CHARTING THE COURSE INTO THE UNFRIENDLY WATERS OF IMMIGRATION LAW

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David Wilson, Esq.
Anne Parsons, Esq.

Wilson Law Group
3019 Minnehaha Avenue Suite 200
Minneapolis MN 55406
612.436.7100

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I. INTRODUCTION : WHY DO SUPERVISORS NEED TO THINK ABOUT IMMIGRATION LAW

a. Rapid growth of immigrant population in Minnesota

b. Decisions of state courts and agencies have potential to impact immigration status

c. In certain cases, federal law specifically asks state courts or agencies to make findings or issue orders as prerequisite to obtaining status:

   i. *Special Immigration Juvenile Status*: state court must make certain findings to allow unaccompanied minor to obtain residency in the United States;

   ii. *U visa*: state court certification that victim/witness was helpful in a criminal proceeding can serve as a basis for a U visa;

   iii. *Protective Orders*: the increase in attempts to "discover" a person's immigration status and the accompanying motions for protective orders.

   iv. Different type of protective orders – OFPs, HROs, can impact immigration.

II. SOURCES OF FEDERAL IMMIGRATION LAW

a. **Titles within the US Code**

   i. Title 8 – known as the Immigration & Nationality Act. It is the primary sources of the intersection between federal and state law

   ii. Title 6 – Domestic Security. It is the federal title that organizes the agencies that exist today for all immigration enforcement related purposes.

iii. Title 18 – Crimes. This is important because it is a source of definitions used in Title 8, and creates immigration-specific crimes too.

1. Document and status-related crimes are defined here.

iv. Title 21, chapter 13 – Drug Abuse Prevention and Control. Again, a source of definitions for Title 8.

b. **Key Regulatory Titles**

i. Title 8 – enabling regulations for the Immigration & Nationality Act

1. This includes defining the procedures that all of the relevant agencies will follow

ii. Title 20 Chapter V parts 655 & 656

1. These regulations empower the Department of Labor to regulate temporary and permanent hiring of foreign nationals in the United States

iii. Title 22 Chapter I Parts 40-68

1. These regulations empower the Department of State to issue temporary and permanent visas abroad.

c. **Case Law**

i. Federal court precedent;

ii. Administrative decisions by the Board of Immigration Appeals.

III. AGENCIES ENFORCING U.S. IMMIGRATION LAW

a. **Department of Homeland Security**

i. Big three:

1. U.S. Citizenship and Immigration Services ("USCIS")

2. U.S. Immigration and Customs Enforcement ("ICE")

3. U.S. Customs and Border Patrol ("CBP")

ii. Other notable names: FEMA, US Coast Guard, TSA, and Secret Service

b. **Department of Justice**

i. Executive Office for Immigration Review – separated from DHS in 2002 as part of the government reorganization

1. Houses immigration courts and Board of Immigration Appeals

ii. Office of Immigration Litigation

1. Represents the government in immigration cases in federal court

iii. Office of Special Counsel for Immigration-Related Unfair Employment Practices

1. Enforces a provision of the Immigration and Nationality Act that prohibits employment discrimination based on citizenship, national origin, or immigration status, and unfair documentary practices relating to employment eligibility verification process.

c. **Department of State and Department of Labor are ancillary players in the immigration world.**

IV. IMMIGRATION LAW: IMPORTANT TERMS AND CONCEPTS

a. **Legal Terminology**

i. **Alien**: any person who is not a citizen or national of the United States

1. Use of non-offensive terms such as foreign national ("FN")

ii. **Adjustment of Status**: the process of changing from a lawful, nonimmigrant status to that of lawful permanent resident status within the United States.

iii. **Admission**: the lawful entry into the United States. A lawful entry requires that an immigration officer inspect and authorize the person's entrance into the country.

iv. **Admissible**: satisfies the criteria for admission to the United States set forth by Congress. Reasons for being <u>inadmissible</u> include:

1. Health condition that poses a threat to others, e.g. TB
2. Criminal reasons
3. National security reasons
4. Foreign policy reasons
5. Public charge
6. Present without admission or parole
7. Fraud or misrepresentation

8. False claim to U.S. citizenship
9. Smugglers
10. Failure to possess valid visa or entry document
11. Failure to possess passport that is valid for a minimum of six months
12. Previously removed from the United States, inadmissible for ten years
13. Unlawfully present for more than 180 days and then departed from the United States, inadmissible for three years
14. Unlawfully present for more than a year or ordered removed, inadmissible for ten years
15. Practicing polygamists
16. International child abductors

v. **Employment Authorization Document (EAD)**: commonly known as a work permit.

vi. **Immigrant**: a person traveling to the United States with the intention of residing permanently.

vii. **Lawfully Admitted for Permanent Residence ("LAPR")**: having lawful permanent resident status in the United States.

viii. **Naturalization**: the process of attaining citizenship status in a country. Excludes citizenship that a person obtains at birth.

ix. **Non-immigrant**: a person traveling to the United States for a temporary purpose, i.e. work, tourism, business, etc.

x. **Removal (deportation)**: immigration court proceeding to remove those aliens who are either inadmissible (barred) or subject to removal due conduct in the United States.

xi. **Visa**: document required to enter the U.S. and issued by a consular officer outside the United States.

b. **Other Important Immigration-Related Terminology**

i. **Coyote:** someone who assists immigrants in entering the United States illegally, most often for a fee.

ii. **DREAMER:** child who was brought to the Unites States while young and has grown up culturally American but does not have documents, i.e. the individuals who would potentially benefit from a DREAM Act.

iii. **Green card:** proof of LAPR status. Allows LAPR to work and travel freely outside of the United States. Must renew card every ten years.

iv. **Mara or pandilla:** Spanish words for gang.

v. **Notario:** non-lawyer who engages in the unauthorized practice of immigration law.

vi. **Permiso:** usually refers to the work permit.

vii. **Sin papeles:** Spanish word for undocumented.

V. SPECIAL ISSUES IN SERVING IMMIGRANT POPULATIONS

a. Spanish Naming Conventions

i. First Name + Father's Last Name + Mother's Last Name

1. EX: Anna Maria Torres Morales

ii. Individual may use one or both names

iii. Last name may or may not include hyphen

iv. Common errors in recording names:

1. Adding a hyphen into the last name (e.g. Torres-Morales) when none exists

2. Entering the first last name as a middle name instead of a last name

v. Recording errors make it difficult to locate records and track cases

b. Name Changes

i. Many immigrants are not aware that their name changes when they marry

1. Notify parties when issuing marriage certificates

2. Confirm with parties whether they want to change their names

3. Review marriage certificates carefully to make sure there are no obvious errors

VI. IMMIGRATION LAW: WHAT IS STATUS?

a. Overview: Hierarchy of Immigration Statuses

i. No status / undocumented

ii. Temporary pseudo-status

iii. Temporary Visas

iv. Humanitarian status

v. Lawfully Admitted Permanent Resident

vi. U.S. Citizen

b. No status / undocumented

i. Person entered without inspection and admission by an immigration officer

c. Temporary Pseudo-Status

i. **Deferred Action for Childhood Arrivals (DACA)**

1. Created by Executive Order on June 15, 2012;

2. Does not provide immigration status, per se, but the government will not seek to deport DACA recipients and DACA recipients are authorized to work for the duration of status.

3. Requirements:

a. Under the age of 31 as of June 15, 2012;

b. Came to the United States before turning 16;

c. Resided continuously in the United States from June 15, 2007, until the present;

d. Physically present in the United States on June 15, 2012, and not in lawful status on that date;

e. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a GED certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and

f. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

4. Grant of DACA is good for two years. DACA recipient may apply to renew for an additional two years if still eligible.

5. Proof of status:

a. DACA approval notice;

b. Work authorization document.

ii. **Temporary Protected Status (TPS) and Deferred Enforced Departure (DED)**

1. **TPS**

a. Granted to FNs who cannot return to their countries of origin because of armed conflict, environmental disasters, or other extraordinary and temporary conditions.

b. Attorney General designates countries and may renew designation as needed.

i. TPS countries currently include: El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria.

c. Eligibility requirements:

i. National of TPS country;

ii. File during open registration or re-registration periods;

iii. Continuous physical presence in the United States since last effective date;

iv. Continuous residence in the United States since date specified for the specific country;

v. No convictions for felony or two or more misdemeanors;

vi. Admissible to the United States.

d. Proof of status:

i. TPS approval notice;

ii. Work authorization card.

e. Despite the name, TPS is usually not temporary. Many individuals have been present in the United States on TPS for years.

f. TPS does not provide automatic pathway to a green card. The issue of whether an individual who received TPS may apply to adjust status from within the United States based on a visa petition filed by a relative is currently being litigated in the federal courts.

