligibility requirements - Victim of crime	➢ Must be victim of a severe form of trafficking in persons which is defined by the Act to mean: ➢ Sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained 18 years of age; or The recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery. --- INA 101(a)(15)(T)(i)(I).and Trafficking Victims Protection Act Sec. 103(8)and 103(13).	➢ Must have suffered substantial physical or mental abuse as a result of certain criminal activity: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; attempt, conspiracy, or solicitation to commit any of the above; or any similar activity in violation of federal, state, or local criminal law..-- INA 101(a)(15(U)(iii).

[10] INA §245(l)(1), added by VPVPA §1513(f)

	Provision	T Visas	U visas
3	Eligibility requirements - Certain criminals excluded	➢ Visa denied if there is substantial reason to believe victim committed a severe form in trafficking of persons as defined in the Act. --- INS Sec. 214(n)(1) and Trafficking Victims Protection Act Sec. 107(e)(2).	➢ No similar provision. The only applicable inadmissibility ground 212(a)(3)(E) Nazi persecutors and genocide perpetrators. --- INA 212(d)(13); VAWA Section 1513 (e)..
4	Eligibility requirements	✓ The trafficking victim has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking; OR ✓ Has not attained the age of 18; AND ✓ The alien would suffer extreme hardship involving unusual and severe harm upon removal INA 101(a)(15)(T)(i)(III). In addition to the T-visa provisions there may be additional authority to permit continued presence in the United States of persons who are victims of a severe form of trafficking and who are potential witnesses to trafficking in order to effectuate prosecution of those responsible. Trafficking Victims Protection Act Section 107(c)(3). This is in addition to the T-visa provisions.	➢ The immigrant has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity listed in the statute; ➢ The immigrant (or if the immigrant is under 16, the parent, guardian or next friend of the immigrant) must possess information concerning the criminal activity described in the statute ➢ The immigrant (or in the case of an immigrant child under the age of 16, the parent, guardian, or next friend of the it) has been helpful, is being helpful, or is likely to be helpful to a Federal, State or local law enforcement official, to a Federal, State or local prosecutor, to a Federal or State judge to the INS or to other Federal, State or local authorities investigating or prosecuting criminal activity listed in the statute. INA 101(a)(15)(U)(i)(I)-(III).
5	Eligibility requirements - Cooperation w/ law enforcement	➢ If 18 years or older, victim must have complied (and/or be willing to comply) with any reasonable request for assistance with the investigation or prosecution of severe forms of trafficking.	➢ The applicant's petition must include a certification from a Federal, State or local law enforcement official, prosecutor, judge or representative of other government agency investigating or prosecuting listed criminal activity or an official of the INS certifying that the immigrant (or if under 16 the parent, guardian, or next friend) must have been helpful, be helpful, or be likely to be helpful to a federal, state, or local investigation or prosecution of criminal activity. INA 101(a)(15)(U)(i)(III).
6	Eligibility requirements – Force, Fraud, Coercion -	➢ If 18 years old or over, must have been induced to participate in the severe form of trafficking by force, fraud or coercion. Trafficking Victims Protection Act Sec.103(8).	➢ Not required
7	Eligibility requirements - Fear of retribution if removed	➢ The AG must determine that the alien would suffer extreme hardship involving unusual or severe harm upon removal. -- INA 101(a)(15)(T)(i)(IV).	➢ Not required

	Provision	T Visas	U visas
8	Petitioning process (certification requirement)	➢ It can be a self-petition or a prosecutor filed petition.	➢ Victim may petition on his own behalf, but must obtain a certification from a Federal or State law enforcement official, prosecutor, judge, DHS or other authority investigating criminal activity described above that the immigrant "has been helpful, is being helpful, or is likely to be helpful" in the investigation of the criminal activity (as required above) --- INA 101(a)(15)(U)(i).
9	Eligibility of family members (who are accompanying or following to join)	➢ The following relatives accompanying or following to join an immigrant who qualifies for a T-visa may also receive T-visas. ➢ If the immigrant trafficking victim is under 21: their spouse, child, parent, and unmarried siblings under 21 are eligible. ➢ If the immigrant trafficking victim is over 21: their spouse and children. INA 101(a)(15)(T)(ii).	➢ The following family members can also receive their own U-visa: ➢ In the case of a juvenile victim a spouse, child, parent, or unmarried sibling under 18 years of age; ➢ In the case of an adult victim a spouse or child: PROVIDED THAT EITHER --- ➢ The Attorney General considers granting the visa to the family member necessary to avoid extreme hardship; OR ➢ The Attorney General may also grant a U-visa to these family members based upon certification of a government official that an investigation or prosecution would be harmed without the assistance of these family members. --- INA 101(a)(15(U)(ii). .
10	Employment authorization	➢ T-visa recipients are employment authorized. INA Sec. 101(i)(2). Trafficking Victim's Protection Act Sec. 107(e)(4).	➢ U-visa recipients are employment authorized. INA Sec. 214(o)(3)((B). VAWA 2000 Sec. 1513(c).
11	Visa numeric limits	➢ 5,000 maximum in any fiscal year (not including the spouses, sons, daughters, or parents of the victims admitted). INA Sec. 214(n)(2); Trafficking Victims' Protection Act Sec. 107(e)(2).	➢ 10,000 maximum in any fiscal year (not including spouses, children, or parents of the victims admitted). --- INA Sec.214(o)(2)(A); VAWA 2000 Sec. 1513(c).

	Provision	T Visas	U visas
12	Waiver of Grounds of Inadmissibility	➢ In addition to any other waivers that may be available under section 212, if in the national interest to do so the Attorney General may waive certain grounds of inadmissibility -- ➢ (Section 212(a)(1) (health related grounds) and 212(a)(4) (public charge); and ➢ Any other provision or 212(a) except 212(a)(3)(national security), 212(a)(10)(C)(international child abduction) and 212(a)(10)(E)(citizens who renounced citizenship to avoid taxation) so long as the activities that rendered the immigrant inadmissible these other provisions of 212(a) were caused by or incident to their trafficking victimization ➢ INA Sec. 212(d)(13)	➢ The Attorney General may waive all grounds of inadmissibility both for U-visa applicants and at adjustment except 212(a)(3)(E)(Nazis and genocide perpetrators) when the Attorney General considers the waiver to be in the national or the public interest. The waiver is not available to family members who are following or accompanying to join. --- INA Sec. 245(l)(1)&(3).
13	Length of temporary status	➢ 4 years, unless certification is obtained that an extension is necessary for the prosecution of the traffickers.	➢ No limitation
14	Access granted to public benefits	➢ Granted same access to benefits and services under any state or federally funded or administered program that is granted to refugees. – Trafficking Victims Protection Act Sec. 107(b)(1)((A). ➢ Trafficking victims authorized to receive services and benefits funded by HHS, Department of Labor, Legal Services Corporation and other federal agencies. -- Trafficking Victims Protection Act Sec. 107(b)(1)(B). ➢ To access public benefits an immigrant must have made a bona fide application for a T-visa that has not been denied; OR ➢ Is a person whose continued presence in the U.S. the AG is ensuring in order to effectuate prosecution of traffickers. This group can only get benefits for so long as the AG certifies is necessary to effectuate prosecution of traffickers.	➢ No access granted.

	Provision	T Visas	U visas
15	Adjustment to LPR status - Basic requirements	➢ Continuous physical presence for at least 3 years since the date of admission as a T-visa non-immigrant. *The Violence Against Women and Department of Justice Reauthorization Act of 2005 appears to waive the requirement if you obtain certification that the investigation / prosecution of the traffickers is completed.* ➢ Good moral character throughout this period. ➢ Has complied with any reasonable request for assistance in the investigation or prosecution of trafficking acts during such period. ➢ Would suffer extreme hardship involving unusual and severe harm upon removal from the U.S. – INA Sec. 245(l)(1)	➢ Continuous physical presence for at least 3 years since date of admission as a U-visa non-immigrant. ➢ AG determines that immigrant's continued presence in the U.S. is justified on humanitarian grounds, to ensure family unity or is otherwise in the public interest ➢ Must provide affirmative evidence that the immigrant has not unreasonably refused to provide assistance in a criminal investigation or prosecution. --- INA Sec. 245(l).
16	Adjustment to LPR status - Definition of physical presence.	➢ An immigrant will be considered to have failed to maintain continuous physical presence in the U.S. if the immigrant has departed from the U.S. for a period in excess of 90 days or for any periods in the aggregate exceeding 180 days. INA Sec. 245(l)(2) Note that there are two section (l)(2) one here and the other discussing inadmissibility.	➢ An immigrant will be considered to have failed to maintain continuous physical presence in the U.S. if the immigrant has departed from the U.S. for a period in excess of 90 days or for any periods in the aggregate exceeding 180 days; ➢ UNLESS the absence was in order to assist in the investigation or prosecution; OR ➢ UNLESS an official involved in the investigation or prosecution certifies that the absence was otherwise justified. INA Sec. 245(l)(2).
17	Adjustment to LPR status - Inadmissibility	➢ In addition to any other waivers that may be available under section 212, if in the national interest to do so the Attorney General may waive certain grounds of inadmissibility -- ➢ (Section 212(a)(1) (health related grounds) and 212(a)(4) (public charge); and ➢ Any other provision or 212(a) except 212(a)(3)(national security), 212(a)(10)(C)(international child abduction) and 212(a)(10)(E)(citizens who renounced citizenship to avoid taxation) so long as the activities that rendered the immigrant inadmissible these other provisions of 212(a) were caused by or incident to their trafficking victimization ➢ INA Sec. 245(l)(1).	➢ Must not be inadmissible under section 212(a)(3)(E)(Nazis and genocide)

	Provision	T Visas	U visas
18	Adjustment to LPR status - Numerical limitations	➢ No more than 5,000 (not including spouses, sons, daughters, or parents) in any fiscal year. -- INA Sec. 245(l)(3)(A)&(B), ➢ No reduction of legal immigration visas upon adjustment of status. – INA Sec. 245(l)(4).	➢ No fiscal year limitations ➢ No reduction of legal immigration visas upon adjustment of status. – INA Sec. 245(l)(4)
19	Attorney General Referrals	The AG is obliged to refer T visa holders to an NGO that would advise them of their options in the US and resources available to them. – INA Sec. 101(i)((1).	➢ The AG shall provide visa holders with referrals to NGO's to advise them regarding their options while in the US and resources available to them. -- INA Sec. 214(o)(3)(A).
20	Conditions for Removal Proceedings	➢ The AG can institute removal proceedings against visa holder for conduct committed after admission on a T visa or for conduct that was not disclosed to the AG prior to admission as a nonimmigrant on a T-visa. Trafficking Victims Protection Act Sec. 107(e)(5).	➢ No similar provision.
21	Credible Evidence Standard	➢ No evidence standard specified.	➢ Credible evidence standard used in VAWA applies to al U-visa case for both visa applications and adjustment. INA Sec. 214(o)(4)
22	Non-exclusive remedy	➢ No provisions included.	➢ U-visa applicants who qualify for other immigration benefits may apply for those benefits in addition to the U-visa. INS Sec. 245(o)(5)