2. **DED**

a. Granted to Liberian individuals who previously had TPS status after TPS designation for that country expired;

b. Does not accord immigration status, per se, but government will not seek to deport individual with DED;

c. DED recipients may be authorized to work;

d. DED recipients have to seek special permission to travel outside of the United States.

d. **Temporary Visa**

i. Authorized stay varies in duration based on type of visa.

ii. If person remains in the United States after authorized date, person falls out of status and begins accruing unlawful presence in the United States.

1. More than 180 days of unlawful presence in the United States = inadmissible!

iii. Some common types of visas:

1. B1/B2 – visitor

2. Visa Waiver Program – allows citizens from certain countries to visit the United States for 90 days or less without a visa

3. F-1 – student

4. J – exchange visitor

5. H-1B – professional worker

6. H-2B – temporary seasonal worker

7. TN – NAFTA Professionals (visa available to Mexican and Canadian citizens in qualifying professions)

iv. Proof of status:

1. Visa;

2. I-94 card.

e. **Humanitarian Statuses**

i. **Refugees/Asylees**

1. Who is eligible?

a. Any person who is outside his or her country of origin and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of,

that country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Status acquired:

    a. A refugee was determined to have a well-founded fear of persecution while abroad, and then resettled in the United States with the help of a refugee resettlement agency; or

    b. An asylee applied for and was granted asylum in the United States by an Asylum Officer or Immigration Judge.

3. Benefits of Status:

    a. Authorized to work;

    b. Can travel freely, except for country where fear persecution;

    c. Qualify for certain public benefits;

    d. Can apply for immediate relatives to come to the United States;

    e. Can apply for lawful permanent residency after one year in refugee/asylee status.

4. Proof of Status:

    a. Refugee travel document;

    b. Asylum approval notice;

    c. I-94 or stamp in foreign passport; or

    d. Work authorization document.

ii. **U Visas**

1. What is the U Visa?

    a. Non-immigrant visa available to victims of qualifying crimes in the United States who have been helpful to law enforcement in the investigation or prosecution of the crime.

    b. Congress created the U visa out of recognition that undocumented immigrants were underreporting crimes to the police out of fear of deportation, which in turn made them more susceptible to victimization. The U visa is designed to promote greater cooperation between immigrant communities and law enforcement agencies.

2. Requirements:

    a. Victim of a qualifying crime;

    b. Victim suffered substantial physical or mental abuse;

    c. Victim possesses information concerning the criminal activity;

    d. Victim was helpful in the investigation or prosecution of the crime.

    e. The criminal activity violated the laws of the United States or occurred in the United States; and

    f. Victim is admissible to the United States.

        i. Note, generous waiver is available for grounds of inadmissibility.

3. Role of Law Enforcement Agencies in U Visa Process

    a. Victim cannot obtain a U visa unless a federal, state, or local government official certifies that the victim has been helpful in the investigation or prosecution of the crime by signing Form I-918B;

b. Certifying officials can be local police, prosecutors, or judges.

c. Victim can demonstrate helpfulness by reporting the crime, responding to police requests for additional information, and testifying against the perpetrator.

d. Policies for handling certification requests vary significantly by agency.

4. WLG recommendations:

a. Police departments should continue to sign even after investigation is closed, if request is made within a reasonable period.

b. If charges brought, prosecutor's office should sign.

c. Prosecutors should not sign until prosecution complete.

d. Prosecutors should not construe victim's approval of a plea deal as lack of helpfulness; there are many reasons why victim may be OK with a plea.

5. Benefits of the U Visa

a. If U visa approved, it is valid for four years and person can apply for work authorization during this period;

b. After three years, U visa holder can apply to adjust status to that of a permanent resident;

c. Person can apply for U visa from within the United States or abroad, for example, after being deported;

d. Person can include certain family members as derivatives on the application.

6. Proof of status:

a. U visa approval notice;

b. Work authorization document.

iii. **T Visas**

1. Similar to the U Visa but specifically for victims of human trafficking.

2. Requirements:

    a. Victim of human trafficking;

    b. Victim is present in United States or a territory as a result of trafficking;

    c. Victim complies with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking (or victim is under the age of 18, or is unable to cooperate due to physical or psychological trauma);

        i. Like U Visa, requires certification of helpfulness from law enforcement official (Form I-914B);

    d. Victim would suffer extreme hardship involving unusual and severe harm if you were removed from the United States;

    e. Admissible to the United States

        i. Broad waiver is available.

3. Same benefits as U Visa, including pathway to LAPR status after 3 years.

iv. **Self-Petition under the Violence Against Women's Act ("VAWA")**

1. Spouses, children, and parents of USCs and LAPRs who have been abused by their USC/LAPR relative may apply for immigration benefits on their own, rather than relying on the abusive relative to petition for them

2. Requirements

    a. Abuse by spouse

b. Married to USC or LAPR abuser or applying within two years of termination of marriage through death of spouse or divorce;

c. Marriage was in good faith, i.e. not solely for immigration benefits;

d. Co-residence with abusive spouse (no specific time requirement);

e. Suffered battery or extreme cruelty;

f. Good moral character.

3. Abuse by child or parent

    a. Requirements similar except no need to prove good faith marriage

4. If self-petition is approved, person may then be able to apply to adjust status

    a. Person has to prove admissible to the United States, but several grounds of inadmissibility have special waiver for battered immigrants

5. Person need not have reported abuse to police or obtained an OFP to be eligible for benefits under VAWA, however, these can serve as valuable evidence in establishing that the applicant suffered battery or extreme cruelty

v. **Special Immigration Juvenile Status (SIJS)**

1. What is SIJS?

    a. SIJS provides lawful permanent residency to children who are under the jurisdiction of the court and who cannot be reunified with one or both parents due to abuse, neglect, or abandonment.

    b. This literally includes any competent court in Minnesota, not just juvenile or family court.

2. Requirements to apply for SIJS[1]

    a. Child is under 21;

    b. Child is unmarried;

    c. Child has **qualifying state court order**.

3. **"**Qualifying state court order" must make the following findings:

    a. Court has jurisdiction under Minnesota law "to make judicial determinations about the custody and care of juveniles";

    b. The child must either be a dependent of the court or placed with a state agency, a private agency, or a private person

        i. The quote is "has been placed in the custody of an individual or entity appointed by a State or juvenile court."

    c. The child has been subjected to neglect, abuse, abandonment, or another similar ground based in Minnesota law for addressing whether reunification with one or both parents parent is viable at the time of the order. *See, e.g*., Minn. Stat. § 260C.007, subd. 6;

        i. USCIS will reject orders that do not contain findings tied to state law.

    d. Reunification with one or both of the juvenile's parents is not viable due to abuse, neglect, or abandonment[2];

        i. *Trafficking Victims Protection Reauthorization Act of 2008 (*TVPRA) removed the need for a juvenile court to deem a juvenile eligible for long-term foster care due to abuse, neglect or abandonment, and replaced it with a requirement that the juvenile court find that reunification with one or both parents is not viable due to abuse, neglect,

[1] *See* 8 U.S.C. § 1101(a)(27)(J); INA § 101(a)(27)(J)

[2] The William Wilberforce Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA) broadened SIJS availability by eliminating the long-term foster-care requirement and instead requiring only a finding that "reunification with *1 or both*" parents is not viable.

abandonment, or a similar basis found under state law.

ii. Helpful to include finding that reasonable efforts have been made to reunify, or that efforts would be futile or unreasonable under Minn. Stat. § 206.012, subd. 7

e. It is not in the child's best interest to return to country of nationality or last habitual residence and that it is in the child's best interest to remain in the United States

f. Note: the court may be asked to make the findings in a motion for special findings while it is addressing other issues about the child or the parent.

4. What is the effect of the court's order then?

a. Merely establishes a prima facie showing of eligibility for a minor to proceed to seek relief before USCIS

b. USCIS has the ultimate authority and will deny the child a benefit under the Immigration & Nationality Act:

- USCIS is charged with consenting to the state court's determination.

- The effect of USCIS' consent determination "is an acknowledgement that the request for SIJ classification is bona fide," meaning that neither the dependency order nor the best interest determination was "**sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect**," An approval of an SIJ petition itself shall be evidence of the Secretary's consent." *TVPRA - SIJ Provisions Memo* at 3.