WHAT TO LOOK FOR WITH UNDOCUMENTED IMMIGRANT JUVENILES

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VAWA

Applicant must show:
1. Abuse by U.S. citizen or LPR spouse or parent; abuse can be to self, or to child
2. Good moral character
3. Not inadmissible or removable on certain grounds

Applicant can file a petition for an immigrant visa, but recent interpretation by CIS may not allow a VAWA self petition if the applicant entered the U.S. illegally

If the child, child's parent, or child's sibling has been abused by the child's **U.S. Citizen or Lawful Permanent Resident parent**, child may qualify for residency under VAWA.

U-Visa

Part of the Victims of Trafficking and Violence Protection Act, Applicant must show substantial physical or mental abuse as the result of one of a specified form of criminal activity (or "similar" activity)

- Obtain a certification from a federal, state, or local law enforcement official that states that the applicant is being, has been, or is likely to be helpful to the investigation or prosecution of the criminal activity

If the child, child's parent, or child's sibling has been a **victim of a "serious" crime in the U.S.**, including domestic violence by an undocumented parent, child may qualify for a U-Visa.

S.I.J.

Eligible for residency if:
1. Under 21 and unmarried
2. Declared "dependent" on a US juvenile court, or placed in the custody of an agency or department of a State, or an individual or entity appointed by a State or juvenile court
3. Reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis under State law
4. Not in the juvenile's best interest to return to country of origin

If the child has been abused, **abandoned, or neglected by one parent**, either in the U.S. or in the country of origin, child may qualify for residency under S.I.J.

EXAMPLES: A parent is M.I.A., no father is on the birth certificate, one parent is deceased

Asylum

Immigration may grant asylum if individual shows:
A "well-founded fear" of persecution by the government or a group the government is unable/unwilling to control on account of the individual's race, religion, nationality, political opinion, or membership in a social group

- Domestic Violence may now qualify as a basis for asylum

If the child is **afraid to return to the country of origin**, child may qualify for asylum.

Entails risk, but child should seek consultation. EXAMPLES: Domestic violence in country of origin, sexual orientation, vendetta against family

Juveniles and Immigration: What You Should Know and What You Can Do

Susan L. Watson, J.D., M.P.Aff.
Practice Group Coordinator – Individual Rights

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What You Will (Hopefully) Gain From This Session…

- An understanding of the benefits, requirements & special issues confronting undocumented juveniles;
- An overview of immigration relief options for this population;
- An understanding of how a child's criminal history may affect his/her immigration status;
- A review of *Padilla v. Kentucky* and its implications for juveniles, and
- Resources

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What You Will *Not* Gain From This Session:

- In-depth knowledge of how to apply for various forms of relief;
- A definitive answer about what *Padilla* means in practical terms (not sure that anyone knows…!)

Caution!

- Only a licensed attorney or Board of Immigration Appeals (BIA) Accredited Representative may assist someone with immigration paperwork.
- Even if you don't charge a fee, helping someone with an immigration application is practicing law without a license and you are subjecting yourself and your office/agency to liability.
- For information on how to become BIA accredited, contact Linda Brandmiller, Catholic Charities San Antonio – (210) 433-3256.

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These are particularly challenging cases…

Children, in addition to being minors, are often abused and victimized, and almost certainly:

- Fear their abusers (who threaten deport/custody);
- Are often too timid, embarrassed, and/or humiliated to ask for help (especially if they themselves have a criminal history);
- Unable to leave their abusers (or, alternatively, are abandoned with no support);
- Often are unaware of their rights and do not know that there are existing services and resources that could benefit them and/or keep them safe.

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Other Challenges

- Embarrassment and fear prevents the child from disclosing facts and details.
- Word game – is the child saying what he/she thinks you want to hear?
- Language, culture and gender issues *cannot* be overemphasized.
- Time – it takes a long, long time to build trust with/get necessary information from children.
- Perceptions of "authority" figures: lawyers, teachers, law enforcement, immigration officials, etc.

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Immigration Law

Terms, Sources, and Agencies

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What's That You Say?

- DHS: Department of Homeland Security
- USCIS: US Citizenship and Immigration Service
- ICE: Immigration and Customs Enforcement
- CBP: Customs and Border Protection
- ORR: Office of Refugee Resettlement
- USC: United States Citizen
- LPR: Legal Permanent Resident
- VAWA: Violence Against "Women" Act
- T-Visa: Trafficking Victim Visa
- U-Visa: Crime Victim Visa
- UAC: Unaccompanied Alien Child (6 U.S.C. § 279(g))
- SIJ: Special Immigrant Juvenile
- TVPRA: Trafficking Victims Protection Reauthorization Act

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Sources of Immigration Law

- Immigration and Nationality Act (INA) – 8 U.S.C. §§ 1101 *et seq*.
- 8 Code of Federal Regulations
- Policy Statements, Directives, Memos
- Administrative Cases
- Board of Immigration Appeals (BIA) decisions
- Federal Circuit Court Decisions
- *Flores* Settlement Agreement (for detained UACs)

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U.S. Citizen

- Born in the United States
- Derivative citizen (born abroad to U.S. citizen parent(s) or a permanent resident minor whose parents naturalize before he turns 18)
- Naturalized (INA §§ 301-361, 8 USC §§ 1401-1504)
- Remember: citizens cannot be deported, and it is extremely difficult to revoke citizenship

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Lawful Permanent Resident (LPR) a.k.a. "green card" holder

- Defined at INA § 101(a)(20), 8 USC §1101(a)(20);
- Allowed to live and work permanently in the U.S.;
- ***Subject to removal (deportation) from the U.S. for violation of criminal and immigration laws, regardless of how long he has been an LPR***;
- Subject to abandonment for prolonged absences from the U.S.