5. Jurisdictional Issues and State Court Authority to Make SIJS Finding

a. Does state court have jurisdiction when FN child is 18?

i. Yes, for matters initiated under 260C.007, as long as the juvenile court assumed jurisdiction before

the FN child turned 18, state court can exercise jurisdiction until 19th birthday.[3]

1. See also Minn. Stat. § 524.5-204(a)

b. Why does this question matter?

i. Because the federal definition of a child is up the age of 21, not 18. The government will therefore grant residency to a child under this program if the child is under 21 at the time of its decision.

c. This is often a common oversight.

6. *Does state court have jurisdiction when FN child is in the United States and parents are abroad?*

a. Yes, MN courts have subject-matter jurisdiction over FN children in MN, regardless of immigration status.

i. Subdivision 4 of section 260C.101 states, "A parent, guardian, or custodian of a child who is subject to the jurisdiction of the court is also subject to the jurisdiction of the court in any matter in which that parent, guardian, or custodian has a right to notice under section 260C.151 or 260C.152, or the right to participate under section 260C.163."

ii. Minn. Stat. § 260C.101(4); 518B.101-317; *In re Welfare of Children of D-M-T-R*, 802 N.W.2d 759, 765 (Minn. Ct. App. 2011).

7. *State court authority to make SIJS findings not limited to child protection matters under 260C.141-.328.*

a. Includes juvenile delinquency proceedings, guardianship proceedings, or probate.

b. The Code of Federal Regulations definition is intentionally broad to encompass all forms of proceedings before a state court. It states "Juvenile court means a court located

[3] *See In re Welfare of Child of L-M-L-*, 730 N.W.2d 316, 320-21 (Minn. Ct. App. 2007) ("Jurisdiction does not depend on an *adjudication* that a child is in need of protection or services; rather, it attaches as soon as a sufficient allegation that a child is in need of protection or services is made") (internal citations omitted).

in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a).[4]

c. *See In Re Welfare of D-A-M-*, 2012 WL 6097225 (unpublished) ("Federal law deems courts competent to make SIJS findings in *any* proceedings in which state law grants them the authority to determine the care and custody of children.") (emphasis added).

8. County need not initiate proceedings.

a. Private individuals may bring CHIPS petitions under Minn. Stat. § 260C.141 and TPR petitions under Minn. Stat. § 260C.307.

i. Allows prospective guardians or adoptive parents, who are often relatives of unaccompanied minor, to initiate proceedings.

b. Private individual can also proceed in guardianship under Minnesota Statute Section 524.5-204(a)

9. Pending removal proceedings and state court jurisdiction

a. A pending removal proceedings will preempt a state court jurisdiction to make findings that child is in need of protection or services when the ***only*** allegations are that child would suffer in his or her country of origin because of the deportation itself, rather than the conduct of a parent before the initiation of the proceeding. *See In Re Welfare of C-M-K-*, 552 N.W.2d 768 (1996)

i. Extending jurisdiction in this instance is tantamount to state court exercising jurisdiction over an asylum claim.

b. *However,* the Minnesota Supreme Court reminded its judges that it needed to continue to apply state law and render decisions regardless of the existence of a removal

[4] It is important to note that the Code of Federal Regulations are not current regarding this issue. A review of section 204.11 of Title 8 reveals that the regulation still refers to the old version that existed before 2008. USCIS has delayed creating regulations interpreting this section of the Immigration & Nationality Act as amended.

proceeding in one party's life. *See In Re Civil Commitment of Richards*, 738 N.W.2d 397 (2007) (pending removal proceedings or removal order do not deprive state court of jurisdiction to civilly commit that person). Same logic applies to the operation of Minnesota law when dealing with children in need of services.

f. **Lawfully Admitted Permanent Resident ("LAPR")**

i. Status acquired three main ways:

1. Through grant of humanitarian status (see above):

a. Asylee or refugee after one year in the United States; or

b. U or T visa holder after three years in valid nonimmigrant status;

c. VAWA;

d. SIJS;

2. Employment-based immigration petition;

3. Family-based immigration petition.

ii. Proof of status:

1. Form I-551, Alien Registration Card (commonly known as "green card"); or

2. I-551 stamp in foreign passport.

iii. "Permanent Residency" is not really permanent:

1. Possible to abandon LAPR status if fail to maintain domicile in the United States;

2. LAPRs are subject to deportation if commit certain crimes or fraud;

3. If LAPRs travel, they may be deemed inadmissible based on crimes or fraud and will be placed into removal proceedings.

g. **United States Citizen ("USC")**

i. Status acquired:

1. By birth in the United States;

2. Child born to a USC parent or parent becomes USC before child turns 18;

3. Child adopted by USC;

4. Through process of **naturalization**

a. Lawful permanent resident may apply for citizenship after five years, or three years if obtained resident status through marriage to a U.S. citizen spouse and still living together in marital union.

ii. Proof of status:

1. U.S. birth certificate;

2. U.S. passport;

3. Certificate of Citizenship;

4. Certificate of Naturalization.

iii. U.S. citizens CANNOT be deported unless citizenship is first revoked by federal judge because the status was obtained by fraud.

VII. Petition-Based Immigration: The Mythical "Line" for a Green Card

a. **Overview of Process to Immigrate to the United States**

i. Employment-Based Immigration

1. Employer files visa petition on behalf of employee (Form I-140).

2. Classification of Employment-Based Petitions:

a. EB1:

i. Includes individuals with extraordinary abilities, outstanding professors and researchers, and multinational managers and executives;

ii. Comprise 28.6% of EB visas;

iii. Currently no wait time.

b. EB2:

i. Includes professionals holding advanced degrees or persons with exceptional abilities;

ii. Comprise 28.6% of EB visas;

iii. Currently no wait time, unless from China or India and then wait time is 4 years.

c. EB3:

i. Includes skilled workers, professionals, and some unskilled workers;

ii. Comprise 28.6% of EB visas;

iii. Current wait time is about 3 years, unless from China or India and then wait time is 6 and 11 years respectively.

d. EB4:

i. Includes a variety of “special immigrants”: religious workers, broadcasters, Iraqi/Afghan translators, Iraqis who have assisted the United States, international organization employees, physicians, armed forces members, Panama Canal Zone employees, and retired NATO-6 employees;

ii. Comprise 7.1% of EB visas;

iii. Currently no wait time.

e. EB5:

i. Includes investors of $1 million in a new commercial enterprise that creates or preserves at least 10 full-time U.S. jobs;

ii. Comprise 7.1% of EB visas;

iii. Currently no wait time.

ii. Family-Based Immigration

1. Step One: The Visa Petition (Form I-130)

a. USC or LAPR must file visa petition for family member. The visa petition does not grant status. It merely establishes that a qualifying relationship exists for immigration purposes.

2. Classification of Family-Based Petitions

a. Immediate Relative Petition

i. Category includes spouses, parents, and unmarried children under 21 of U.S. citizens;

ii. There is no cap on the number of immediate relatives that may be admitted to the United States each year so immediate relatives may immigrate immediately upon approval of the visa petition.

b. Preference Petitions

i. All other relatives fall into preference categories.

ii. Each preference category is subject to annual cap in visa numbers. This means that after visa petition is approved, the intending immigrant has to wait until his/her visa number becomes current.

iii. Types of Preference Petitions

1. F1 Petition

a. Category includes unmarried adult children of USCs;
b. Number of visas allotted per year = 23,400.

c. Current wait time is **7 years.**

2. F2A Petition

a. Category includes spouses and minor children of LAPRs;

b. Number of visas allotted per year = 88,000

c. Current wait time is **17 months.**

3. F2B Petition

a. Category includes unmarried adult children of LAPRs;

b. Number of visas allotted per year = 26,200

c. Current wait time is **7 years.**

4. F3 Petition

a. Category includes married children of USCs;

b. Number of visas allotted per year = 23,400;

c. Current wait time is **11 years.**

5. F4 Petition

a. Category includes brothers and sisters of USCs;

b. Number of visas allotted per year = 65,000;

c. Current wait time is **14 years.**

iv. Wait times are considerably longer for relatives immigrating from Mexico or the Philippines.

v. Note that LAPRs cannot petition for parents, married children, or siblings to immigrate to the United States.

c. Once visa petition is approved and the visa number is current, the relative may obtain a green card through one of two processes.

3. Consular Processing

a. For individuals living abroad, the consulate decides whether the individual is admissible and eligible to immigrate to the United States.

b. General process

i. USC or LAPR relative must file certain documents, including an Affidavit of Support, indicating that they maintain intending immigrant at 125% of the poverty guidelines;

ii. Intending immigrant must obtain medical exam abroad;

iii. Intending immigrant must attend visa interview at the U.S. Embassy or consulate in that country;

iv. If consulate determines that person is admissible, the person enters the United States as a LAPR and obtain green card shortly after entry;

v. If consulate determines that person is inadmissible, the person may be eligible to apply for a waiver to cure the specific ground of inadmissibility.

4. Adjustment of Status

a. If individual was admitted to the United States and is still present in the United States, he or she may be able to apply to adjust status to that of a LAPR from within the United States;

i. Immediate relative need not be in valid status at the time of the application;

b. General process:

i. File Form I-485 with U.S. Citizenship and Immigration Services, which includes medical exam

1. Application costs $1070

ii. Attend interview with USCIS

iii. If USCIS determines person is admissible, person is granted LAPR status and green card

c. If person is present in the United States without being admitted or paroled, then person is not eligible to adjust status from within the United States and will have to return to his or her home country to consular process

i. Person will likely need inadmissibility waivers in order to return to the United States

d. Narrow exception exists for people that had visa petitions filed for them before April 2001. They can adjust status from within the United States if they pay an additional $1000 penalty fee.

VIII. **Immigration Law in Civil Cases**

a. **Marriage and Divorce**

i. Validity

10. Marriage must be valid under the laws of the state or country where it occurred for it to be recognized for immigration purposes

11. Divorce must be valid under the laws of the jurisdiction granting the divorce for it to be recognized for immigration purposes

12. An FN is able to divorce in Minnesota even if the marriage occurred outside of the United States

    a. If FN is residing in Minnesota, he/she should initiate divorce proceedings here. Most countries have residency requirements for divorce so divorces obtained while both parties living abroad will not be valid for immigration purposes.

    b. Some FNs seek divorce through their consulates. **These are not valid for immigration purposes. Neither are proxy divorces.**

b. **Annulment**

   i. Sometimes individuals are so mad about the end of a relationship that one person seeks an annulment from the other person.

   ii. The basis for this in the immigration context is an effort to perfect a deportation by annulment.

      1. The reasoning is that if the court annuls the marriage then it never existed, which means that any immigration status contingent on the marriage also did not exist.

      2. In Minnesota, this is true if there was a flaw in the inception of the marriage, such as capacity.

      3. However, State v. Yoder, 130 N.W. 10, (Minn. 1925), established that from the time of the marriage ceremony to the date of the judgment, the marriage existed.

      4. Northrup v. St. Paul Fire Dept Relief Ass'n, 259 N.W. 185 (Minn. 1935) clarified that an annulment restores the couple to their original position, but does not alter the rights of the parties in relation to others, even if the right depends on the marriage existing at one time.

c. **Child Custody and Parenting Plans**

   i. Immigration status is irrelevant to one's ability to be a good parent and is not included in the best interest factors under Minn. Stat. §§ 518.17 or 257C.04, subd. 1;

ii. Immigration status of parent is not an "extraordinary circumstance" under Minn. Stat. § 257C.03, subd. 7(a) in the context of third party petition for custody.

1. *In Re Custody of A.L.R.*, 830 N.W.2d 163, 172-73 (2013) (finding that the district court erred in determining that grandparents were interested third parties based on extraordinary circumstances because "[m]other's undocumented is not unusual" and "[t]here is nothing in the record to indicate that mother's parenting ability or the child's well-being is affected by her immigration status").

iii. *Please hold a Claimant to Burden of Proof:*

c. Claims that undocumented parent might flee with children should be supported with real evidence;

i. A common fear for FNs is that the other parent will be allowed to take the child out of the country just because he/she has sole custody. Judges can help alleviate this fear by pointing out that the law does not allow change of the child's residence outside of MN if there is court ordered parenting time.

ii. Order the enrollment of the child in the State Department has the Children's Passport Issuance Alert Program.

iv. The fact that parent is undocumented does not necessarily mean he or she will be deported, as many undocumented people reside in the United States for years and are never placed in removal proceedings.

1. The fact that parent is in removal proceedings does not necessarily mean he/she will be deported;

2. Removal proceedings can take years to resolve and FN may have defenses to removal;

a. Having a U.S. citizen child or spouse is not by itself a defense to removal, though can be important factor as certain defenses require proof of hardship to qualifying relatives;

3. Immigration and Customs Enforcement ("ICE") has increased use of prosecutorial discretion in removal proceedings for low-priority FNs following issuance of an executive order in 2011

d. **Child support**

i. A person's immigration status, or lack thereof, does not prohibit a court from entering an order of child support.

ii. Zaldivar v. Rodriguez, 819 N.W.2d 187 (Minn. Ct. App. 2012)

13. Trial court was not prohibited, by either federal **immigration** law or state **child**-**support** statute, from holding unauthorized alien, who was not permitted to reside or work within the United States pursuant to federal **immigration** law, in contempt for failure to pay **child support**; federal **immigration** law did not prohibit unauthorized aliens from being held in contempt of court for failure to pay **child support**, either generally or specifically, and state **child**-**support** statute did not distinguish between authorized and unauthorized aliens and did not exclude unauthorized aliens from either paying or receiving **child support**.

e. **Affidavits of Support in Divorce and Child Custody Cases**

i. What is an Affidavit of Support?

1. Origin – 1996. Prevent incoming immigrants from needing welfare upon arrival.

2. Used to show U.S. Citizenship and Immigration Services that sponsor has adequate means to support the immigrant and that the immigrant will not become a "public charge"

3. The sponsor must show income sufficient to support the immigrant at no less than 125 percent of the Federal poverty line

4. The sponsor agrees to reimburse the government (Federal, State, local) if immigrant uses any means-tested benefits

5. Joint sponsors accept joint and several liability Relevant law: INA § 213A; 8 C.F.R. § 213a

6. Form I-864: it is a contract between the U.S. government and a U.S. citizen or LPR who is sponsoring an immigrating family member

ii. Categories except from filing I-864:

1. Any intending immigrant who can be credited with 40 qualifying quarters of work in the United States;

2. Any intending immigrant who will, upon admission, acquire citizenship; and

3. VAWA and SIJS applicants and other individuals who qualify for self-petitions.

iii. Why is the Affidavit of Support important?

1. Because section 213A(e)(a)(1) provides, "An action to enforce an affidavit of support executed under subsection (a) may be brought against the sponsor in any appropriate court- "(1) **by a sponsored alien, with respect to financial support.**";

iv. Termination of Enforceability

1. Only the following circumstances terminate contract:

a. Immigrant naturalizes and becomes a U.S. citizen;

b. Immigrant has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act (42 U.S.C. § 401 et seq);

c. Immigrant returns home and abandons residency;

d. Immigrant in removal proceedings obtains a new grant of adjustment of status as relief from removal (old sponsors no longer on the hook);

e. Immigrant dies;

f. Sponsor dies.

v. Divorce does not terminate enforceability of affidavit of support

1. Sponsored immigrant does not need to request that the sponsor or joint sponsor comply with the support obligation before bringing an action to compel compliance, INA § 213a.4(a)(2)

a. Actions can be brought in either state or federal court;

i. Maintenance standards do not apply.

ii. Some courts have awarded support payments to former spouse based on affidavit of support. E.g. Shumye v. Felleke, 555 F.Supp.2d 1020 (N.D. Cal. 2008).

vi. Pre-marital agreement does not void the agreement. Erler v. Erler.

vii. An award of maintenance could negate an affidavit of support claim

1. No duty to mitigate by seeking employment – Liu v. Mund, 686 F.3d 418 (7th Cir. 2012)

2. Stump v. Stump – awarding less than 125% of the federal poverty guidelines when the plaintiff received maintenance and other financial contributions

3. See also Yaguil v. Lee, 2014 WL 1400959, (E.D. Cal. 2014)

viii. *Why this topic is important TODAY?*

1. The trend is for this topic to appear in the context of either a support or dissolution proceeding rather than waiting to file a separate action later.

2. *Contrast* with *In re Marriage of Khan*, -- P.3d--, (Wa. Ct. App. Aug. 5, 2014) (does not mandate consideration of affidavit of support when assessing whether to award maintenance, **but left open the question whether doing so is an abuse of discretion**) with

3. **Love v. Love, 33 A.3d 1268 (Pa. Sup. Ct. 2011) (trial court erred by requiring a separate action to enforce the affidavit of support when a petitioner raised it when seeking spousal and child support).**

4. Open questions for a future discussion:

a. How does affidavit of support factor into child support?

b. Does payment of support count as a reduction of income?

f. **Adoption and Hague Convention Issues**

i. Generally, children are eligible to derive status through U.S. citizen and LAPR parents

1. Well-meaning relatives or families seek to adopt foreign national children when a parent is facing incarceration or deportation

a. NOTE – DACA has tempered demand for adoption because the status of the child is not as uncertain

b. The child coming to visit and ultimately stay with his or her aunt and uncle pattern is nonetheless ongoing.

ii. An adoption valid for immigration purposes if:

1. It is valid under the laws of the place issuing the order;

2. It terminates child's relationship with natural parents;

3. It creates a legal, permanent parent-child relationship with adopting parents.

4. Unique immigration requirements:

a. Adoption where adopting parent has two years physical custody and residence before seeking the immigration benefit;

b. Child is adopted before the age of 16;

c. Child has been in the legal custody and resided with adoptive parents for at least two years before turning 21;

i. Residency can occur before or after adoption

iii. **Hague Convention Countries**[5]

1. The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption (Hague Adoption Convention) is an international agreement to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child.