Non-Immigrant Classifications

- Defined at INA §101(a)(15), 8 USC §1101(a)(15)
- Includes tourists, business visitors, students, investors, athletes, entertainers, and temporary workers
- Also includes T and U visas
- Violation of status or ***criminal conviction*** can result in removal from U.S. and/or jeopardize eligibility to become an LPR

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Refugees and Asylees

- Allowed to live and work in the U.S. pursuant to a grant of protection from persecution in their home country
- Refugees – admitted to U.S. from a country outside (INA §207, 8 USC §1157)
- Asylees – apply for and receive asylum from an asylum officer or Immigration Judge within the U.S. (INA §208, 8 USC §1158)
- Can apply for LPR status after one year in U.S. in protected status
- ***Subject to removal from U.S. for conviction of crimes, although waiver is available (in certain circumstances)***

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Entry Without Inspection ("EWIs")/Present Without Admission

- Entered the U.S. without lawful authorization and inspection by an immigration officer
- Presence in the U.S. without authorization is a ground for inadmissibility and removability
- Have limited opportunities to apply for relief from removal

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Entities Involved in Immigration

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U.S. Department of Homeland Security (DHS)

- Former INS is now divided into three different agencies within DHS:
  1. Citizenship and Immigration Services (CIS);
  2. Customs and Border Protection (CBP);
  3. Immigration and Customs Enforcement (ICE)

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Citizenship and Immigration Services (CIS)

- Processes applications for immigration benefits, such as Adjustment of Status, Asylum Applications, and Employment Authorization Cards
- Accepts filing fees for applications for benefits and relief
- Oversees Asylum Office, which interviews for credible fear, reasonable fear, and affirmative asylum applications

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Customs and Border Protection (CBP)

- Inspects people and goods at land, sea, and air ports of entry
- Performs the same duties as the former Customs Service and INS Inspections and Border Patrol

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Immigration and Customs Enforcement (ICE)

- Enforces immigration and customs laws within the U.S.;
- Investigates immigration law violations and makes immigration related arrests;
- Sets bonds, transports, houses, and processes detained immigrants;
- Arrests, detains, and removes individuals with outstanding removal orders;
- Contains the Office of Chief Counsel, the legal office responsible for representing the government (DHS) before the Immigration Court.

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Office of Refugee Resettlement (ORR) – U.S. Dept. of Health and Human Services

- Unaccompanied Children's Services (UACs);
- Unaccompanied Refugee Minors (URMs);
- Anti-Trafficking in Persons; and
- Other Refugee Benefits

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Executive Office for Immigration Review (EOIR) within the Department of Justice

- Immigration Court system with 52 immigration courts and over 200 Immigration Judges (IJs) nationwide
- IJs hear removal cases, decide issues of inadmissibility and removability, and adjudicate applications for relief from removal, such as asylum, cancellation, and adjustment
- Procedural rules are found at 8 CFR Part 1003, subpart C

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Forms of Immigration Relief for Juveniles

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Most Frequent Forms of Relief

- Asylum
- V.A.W.A.
- T-Visas
- U-Visas
- Special Immigrant Juvenile (SIJ) status

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Basic Questions to Ask:

- Immigration history of the child?
- Any history of abuse or victim of crime? Were criminal charges brought?
- Does *child* have criminal history?
- Does child have siblings? Ages? Living where?
- Have deportation/removal proceedings been instituted against either party?
- Where is child living now and is he/she safe?
- Marital status? Does juvenile have children of his/her own?

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Asylum

Asylum

- Immigration Judge or Asylum Officer may grant asylum if individual shows:
  - A well-founded fear of persecution by the government or a group the government is unable/unwilling to control on account of the individual's race, religion, nationality, political opinion, or membership in a social group

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Legal Test for "Well-Founded Fear"

- An applicant need only show a ***reasonable possibility*** that he will be persecuted.
- Subjective component: Must show ***actual fear*** of returning to his country of origin
- Objective component: Must show that a ***reasonable person*** would experience a fear of persecution
  - Specific facts through objective evidence or
  - Persuasive, credible testimony

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Grounds for Persecution

- **Race** – Includes all types of ethnic groups that are commonly referred to as 'races'
  - (For example, Chechens and Kurds qualify)
- **Religion** – Includes religious beliefs (or lack thereof)
  - Mere membership in a religious community will not, in most cases, be enough
  - Persecution can include imputed religious beliefs
- **Nationality** – Includes citizenship or membership in an ethnic or linguistic group
  - May overlap with race

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Grounds, continued

- **Political opinion**
  - Includes persecution due to coercive population control programs, such as forced abortion or sterilization
  - May include refusing to join opposition forces if client refused because he/she disagreed with the goals of the opposition
  - May include an opinion the persecutor believes the applicant to have ("Imputed political opinion")