2. The Convention entered into force for the United States in April 2008. The Hague Adoption Convention applies to adoptions between the United States and the other countries that have joined it.

3. Hague Convention applies to adoptions occurring after April 1, 2008 and involving children from signatory countries.

[5] *See* 8 U.S.C. § 1101(b)(1)(G); INA § 101(b)(1)(G); 8 C.F.R. 204.301-313.

4. Child who is citizen of Hague Convention country should generally be deemed a habitual resident of that country, even if present in the United States based on the adoption. 8 C.F.R. § 204.303(b).

    a. The implementing regulations discouraged circumvention of Convention;

    b. Adoption must follow Hague procedures, including that it take place abroad, in order for child to obtain permanent residence in the United States.

    c. USCIS requires prospective adoptive parents to obtain written determination regarding child's habitual residence from the Central Authority in the child's country of origin

    d. "Central Authority" means the entity designated as such under the Convention

5. What problem does this pose for adopting parents in Minnesota?

    a. WHAT ARE ADOPTING PARENTS TO DO WHEN THERE IS NO CENTRAL AUTHORITY ABROAD?

    b. IF THERE IS A CENTRAL AUTHORITY, BUT THE FOREIGN GOVERNMENT DOES NOT RECOGNIZE PRIVATE OR FAMILY ADOPTIONS AS UNDER THE CENTRAL AUTHORITIES JURISDICTION

    c. A LOT OF ADOPTIONS HAVE BEEN PUT IN JEOPARDY

6. In December 2013, U.S. Citizenship and Immigration Services issued an interim policy memorandum clarifying criteria when the Hague Convention applies to the adoption of a child who is from a Hague country but currently residing in the United States. *See* USCIS Interim Policy Memorandum, *Criteria for Determining Habitual Residence in the United States for Children from Hague Convention Countries* (PM 602-0095) (Dec. 23, 2013), *available at* http://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Habitual-Residence-PM-Interim.pdf. If the Central Authority in the child's country of origin deems the child a habitual resident of that country, the Convention applies. However, if the Central Authority no longer considers the child a habitual resident, the Convention no longer applies.

7. **<u>State court judges must make special findings in adoptions involving children from Hague Convention countries</u>**

    a. If Central Authority issues statement on child's habitual residence, the adoption decree must expressly state:

        i. The Central Authority in the child's country of origin advised the court in writing that the Central Authority was aware of the child's presence in the United States;

        ii. The Central Authority is aware of the proposed adoption;

        iii. The Central Authority does not consider the child a habitual resident.

    b. If Central Authority **did not issue** a statement on habitual residence or has a policy of declining to do so, the adoption decree must expressly state the following:

        i. The court's findings establishing course of events that led to child's availability for adoption;

        ii. The court's findings related to child's purpose for entering the United States including, if applicable, that the child did not enter for adoption purposes;

        iii. The child has resided in the United States for a substantial amount of time, and has established compelling ties to the United States;

        iv. The Central Authority in the child's country of origin was notified of the proceedings in a satisfactory manner; and

        v. The Central Authority did not object to the proceedings with the court within 120 days after receiving notice.

8. **New procedure means adoptions from Hague countries will take longer.** To comply with the new policy, parents must request a determination on the child's habitual residence, prove that the request was received, and give the Central Authority 120 days to respond.

Immigration & Crimes

I. Marker #1: Will the plea actually result in a conviction? Impact of Judgment and Sentencing on Immigration Status

a. **Definition of Conviction**:

i. Minnesota State Law, *see* Minn. Stat. § 609.02, subd. 5

1. Conviction means:

a. Plea of guilty; or

b. Verdict of guilty by judge or jury.

ii. Congress expanded the definition of conviction in 1996 to include much more than the state definition.

iii. Federal Immigration Law, *see* 8 U.S.C. § 1101(a)(48)(A); INA § 101(a)(48)(A)

1. Conviction means:

a. Formal judgment entered by a court; or

b. If adjudication of guilty has been withheld where:

i. A judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and

ii. The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

iv. **KEY: admission of sufficient facts or finding of guilt + punishment = conviction**

1. **IT IS NOT THE END OF THE CASE THAT MATTERS. RATHER, IT IS WHAT OCCURS AT THE TIME ANY AGREEMENT BECOMES FINAL.**

2. **PUNISHMENT INCLUDES JUST A FINE OR PROBATION**

b. **Effect of Stay of Imposition under Minn. Stat. § 609.135 is a convictioN**

i. Stay of imposition or other deferred adjudications still constitute convictions for immigration purposes if there was a plea

c. **Effect of Diversion / De Novo Program**

i. If no allocution or other finding of guilt, then not a conviction for immigration purposes

ii. Any diversion agreement that requires a guilty plea or similar admission of guilt will be considered a conviction under immigration law.

d. Diversion, continuance for dismissal, or continuance without prosecution are acceptable as long as there is no guilty plea or admission of facts.

e. **Adjudications in juvenile proceedings are not considered "convictions" for immigration purposes BUT:**

1. Juvenile delinquency findings are considered as negative discretionary factors in determining whether to grant relief from removal or other immigration benefits; and

2. Could also be basis for inadmissibility finding since inadmissibility grounds may apply even in the absence of a conviction

f. **Specialty Courts**

i. Minn. Stat. § 152.18, subd. 1 allows courts to defer adjudication for first time drug offenders <u>without</u> allocution or other adjudication of guilt. If no guilty plea or adjudication of guilt, then FN does not have a conviction for immigration purposes.

ii. An admission of guilt as a condition of participation in the court program is a removable conviction regardless of what happens after the person completes the program.

g. **Effect of Expungement of Criminal Records**

i. Expungement does not eliminate conviction for immigration purposes

1. The destruction of records and transcripts makes it very difficult to explain to immigration what happened in a particular case, but letters from the court confirming "No Record" is helpful when there's nothing else. Immigration court and service will often require detailed records and question arrests and charges that do not have subsequent police reports or court records.

2. Judges and court staff should give specific advisories to expungement applicants that an expungement will not erase the criminal conviction under federal immigration law, ideally at the time that they apply but definitely at the expungement hearing. Advise applicants to consult with an immigration attorney about whether expungement is going to harm their immigration process.

A. Marker II – A felony is almost always an aggravated felony for immigration purposes

a. **Introduction**

i. **The Immigration & Nationality Act defines the category of aggravated felony type crimes rather loosely to try to match up with the 50 states and federal laws that Congress wanted to target**

ii. **Generally, aggravated felonies ensure a person's removal from the United States, except in rare instances in which humanitarian relief remains available.**

b. **What is an Aggravated Felony?**

i. Definition

1. Statutorily defined at 8 U.S.C. § 1101(a)(43); INA § 101(a)(43) (**bold** indicates most common types):

a. Murder, rape, or sexual abuse of a minor;

b. **Illicit trafficking in a controlled substance** (as defined in 21 U.S.C. § 802), including a drug trafficking crime (as defined in 18 U.S.C. § 924(c));

c. **Illicit trafficking in firearms or destructive devices** (as defined in 18 U.S.C. § 921), or in explosive materials (as defined in 18 U.S.C. § 841(c));

d. An offense described in 18 U.S.C. § 1956 or 1957 (relating to **money laundering**) if the amount of the funds exceeded $10,000;

e. **A crime of violence** (as defined in 18 U.S.C. § 16) **for which the term of imprisonment is at least one year**;

f. **A theft or burglary offense for which the term of imprisonment is at least one year** (includes receipt of stolen property);

g. An offense described in 18 U.S.C. §§ 2251, 2251A, 2252 (relating to child pornography);

h. imposed;

i. An offense that relates to the **owning, controlling, managing, or supervising of a prostitution business** or is described in 18 U.S.C. §§ 2421-2423 if committed for a commercial advantage, or an offense described in 18 U.S.C. §§ 1588-1591 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

j. **An offense involving fraud or deceit in which the loss to the victim is greater than $10,000**, or an offense described in 26 U.S.C. § 7201 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

k. An offense in violation of 18 U.S.C. § 1543 (falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument), or **which is described in 1546(a) (relating to document fraud), for which the term of imprisonment is at least 12 month**s, exception in the case of a first offense for which the FN has shown that the FN committed the offense for the purpose of assisting, abetting, or aiding only that person's spouse, child, or parent;

l. An offense relating to **obstruction of justice, perjury or subornation of perjury, or bribery of a witness**, for which the term of imprisonment is at least one year;

m. An attempt or conspiracy to commit any of the offenses described above.

II. Marker #3 - 365 = 666

a. Congress and Minnesota do not agree on the definition of felony in terms of the length of a sentence.

b. In Minnesota, 365 days is a gross misdemeanor.

c. Under the INA, this qualifies most of the previously identified crimes as aggravated felonies.

d. Thus, a sentence of 365, whether executed or not, equals a much greater problem for the immigrant defendant.

e. **Here is a perfect example how this number arises:**

   i. **Original charge – assault IV**

   ii. **Offer – obstruction of legal process with a 365 day sentence**

      1. **This sentence possible invokes the "crime of violence" aggravated felony definition**

f. **Example Offenses:**

   i. Assault

   ii. Robbery

   iii. Terroristic Threats

   iv. Burglary

   v. Theft

   vi. Receiving Stolen Property

   vii. Gambling Offenses

   viii. Obstruction of Legal Process

   ix. Violation of an Order for Protection

III. Marker #4: Like your mother said - beware of sex, drugs, guns, and your family

a. **Sex – prostitution**

   i. It is an open question in this circuit whether a single instance of solicitation of hiring a prostitute actually triggers a reason to remove someone from the United States or bar him or her from obtaining an immigration benefit under federal law.

b. **Drugs** – a single offense of possession of anything other than marijuana if the possession of marijuana is for personal use and was for 30 grams or less

a. Defendants needs to make sure to specify the amount he or she is allocating to possessing.

b. THIS IS IMPORTANT IN MINNESOTA BECAUSE THE STATE DEFINITION OF A SMALL AMOUNT IS LARGER THAN THE FEDERAL DEFINITION.

c. If the record is silent, ICE will look to the police report and the statute for the amount.

d. Drug paraphernalia triggers the immigration violation.

c. **Firearms:**

i. Violation of any law of purchasing, selling, offering for sale, exchanging, use, owning, possessing, or carrying a firearm or destructive device (as defined in 18 U.S.C. § 921(a)), or attempt or conspiracy to do the same

ii. There are two firearm concerns in the INA

1. There is an aggravated felony for possessing a weapon at the felony level a weapon classified in federal law as a dangerous weapon

2. There is also a separate removal charge for possession of any firearm described in 18 USC 921(a)(3).

iii. Virtually every offense with a firearm as an element is a deportable firearms

iv. Ammunition is not included in the definition of "firearm" under 18 USC § 921(a)(3), which is the definition that applies to the firearms deportation ground at 8 USC § 1227(a)(2)(C).

v. Antique firearms are not included in the applicable definition of firearms at 18 USC § 921(a)(3). Section 921(a)(16) provides that antiques are firearms made in 1898 or before, plus certain replicas.

vi. NOTE – DNR TICKETS CAN CREATE POTENTIAL IMMIGRATION CONSEQUENCES.

d. **Family:**

i. Crimes of domestic violence, where crime of domestic violence means any crime of violence (**as defined at 18 U.S.C. § 16**) against a domestic relation;

1. It is an open question whether a plea under 609.2242 subd. 2(1) is qualifies as a removable offense

ii. Crimes of stalking;

iii. Crimes of child abuse, neglect, or abandonment;

1. In Minnesota, this is maltreatment of a child or vulnerable adult

iv. Violation of the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the issuing party

1. A clear record here is important. If the violation is for a tangential issue, such as a mandatory class, then a conviction is arguably not a removable offense.

IV. Marker #5 – I know evil when I see it test

a. **CIMT – grounds for removal**

i. A single crime involving moral turpitude ("CIMT") committed with five years for which a sentence of one year or longer ***may be imposed***;

ii. Two or more CIMTs not arising out of a single scheme of criminal misconduct, regardless of sentence;

b. **CIMT – bar to admission**

1. A single crime involving moral turpitude (CIMT), includes convictions or admissions

a. Exception: a single offense for which the maximum penalty possible was less than one year and actual sentence imposed was six months or less ("petty offense" exception)

ii. BRING UP TRAVEL ISSUE – BEWARE OF TELLING DEFENDANT'S IT IS OKAY TO TRAVEL. THE COURT MAY ANSWER FROM THE SENTENCE PERSPECTIVE, WHEREAS THE DEFENDANT IS ASKING IN THE ENTIRETY, INCLUDING IMMIGRATION.

1. BRING UP VIETNAMESE REASON TO BELIEVE EXAMPLE.

c. **What is a crime involving moral turpitude?**

i. There is NO statutory definition.

ii. The Attorney General, in *Matter of Silva-Trevino*, 24 I&N Dec. 678 (A.G. 2008), tried to define what is a qualifying offense to settle the conflicting definitions that were emerging between the circuit.

1. According the AG, "the offense must require morally reprehensible conduct **plus some degree** of scienter whether specific intent, deliberateness, willfulness, or recklessness**."**

V. Sentencing Issues

a. Judges should take alienage and national origin into account during sentencing despite *State v. Mendoza*, 638 N.W.2d 480 (Minn. Ct. App. 2002).

i. In *Mendoza*, case was remanded because the judge considered the defendants' likely deportation in the decision to not allow the defendants to be sentenced to probation instead of jail time. The judge chose this punishment because the judge knew the defendants would be deported if given probation, defeating the point of probation.

ii. Minnesota Supreme Court has yet to address the issue squarely.

iii. Other states have begun to reject Minnesota's approach. *See State of Alaska v. Silvera,* 309 P.3d 1277 (Alaska Ct. App. 2013).

iv. The Minnesota Supreme Court has noted that the consideration of immigration consequences in gross misdemeanor cases is an open question in Minnesota.

v. It stated in **footnote 7 to *State v. Kebaso***, 713 N.W.2d 317 (Minn. 2006, "While we agree with the court of appeals' decision in this case, we do not address its broad assertion that "possible deportation because of immigration status is not a proper consideration in criminal sentencing." *Kebaso II,* 2005 WL 1153727, at *3. We acknowledge the concern articulated by a number of federal courts that permitting consideration of immigration consequences in sentencing allows courts to use their sentencing power to circumvent immigration laws, thereby encroaching on the prerogative of Congress to set the immigration consequences of criminal acts. *See, e.g., United States v. Maung,* 320 F.3d 1305, 1309 (11th Cir.2003); *United States v. Aleskerova,* 300 F.3d 286, 299-301 (2d Cir.2002). But because *Kebaso* did not seek review of the district court's initial sentencing decision or its refusal to reduce his sentence to 364 days, the question of whether immigration consequences may be considered in gross misdemeanor sentencing is not before us in this case. While we note that judges have broad discretion in sentencing on

misdemeanors and gross misdemeanors and should consider all "facts bearing on the exercise of sentencing discretion," *State v. Lambert,* 392 N.W.2d 242, 243-44 (Minn.1986), *we leave resolution of this broader question for another day.*"

VI. Sentence Modification

a. State courts have authority to modify a sentence under Minn. R. Crim. Pro. 27.03, subd. 9

    i. Currently, there is a case pending before the court of appeals on whether rule permits sentence modification when probation has already been completed.

b. Criminal sentence modifications are accepted by immigration even if done solely for an immigration purpose.[6]

    i. The immigration judge or adjudicator will not look at the reasons for the modification or reduction. *See Matter of Song*, 23 I. & N. Dec. 173 (BIA 2001).

c. In many cases, immigration consequences are mitigated by sentencing to 364 instead of 365. The following crimes become aggravated felonies when sentence is 365 or more, even if it is a gross misdemeanor:

    i. Crimes of violence

    ii. Theft and burglary offenses

    iii. Offenses related to forgery

    iv. Obstruction of justice

d. Having an aggravated felony can result in: removal, permanent bar to re-entry, expedited removal proceedings without a hearing, mandatory detention during proceedings, and enhanced penalties for illegal re-entries. Immigration Judges have no discretion to grant relief in the case of FN with an aggravated felony conviction.

[6] *See Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

U.S. Citizenship and Immigration Services

Special Immigrant Juvenile Status: Information for Juvenile Courts

What is Special Immigrant Juvenile Status?