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Benefits of Asylum

- Work permit
- Eligible for refugee resettlement benefits (such as Medicaid, food stamps and limited housing assistance)
- Able to adjust to LPR status after 1 year
- Derivative benefits – can bring spouse/children to the U.S., but not parents or younger siblings

Violence Against Women Act Relief (VAWA)

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Purpose of VAWA

- Immigrant victim allowed to "Self-Petition" without the support of the batterer
- Information from the abuser cannot be used against the victim/confidential
- **Non-citizen children of the victim are also protected**
- Approved self-petition leads to LPR

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VAWA Eligibility

- any alien having married in good faith to a U.S. Citizen or Lawful Permanent Resident, INA §204(a)(1)(A)(iii)
- or any child of that alien, if during the marriage the alien or a child of the alien were either battered or subject to extreme cruelty by USC or LPR spouse.INA §204(a)(1)(A)(iv). *See also*,INA §204(a)(1)(B)(iii).
- VAWA is also available to the parents of abusive USCs if the USC is at least 21 years old. INA §204(a)(1)(A)(vii).

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VAWA Self-Petition

Applicant must show:

- Abuse by U.S. citizen or LPR spouse or parent
  - Abuse can be to self, or to child
- Good moral character
- Not inadmissible or removable for:
  - Criminal acts
  - False claims of US citizenship
  - Marriage fraud
  - Security or terrorist activity
- Applicant can file a petition for an immigrant visa, but recent interpretation by CIS will not allow a VAWA self petition if the applicant entered the U.S. illegally

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Requirements of a VAWA Self-Petition

- Battery or Extreme Cruelty
- Abuse inflicted by the United States Citizen or Legal Resident Spouse or Parent
- Good Faith Marriage
- Residence with the Abuser
- Good Moral Character
- "Any credible evidence" standard

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Cases Needing Special Attention

RED FLAGS (Consult an immigration attorney to avoid putting client at risk):

1) Complicated Immigration History (previous deportation, numerous entries, false claims to citizenship)
2) ANY Criminal Record
3) Question on Fraudulent Marriage (Bigamy, Married for immigration benefit)
4) Using fraudulent documents

It is important to note and red flag any use of false documents because it can affect the applicant's ability to adjust her status to a legal permanent resident. There are VAWA waivers available that can be used to overcome many of these issues.

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VAWA Cancellation

- Available only in removal proceedings, as form of relief from removal
- Benefits: LPR status & employment authorization
- Also, DHS will parole grantee's child or, if child, parent into U.S. with work authorization until able to adjust based on visa petition filed by grantee

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VAWA Cancellation

Applicant must show:

- Abuse by U.S. citizen or LPR spouse or parent
- Three years continuous physical presence in U.S. years before receiving Notice to Appear
- Good moral character for three years
- Not inadmissible or removable for:
  - Criminal acts
  - False claims of US citizenship
  - Marriage fraud
  - Security or terrorist activity
- Removal would cause extreme hardship to client, child or parent

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Bars to VAWA Cancellation

Applicant must not fall under certain INA § 212 inadmissibility grounds or certain INA § 237 deportation grounds [crimes, national security, marriage fraud, falsification of documents, aggravated felonies.]

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NOT Bars to VAWA Adjustment

- Not having been inspected and admitted or paroled (EWI)
- Having worked without authorization
- Having failed to maintain lawful non-immigrant status
- No $1000 penalty fee required for VAWA self-petitioners.

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T-Visas: Victims of Human Trafficking

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T-Visa Status

- Part of the Victims of Trafficking and Violence Protection Act (VTVPA) in 2000
- Victimization, either past or present, under a severe form of trafficking
- Presence in the United States on account of such trafficking
- Compliance with any reasonable request for assistance in the investigation or prosecution of acts of trafficking
- Extreme hardship if removed from the U.S.

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"Trafficking" vs. "Smuggling"

The Three "Cs" of Trafficking:

- Control
- Coercion
- Commerce

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Defining "Trafficking"

Under federal law, the technical term for modern-day slavery or coerced labor is "severe forms of trafficking in persons:"

1. sex trafficking in which a commercial sex act is induced by force, fraud, or coercion or in which the person induced to perform such an act is under 18; or
2. the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subjecting that person to involuntary servitude, peonage, debt bondage, or slavery.

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Defining "Trafficking" – cont'd

- Sex trade
- Labor situations
  - domestic servitude,
  - labor in a prison-like factory, or
  - migrant agricultural work.
- Defining Trafficking depends on the type of work victims are made to do **AND** use of force, fraud, or coercion to obtain or maintain that work (minors in sex trade need no force, fraud or coercion).

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More on “Trafficking”

Trafficking also covers people who are held against their will to pay off a debt; this is known as peonage. A victim's initial agreement to travel or perform the labor does not allow an employer to later restrict that person's freedom or to use force or threats to obtain repayment.

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Benefits of the T-visa

- Eligible for certain benefits and services to the same extent as refugees.
- To be eligible to receive this assistance, victims of severe forms of trafficking who are eighteen years or older must be certified by the U.S. Department of Health and Human Services (HHS), after HHS consults with the U.S. Department of Justice. HHS must certify that the victim
  - is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons, and
  - has either made a bona-fide application for a T visa or is a person whose continued presence in the United States the Attorney General is ensuring in order to effectuate prosecution of traffickers in persons.

Benefits of the T-visa

Eligible for certain government-funded programs, services, and assistance that are necessary for the protection of life and safety, such as:

- crisis counseling and intervention programs,
- short-term shelter or housing assistance, and
- mental health assistance.

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T-visa Certification?

- Helpful but NOT required.
- It IS possible to gain T-Visa status for a victim without certification from DHS however, they will not qualify for interim benefits like they would with the certification.
- Without certification, document all efforts to work with officials on the case.
- Trafficking Hotline: 1-888-3737-888

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Identifying a Trafficking Victim

- Are you now being (or have you at one time been) held against your will?
- Were you ever forced or intimidated to do something against your will?
- Do you have a choice of where you work and how much you work?
- Have you been abused or beaten by your employers?
- Can you come and go as you please?
- Are you paid?
- How many hours/day and days/week do you work?
- Have you or your family been threatened to prevent you from leaving?
- Upon arrival in the U.S. did someone ask you to pay back a debt?
- Are you doing what you were told you would be doing in the U.S.?
- Who has your passport or identification papers?

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U-Visas: Victims of Crime

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U-Visa Status

- Part of the Victims of Trafficking and Violence Protection Act (VTVPA) in 2000
- Show substantial physical or mental abuse as the result of one of a specified form of criminal activity (or "similar" activity)
- Possess information concerning the criminal activity
- Obtain a certification from a federal, state, or local law enforcement official that states that the applicant is being, has been, or is likely to be helpful to the investigation or prosecution of the criminal activity

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Purpose of the U-Visa

- Law Enforcement: Overcome victim fear of detection, encourage reporting and other cooperation with investigation or prosecution of crimes.
- Humanitarian: Protect vulnerable victims, assist domestic violence and other crime survivors.

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U-Visa Requirements

- Victim of Designated or Similar Crime
  - Can't be culpable in qualifying crime
- Suffered substantial abuse as result of crime
- Applicant determined to be "admissible" to US
- Was/Is/Will be helpful in:
  - Investigation or
  - Prosecution
- Can't reasonably refuse to help
- Law Enforcement must certify helpfulness

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Statutory List of Crimes

- INA 101 (a) (15)(U)
  - Rape, Incest
  - Torture
  - Trafficking
  - Domestic violence
  - Sexual assault, Abusive sexual contact
  - Prostitution, Sexual exploitation
  - Female genital mutilation
  - Peonage, Involuntary servitude, Slave trade
  - Hostage taking, Kidnapping, Abduction, False imprisonment
  - Blackmail, Extortion
  - Manslaughter, Murder
  - Felonious assault
  - Witness tampering, Obstruction of Justice, Perjury

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Statutory List of Crimes

- PLUS:
  - Attempt,
  - Conspiracy, or
  - Solicitation to commit any of the above-listed crimes,
  - Or any similar activity in violation of federal, state or local criminal law
- PLUS:
  - Law Enforcement Certification

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Who Can Certify?

- Head of law enforcement agency (or person designated by head official) – includes federal, state and local
- Child Protective Service agencies
- Judges
- Certain federal agencies: EEOC, DOL

Derivatives

- Family members of principal applicants mentioned in §101(a)(15)(U)(ii) may qualify as derivatives
  - Spouses
  - Children
    - *"children" = under 21 and unmarried*
  - parents of juveniles
    - *"juvenile" = under 21 and unmarried*
  - minor siblings of juveniles
    - *"minor" = under 18 and unmarried*

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Inadmissibility

- The Trafficking Act provides a generous waiver for all grounds of inadmissibility with the sole exception of the Nazi and genocide grounds pursuant to §212(a)(3)(E). (INA §212(d)(13); added by VTVPA §1513(e)) Inadmissibility for all other grounds may be waived in the "public or national interest." No other grounds of inadmissibility should apply to U visa holders upon application for adjustment of status.

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LEA certification is essential

- It is best to obtain the certification during the investigation or prosecution of the criminal activity. The certification must come from a federal, state, or local law enforcement official, prosecutor, or judge investigating or prosecuting the criminal activity. The Vermont Service Center requires the law enforcement certification to be executed on form I-918B for any applicant who was not granted interim relief.

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Applicants in Removal Proceedings

Unlike most other forms of relief, the Immigration Judge does not have the authority to grant your client U (or T) visa status. The objective in removal proceedings will be for the Immigration Judge to find that your client appears eligible for U-visa status and therefore terminate removal proceedings.

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U-Visa Approvals

- Recipients of U-visas are eligible for employment authorization, and may adjust their status to that of lawful permanent resident in accordance with federal law and regulations after three years. In appropriate circumstances, these visas may also be available to family members of the victim (derivative visas).
- By statute, only 10,000 U-visas may be issued to victims annually. These limits do not apply to family members.