Some children present in the United States without legal immigration status may be in need of humanitarian protection because they have been abused, abandoned, or neglected by a parent. Special Immigrant Juvenile (SIJ) status is an immigration classification that may allow for these vulnerable children to immediately apply for lawful permanent resident status ("LPR" status or a "Green Card").

Who is Eligible?

A child must be unmarried, under 21 years of age at the time of filing with U.S. Citizenship and Immigration Services (USCIS), physically present in the United States, and have a qualifying juvenile court order. SIJ-eligible children may come from a variety of circumstances, including, but not limited to, children in federal custody in the U.S. without parents or legal guardians, children in a state's child welfare system (for example, foster care), and children in the court-ordered custody of a state agency or individual. This can include adoption or guardianship.

What is the Role of the Juvenile Court?

Juvenile courts issue orders that help determine a child's eligibility for SIJ status. A child cannot apply to USCIS for SIJ status without an order from a juvenile court. However, juvenile judges should note that providing an order does not grant SIJ status or a "Green Card" - only USCIS can grant or deny these benefits. The role of the court is to make factual findings based on state law about the abuse, neglect, or abandonment; family reunification; and best interests of the child.

Which Courts May Issue the Order?

A juvenile court is a court in the United States that has jurisdiction under state law to make judicial determinations about the custody and care of children. Examples include: juvenile, family, orphans, dependency, guardianship, probate and delinquency courts.

What is the Role of USCIS?

USCIS determines eligibility for SIJ status by adjudicating the **Form I-360**, Petition for Amerasian, Widow(er), or Special Immigrant, which includes review of supporting documentation and the juvenile court order. USCIS may also determine a special immigrant juvenile's eligibility for lawful permanent resident status by adjudicating **Form I-485**, Application to Register Permanent Residence or Adjust Status.

Helpful Tips for Juvenile Courts

- **Be familiar with current immigration law.** The Immigration and Nationality Act (INA) section 101(a)(27)(J) establishes the definition of a Special Immigrant Juvenile. This definition can change by acts of Congress. For example, the Trafficking Victims Protection Reauthorization Act of 2008, **Pub. L. 110-457** amended the SIJ **definition**. These statutory changes supersede portions of the Code of Federal Regulations relating to SIJ status **(8 CFR 204.11)**. Note: All findings must be based on state law.

- **Ensure HHS consent has been obtained if it is necessary.** If a child currently in the custody of the U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) seeks a juvenile court order that also alters his or her custody status or placement, HHS must specifically consent to the court's jurisdiction. If the order simply restates the child's current ORR placement, HHS consent is not required. See ORR's website at **http://www.acf.hhs.gov/programs/orr/programs/ucs**.

- **Be timely.** A child must obtain a juvenile court order and apply to USCIS for SIJ status before the child ages out of the juvenile court's jurisdiction (usually before 18 years of age), and before he or she turns 21 (even in states where juvenile court jurisdiction extends beyond age 21). In some cases, children may need to obtain SIJ status prior to turning 18 years of age to access certain benefits (such as federally-funded foster care).

- **Ensure the court order makes all required findings.** The order must make the following findings:
  - o Declares the child dependent on the court, or legally commits or places the child under the custody of either a state agency or department or an individual or entity appointed by a juvenile court.
  - o Reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law. Note: The abuse may have occurred in the United States or prior to the child's arrival in the United States.
  - o It would not be in the child's best interest to be returned to his or her country of origin.

- **Provide a detailed court order.** The Secretary of Homeland Security, through USCIS, must consent to the grant of SIJ status. This means that for a child to be eligible for SIJ status, USCIS must determine that the juvenile court order was sought primarily to obtain relief from abuse, neglect or abandonment, rather than primarily to obtain an immigration benefit. Template orders are usually not sufficient to establish this. The court order should include the factual basis for the findings on parental reunification, dependency or custody, and best interests. Alternatively, the child or the child's attorney may submit separate findings of fact, records from the judicial proceedings, or affidavits summarizing the evidence presented to the court. The court order need not be overly detailed, and need not recount all of the circumstances of the abuse, abandonment or neglect, but must show the factual basis for the court's findings.

U.S. Citizenship and Immigration Services

Special Immigrant Juvenile Status: Information for Child Welfare Workers

What is Special Immigrant Juvenile Status?

Some children present in the United States without legal immigration status may be in need of humanitarian protection because they have been abused, abandoned, or neglected by a parent. Special Immigrant Juvenile (SIJ) status is an immigration classification that may allow for these vulnerable children to apply immediately for lawful permanent resident status ("LPR" status or a "Green Card").

Who is Eligible?

A child must be unmarried, under 21 years of age at the time of filing with U.S. Citizenship and Immigration Services (USCIS), physically present in the United States, and have a qualifying juvenile court order. The order must include the three following findings:

- The child is dependent on the court, or legally committed to or placed under the custody of either a state agency or department, or an individual or entity appointed by a juvenile court.
- Reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law.
- It would not be in the child's best interest to be returned to his or her country of origin.

What is the Role of the Child Welfare Worker?

The child welfare worker identifies children who may be eligible and ensures that the child receives assistance with his or her immigration case. The child welfare worker may also provide psycho-social assessments and reports to the juvenile court. These reports assist the juvenile court in making the factual findings for the court order which USCIS requires for SIJ eligibility. In addition, the child welfare worker may collect necessary documents for the child's SIJ petition to USCIS, such as proof of the child's age.

What is the Process to Obtain SIJ Classification and Lawful Permanent Resident Status?

1. Obtain a juvenile court order that contains the required findings.
2. Apply to USCIS by filing USCIS forms and paying any corresponding fees or requesting fee waivers:
    - o **Form I-360**, Petition for Amerasian, Widow(er), or Special Immigrant, and supporting documents. Note that approval of Form I-360 confers SIJ status, but does not confer permanent residency.
    - o **Form I-485**, Application to Register Permanent Residence or Adjust Status, and supporting documents. If possible, filing this form at the same time as Form I-360 is recommended. This form must be filed and approved in order to obtain a "Green Card," which is a key step towards U.S. citizenship.
    - o Related USCIS forms if necessary, including, but not limited to: **Form I-765**, Application for Employment Authorization; **Form I-601**, Application for Waiver of Grounds of Inadmissibility; and **Form I-912**, Request for Fee Waiver.
3. Attend USCIS appointments such as:
    - o Biometric services appointment (fingerprinting and photographs) for children ages 14 and older
    - o Interview(s)

Helpful Tips for Child Welfare Workers

- **Laws and Regulations:** The Immigration and Nationality Act (INA) **INA 101(a)(27)(J)** establishes the definition of a Special Immigrant Juvenile. This definition can change by acts of Congress. For example, the Trafficking Victims Protection Reauthorization Act of 2008, **Pub. L. 110-457** amended the SIJ **definition**. These statutory changes supersede portions of the federal regulations relating to SIJ status.

- **Factual Basis for Juvenile Court Order:** In order for a child to be eligible for SIJ status, USCIS must determine that the juvenile court order was sought primarily to obtain relief from abuse, neglect or abandonment, rather than primarily to obtain an immigration benefit. Template orders are usually not sufficient to establish this. The court order should include the factual basis for the findings on parental reunification, dependency or custody, and best interests. Alternatively, the child may submit separate findings of fact, records from the judicial proceedings, or affidavits summarizing the evidence presented to the court.

- **Age and Juvenile Court Order Issues:** A child must obtain a juvenile court order and apply to USCIS for SIJ status before the child ages-out of the juvenile court's jurisdiction (usually before 18 years of age), and before he or she turns 21 (even in states where juvenile court jurisdiction extends beyond age 21).

- **Legal Services:** Many state child welfare agencies have legal departments and established procedures for handling SIJ cases. The child welfare worker should refer the child to an attorney with immigration law experience, if one is not available through its own legal department. See the United States Department of Justice Free Legal Service Providers list: **http://www.justice.gov/eoir/probono/states.htm**.

- **USCIS Resources:** Visit the USCIS website: **www.uscis.gov** or call the toll-free hotline: (800) 375-5283 TTY: (800) 767-1833.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy and Domestic Operations
Washington, DC 20529-2140

U.S. Citizenship and Immigration Services

HQOPS 70/8.5

Memorandum

TO: Field Leadership

FROM: Donald Neufeld /s/
Acting Associate Director
Domestic Operations

Pearl Chang /s/
Acting Chief
Office of Policy & Strategy

DATE: March 24, 2009

SUBJECT: Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions

1. Purpose

This memorandum will inform immigration service officers working Special Immigrant Juvenile (SIJ) petitions about new legislation affecting adjudication of petitions filed for SIJ status.

2. Background

On December 23, 2008, the President signed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457, 122 Stat. 5044 (2008). Section 235(d) of the TVPRA 2008 amends the eligibility requirements for SIJ status at section 101(a)(27)(J) of the Immigration and Nationality Act (INA), and accompanying adjustment of status eligibility requirements at section 245(h) of the INA. Most SIJ provisions of the TVPRA 2008 take effect March 23, 2009, although some provisions took effect on December 23, 2008, the date of enactment of the TVPRA 2008.

3. Field Guidance

Eligibility for Special Immigrant Juvenile Status

The TVPRA 2008 amended the definition of a "Special Immigrant Juvenile" at section 101(a)(27)(J) of the INA in two ways. First, it expanded the group of aliens eligible for SIJ status. An eligible SIJ alien now includes an alien:

- who has been declared dependent on a juvenile court;
- whom a juvenile court has legally committed to, or placed under the custody of, an agency or department of a State; or
- who has been placed under the custody of *an individual or entity appointed by a State or juvenile court.*

Accordingly, petitions that include juvenile court orders legally committing a juvenile to or placing a juvenile under the custody of an individual or entity appointed by a juvenile court are now eligible. For example, a petition filed by an alien on whose behalf a juvenile court appointed a guardian now may be eligible. In addition, section 235(d)(5) of the TVPRA 2008 specifies that, if a state or an individual appointed by the state is acting *in loco parentis*, such a state or individual is not considered a legal guardian for purposes of SIJ eligibility.

The second modification made by the TVPRA 2008 to the definition of special immigrant juvenile concerns the findings a juvenile court must make in order for a juvenile court order to serve as the basis for a grant of SIJ status. Previously, the juvenile court needed to deem a juvenile eligible for long term foster care due to abuse, neglect or abandonment. Under the TVPRA 2008 modifications, the juvenile court must find that the juvenile's *reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law*. In short, the TVPRA 2008 removed the need for a juvenile court to deem a juvenile eligible for long-term foster care and replaced it with a requirement that the juvenile court find reunification with one or both parents not viable. If a juvenile court order includes a finding that reunification with one or both parents is not viable due to *a similar basis found under State law*, the petitioner must establish that such a basis is similar to a finding of abuse, neglect, or abandonment. Officers should ensure that juvenile court orders submitted as evidence with an SIJ petition filed on or after March 23, 2009, include this new language.

A petitioner is still required to demonstrate that he or she has been the subject of a determination in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence.

Age Requirements

Section 235(d)(6) of the TVPRA 2008 provides age-out protection to SIJ petitioners. As of December 23, 2008, if an SIJ petitioner was a "child" on the date on which an SIJ petition was properly filed, U.S. Citizenship and Immigration Services (USCIS) cannot deny SIJ status to anyone, regardless of the petitioner's age at the time of adjudication. *Officers must now consider the petitioner's age at the time of filing to determine whether the petitioner has met the age requirement.* Officers must not deny or revoke SIJ status based on age if the alien was a child on

the date the SIJ petition was properly filed if it was filed on or after December 23, 2008, or if it was pending as of December 23, 2008. USCIS interprets the use of the term "child" in section 235(d)(6) of the TVPRA 2008 to refer to the definition of child found at section 101(b)(1) of the INA, which states that a child is an unmarried person under 21 years of age. The SIJ definition found at section 101(a)(27)(J) of the INA does not use the term "child," but USCIS had previously incorporated the child definition at section 101(b)(1) of the INA into the regulation governing SIJ petitions.

Consent

The TVPRA 2008 also significantly modifies the two types of consent required for SIJ petitions.

Consent to the grant of SIJ status (previously express consent)

The TVPRA 2008 simplified the "express consent" requirement for an SIJ petition. *The Secretary of Homeland Security (Secretary) must consent to the grant of special immigrant juvenile status.* This consent is no longer termed "express consent" and is no longer consent to the dependency order serving as a precondition to a grant of SIJ status.

The consent determination by the Secretary, through the USCIS District Director, is an acknowledgement that the request for SIJ classification is bona fide. This means that the SIJ benefit was not "sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment." See H.R. Rep. No. 105-405, at 130 (1997). An approval of an SIJ petition itself shall be evidence of the Secretary's consent.

Specific consent

The TVPRA 2008 completely altered the "specific consent" function for those juveniles in federal custody. The TVPRA 2008 vests this function with the Secretary of Health and Human Services (HHS) rather than the Secretary of the Department of Homeland Security as previously delegated to Immigration and Customs Enforcement (ICE). In addition, Congress simplified the language to refer simply to "custody," not actual or constructive custody, as was previously delineated. However, the requirement remains that an SIJ petitioner need only seek specific consent if the SIJ petitioner seeks a juvenile court order determining or altering the SIJ petitioner's custody status or placement. If an SIJ petitioner seeks to obtain or obtains a juvenile court order that makes no findings as to the SIJ petitioner's custody status or placement, the SIJ petitioner is not required to have sought specific consent from HHS. Therefore, on or after March 23, 2009, *officers must ensure that juveniles in the custody of HHS obtained specific consent from HHS to juvenile court jurisdiction where the juvenile court order determines or alters the juvenile's custody status or placement.* USCIS will provide HHS guidance regarding adjudications of specific consent as soon as it is available.

Due to the complex nature and changing requirements of specific consent determinations, USCIS Headquarters (HQ) is temporarily assisting in making the determination on specific consent

requirements. As outlined in the February 20, 2009 guidance email, Field Officers are instructed to forward certain documents to HQ for those SIJ petitions that may involve specific consent that are filed prior to March 23, 2009. HQ will notify the Field Office of the decision on specific consent. The Field Office will then complete adjudication of the petition. This temporary guidance providing HQ assistance with specific consent determinations will remain in effect until further notice.

Expeditious Adjudication

Section 235(d)(2) of the TVPRA 2008 *requires USCIS to adjudicate SIJ petitions within 180 days of filing*. Field Offices need to be particularly aware of this new requirement and take measures locally to ensure timely adjudication. Officers are reminded that under 8 CFR 245.6 an interview may be waived for SIJ petitioners under 14 years of age, or when it is determined that an interview is unnecessary. Eliminating unnecessary interviewing of SIJ petitioners may help in expeditiously adjudicating petitions. Necessary interviews should be scheduled as soon as possible. During an interview, an officer should focus on eligibility for adjustment of status and should avoid questioning a child about the details of the abuse, abandonment or neglect suffered, as those matters were handled by the juvenile court, applying state law. Under no circumstances can an SIJ petitioner, at any stage of the SIJ process, be required to contact the individual (or family members of the individual) who allegedly abused, abandoned or neglected the juvenile. This provision was added by the Violence Against Women Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2006) and is incorporated at section 287(h) of the INA. Officers must ensure proper completion of background checks, including biometric information clearances and name-checks.

Adjustment of Status for Special Immigrant Juveniles

The TVPRA 2008 amends the adjustment of status provisions for those with SIJ classification at section 245(h) of the INA, to include four new exemptions. Approved SIJ petitioners are now exempted from seven inadmissibility grounds of the INA:

- 212(a)(4) (public charge);
- 212(a)(5)(A) (labor certification);
- *212(a)(6)(A) (aliens present without inspection);*
- *212 (a)(6)(C) (misrepresentation);*
- *212(a)(6)(D) (stowaways);*
- 212(a)(7)(A) (documentation requirements); and
- *212(a)(9)(B) (aliens unlawfully present).*

On or after March 23, 2009, none of the above listed grounds of inadmissibility shall apply to SIJ adjustment of status applicants.

Officers are reminded that this list of exemptions is in addition to the waivers available for most other grounds of inadmissibility for humanitarian purposes, family unity, or otherwise being in the public interest. The only unwaivable grounds of inadmissibility for SIJ petitioners are those listed at INA 212(a)(2)(A)-(C) (conviction of certain crimes, multiple criminal convictions, and

controlled substance trafficking (except for a single instance of simple possession of 30 grams or less of marijuana)), and 212(a)(3)(A)-(C), and (E) (security and related grounds, terrorist activities, foreign policy, and participants in Nazi persecution, genocide, torture or extrajudicial killing).

4. Use

This guidance is created solely for the purpose of USCIS personnel in performing their duties relative to adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantial or procedural, enforceable at law by any individual or any other party in removal proceedings, in litigation with the United States, or in any other or form or matter.

5. Contact Information

This guidance is effective immediately. Please direct any questions concerning these changes through appropriate supervisory channels to Rosemary Hartmann, Office of Policy and Strategy or Tina Lauver, Office of Field Operations.

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