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Adjustment of Status

- The U-visa provisions create a special avenue of adjustment for those approved: INA § 245(m).
- Must have been physically present in the United States for at least three years since receiving their visa.
- Humanitarian grounds, family unity, or the public interest must justify their continued presence in the United States.
- Is not inadmissible under INA 212(a)(3)(E).
- Has not unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the applicant was granted U nonimmigrant status.
- Absences greater than 90 days or an aggregate of 180 days will generally terminate continuous presence, with limited exceptions for U visa recipients.
- 8 CFR § 245.24(f) Decision. *The decision to approve or deny a Form I-485 filed under section 245(m) of the Act is a discretionary determination that lies solely within U.S.CIS's jurisdiction.*

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Special Immigrant Juvenile Status

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SIJ Eligibility

- Under 21 and unmarried
- Declared dependent on a juvenile court located in the United States or whom such court has legally committed to, or placed in the custody of, an agency or department of a *State, or an individual or entity appointed by a State or juvenile court located in the United States*
  - Reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law
  - INA § 101(a)(27)(J)(i) as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)

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Practice Tip: DHHS Consent

- If the minor is in actual or constructive custody of Immigration and Customs Enforcement (ICE) and/or DHHS
  - before beginning the juvenile court process,
  - a juvenile court judge cannot make custody decisions until DHHS has granted consent for the state court to have jurisdiction for the dependency process.
- *If you do not seek to have the state court determine or alter the child's **physical custody status or placement**, you are **not required to seek consent** from DHHS.*

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S.I.J. State Court Options

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"Juvenile Court"

- A "juvenile" court is a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles, as such term is defined in 8 C.F.R. 204.11(a).
- In Texas, a state court must make the requisite SIJ findings should appoint a "custodian" before you can proceed with an application for Special Immigrant Juvenile status.
- You will *generally* file a Petition in Suit Affecting the Parent-Child Relationship (SAPRC) in the county District Court with jurisdiction over civil family matters.

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Vehicles to Get into State Court

- No "dependency orders" in TX Family Code
- Ways to get language into orders
  - Suit Affecting Parent-Child Relationships (SAPCRs)
  - Declaratory Judgments
  - Guardianships
  - Adult Adoptions

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Continuing Jurisdiction

- The former Immigration and Naturalization Service (INS) developed regulations for SIJ status that were not written in the federal law, found at 8 CFR § 204.11 and 8 CFR § 205.1(a)(3)(iv). Every attempt should be made to comply with them to ensure SIJ eligibility.
- Under 8 CFR § 205.1(a)(3)(iv)(C), the child must remain under juvenile court jurisdiction until the application for Adjustment of Status has been approved and the child is a Lawful Permanent Resident, unless the change in circumstances resulted from the child's adoption or placement in a guardianship situation. Normally, the state of Texas will only maintain jurisdiction until the child's 18th birthday. Therefore, in practical terms you should attempt to complete all SIJ processes, including adjustment of status, prior to your client's 18th birthday. However, if this is not possible, there is a legal argument that the District Court retains jurisdiction until terminated by the Judge, and it may be possible to extend jurisdiction until the immigration process is complete.

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SIJ Motion and Order in the District Court

- On this day the Court reviewed the Motion of the Petitioner, who appeared through attorney of record. The Court reviewed the court file and other supporting material, heard arguments of counsel, and finds the Motion to be meritorious.
- The Motion is therefore **GRANTED** and the Court issues the following findings:
  1. The Court finds that the subject child has been subjected to parental abandonment and neglect as defined under Chapter 261.001(4), Texas Family Code and as those terms are used in 8 U.S.C. § 1101(a)(27)(J)(i);
  2. Reunification with the [*mother and/or father*] is no longer a viable option;
  3. The subject child has been placed under the custody of an individual appointed by a State or juvenile court located in the United States due to neglect or abandonment by the [*mother and/or father*] ;

SIJ Motion and Order in the District Court (*cont.*)

4. The subject child is dependent upon a juvenile court located within the United States, and shall remain in the [*temporary*] custody of [*the Petitioner*];
5. It is not in the subject child's interest to be returned to [*the Country of Origin*].

- IT IS ORDERED that this Order may be disclosed and used to support a petition for Special Immigrant Juvenile status to the Department of Homeland Security, U.S. Citizenship and Immigration Services, pursuant to 8 U.S.C. § 1101 (a)(27)(J).
- IT IS FURTHER ORDERED that the Court shall retain continued jurisdiction over this matter, and these [*Temporary]* Orders shall continue in force until further order of this Court.

S.I.J. Immigration Process

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Filing the I-360

- Once you have the requisite order from the state court, you should prepare and file the following with U.S.CIS, Chicago lock-box:
- Form G-28, Notice of Appearance as Attorney or Representative
- Form I-360, Petition for Amerasian, Widow or Special Immigrant
- Letter of Consent for Juvenile Court Jurisdiction (if applicable)
- Juvenile court order
- Proof of Age
  - Ideally the client's birth certificate, passport, or official foreign identity document would be submitted. However, it your client may not have or be able to procure such documentation. You may provide any "document which in the discretion of the director establishes the beneficiary's age" pursuant to 8 CFR § 204.11(d)(1). The requirement is for some proof of age, a much looser standard than the proof of birth. If you are unable to obtain a birth certificate, other options include early school records, a baptismal certificate, affidavits from people who are personally aware of the birth, or other proof of age. If these other documents are also not available, you can submit a state court order on a determination of the child's age, a doctor's evaluation especially with dental records, or the results of a bone density scal
- Client's personal declaration (*optional*)

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Important SIJ Tidbit:

- The granting of SIJ status to a juvenile now confers a Federal Government duty/liability toward state child welfare agencies, and provides that the Federal Government shall reimburse the State in which the child resides for such expenditures by the State, subject to federal appropriations. Children in DHHS custody will receive federal funding for foster care from DHHS if the state does not accept financial responsibility, until the child turns 21.

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Revocation of S.I.J. Status

Under 8 CFR § 205.1(a)(3)(iv) SIJ status can be automatically revoked at any point before your client completes final processing for Adjustment of Status. Under the regulations, SIJ status shall be revoked if, prior to obtaining permanent residency, your client:

- Marries
- Ceases to be under juvenile court jurisdiction; or
- Is the subject of a determination in an administrative or judicial hearing that it is in his best interest to return to his or his parents' country of nationality or residence

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Adjustment of Status

- May file concurrently with the SIJ application if the client is not in removal proceedings.
- If the client is in removal proceedings, client must file with the Immigration Court after the I-360 has been approved.
- Juveniles who adjust status as a result of an SIJ classification may not seek to confer an immigration benefit to their natural or prior adoptive parents.
- Congress provided a special waiver at INA § 245(h)(2)(b), available only to applicants for SIJ status, of many of the grounds of inadmissibility.

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Padilla v. Kentucky
130 S.Ct. 1473 (2010)

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Fundamental Holding:

"Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward,…a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."

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So What Do We Know From *Padilla*?

- For LPRs who face criminal charges that will lead to "automatic" deportation (no waivers, etc.), you must advise them of the consequences.
- For LPRs facing all other charges, you must advise them that a plea or conviction *may* negatively affect their immigration status.
- Practice tip: unless you are 100% certain of the effect a criminal charge, plea, conviction will have on your client, consult an immigration attorney or strongly advise your client to do so. (Get it in writing?)

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Effect of *Padilla* on Children Charged as Juveniles?

- Short answer: virtually none. In general, delinquency/juvenile convictions have no bearing on immigration status.
- **EXCEPT:**
  - **Drug-related offenses (other than small amounts of marijuana) - "reason to believe" issue**

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Is *Padilla* Retroactive?

- Majority of courts who have considered retroactivity since *Padilla* have held that it is *not* retroactive. *See*, e.g., *United States v. Mokeem Bacchus*, 2010 U.S. Dist. LEXIS 139583 (D.R.I. 2010); *United States v. Shafeek*, 2010 U.S. Dist. LEXIS 99969 (E.D. Mich. 2010); *United States v. Perez*, 2010 U.S. Dist. LEXIS 119665 (D. Neb. 2010); *United States v. Gilbert*, 2010 U.S. Dist. LEXIS 110997 (D.N.J. 2010); *Haddad v. United States*, 2010 U.S. Dist. LEXIS 72799 (E.D. Mich 2010).
- *But* see *United States v. Chaidez*, 2010 U.S. LEXIS 81860 (N.D. Ill. 2010)

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Are There Any Instances Where Immigration Consequences are "Clear"?

Answer: Sort of….

- Drug trafficking
- Alien smuggling
- Human trafficking
- Aggravated felonies (for immigration purposes, these are drug crimes, violent crimes, or crimes of moral turpitude with 1 year+ sentence)
- Terrorism
- Firearm offenses

NOTE: For aggravated felonies, language of "actual sentence" is important: "I sentence you to 360 days in jail, but will probate that sentence to 2 years" is OK; "I sentence you to 2 years probation" is not OK.

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Also Be Aware That…

- It may not matter if your client is actually convicted. In certain instances, removal can be based on the governments "reason to believe." *See, e.g.*, INA 212(a)(2)(C)(i) "Controlled substance traffickers.--Any alien who the consular officer or the Attorney General ***knows or has reason to believe--*** is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so…"
- Example: your client is driving a truck carrying 10 kilos of cocaine, but is not convicted of any offense. Probably won't save him from removal….

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What *Padilla* Doesn't Address

- Deportability v. inadmissibility?
- Retroactive?
- "Clear" deportation consequences?

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Resources – HELP!!!

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Resources

- US Citizenship and Immigration Services (USCIS) www.uscis.gov
- AILA - American Immigration Lawyers Association www. aila.org
- Catholic Legal Immigration Network, Inc. www.clinic.org
- Immigrant Legal Resource Center www.ilrc.org
- Justice for Immigrants www.justiceforimmigrants.org
- US Conference of Catholic Bishops www.usccb.org
- Berkeley University www.lib.berkeley.edu/doemoff/govinfo/federal/gov_immigration.html
- US Department of Justice www.ovw.usdoj.gov/regulations.htm; www.usdoj.gov/crt/crim/wetf/trafficbrochure.pdf

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Resources

- www.texaslawhelp.org/www.texaslawyershelp.org
- Texas Council on Family Violence
  www.tcfv.org/policy/welfare-immigration-and-vawa
- American Humane www.americanhumane.org
- WomensLaw.org
  www.womenslaw.org/immigrantsVAWA.htm
- Expectmore.gov
  www.whitehouse.gov/omb/expectmore/detail/10003507.2005.html
- Trafficking in Persons Annual Report-
  www.state.gov/g/tip/rls/tiprpt/2008/

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Local Resourecs

Legal Aid Providers:
Texas RioGrande Legal Aid: www.trla.org
Lone Star Legal Aid: www.lonestarlegal.org
Legal Aid of Northwest Texas: www.lanwt.org

Other Non-Profits:
American Gateways (Austin): www.americangateways.org
Diocean Migrant & Refugee Services (El Paso): www.dmrs-ep.org
ProBAR (Harlingen): www.abanet.org/publicserv/immigration/probar.shtml
Texas Civil Rights Project: www.texascivilrightsproject.org
KIND Foundation: www.supportkind.org

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More Resources

Linda Brandmiller, Director of Immigration Services
Catholic Charities Archdiocese of San Antonio
lbrandmiller@ccaosa.org (210) 433-3256

David Walding, Fully Accredited Representative
Bernardo Kohler Center, Austin
davidbkc@netzero.com (512) 626- 3719

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