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# ARTICLE

## SKY IS THE LIMIT: PROTECTING UNACCOMPANIED MINORS BY NOT SUBJECTING THEM TO NUMERICAL LIMITATIONS

DEBORAH S. GONZALEZ\*

I.	Introduction.....	556
	A. Special Immigrant Juvenile Status History and Procedure.....	558
	B. Visa Bulletin System and Delays.....	562
	C. Asylum History and Procedure.....	564
	D. Employment-Based Visas History and Procedure .....	567
II.	Similarities Between Asylum Claims and Special Immigrant Juvenile Claims .....	570
	A. Adjustment of Status for SIJS and Asylees.....	573
III.	Distinction Between Special Immigrant Juvenile Claims and Employment-Based Applications.....	575
IV.	Conclusion .....	580

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## I. INTRODUCTION

William was born in a small town in Valle del Jiquilisco, Jiquilisco, El Salvador. He is the second of three children born to alcoholic parents.<sup>1</sup> William and his family were very poor and, as a result, William began working in fields planting corn and beans at the age of eight. Due to William's parents' alcoholism and inability to supervise their children, William's younger sister died after being hit by a car when she was three years old. She had been playing, unsupervised, in the middle of a road. Soon after his sister's death, William went to live with his aunt because his parents left him to live on the streets. From ages eight to fourteen, William worked full-time to help his abusive aunt with household expenses, and he never attended school. When William was fourteen, he decided to come to the United States to move his life forward. He hired a *coyote* to bring him into the country.<sup>2</sup> In February of 2015, William was caught by Immigration Customs Enforcement (ICE) and placed in removal proceedings. He was granted Special Immigrant Juvenile Status (SIJS) in November of 2015 and is waiting for a visa number to become available so that he can apply for adjustment of status.<sup>3</sup>

Carlos was born in Veracruz, Zacapa, Guatemala. He is one of five children born to alcoholic parents.<sup>4</sup> At the age of eight, Carlos was forced to live on the streets because his parents could not care for him. Unlike William, however, Carlos had no family to care for him or offer shelter. Carlos was very religious and attended church daily. He worked odd jobs to survive, such as carrying boxes for vendors and merchants in exchange for food. He was constantly harassed by gangs that dominated his town. Gang members frequently beat him for refusing to join their ranks because of his religious beliefs. By the age of fourteen, Carlos decided to create his own fate and made his way to the United States. He found his way to Mexico by walking and hitching rides. Once he crossed the border into the United States—in February of 2015—he too was caught by ICE and placed in removal proceedings. Carlos nevertheless applied for and was

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1. The facts are based on a real case, but the names and dates have been changed to preserve confidentiality.

2. A *coyote* is a person who smuggles immigrants from Latin America into the United States for a fee. *Coyote*, BLACK'S LAW DICTIONARY (10th ed. 2014).

3. Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. §§ 1101(a)(27)(J), 1255(a) (2012).

4. These facts are also based on a real case, and the name and dates have similarly been changed to preserve confidentiality.

granted asylum in November of that year. Today he is a lawful permanent resident.<sup>5</sup>

Both of these boys are from Central America, children of parents who are unfit to care for them, and fleeing poverty and violence to come to the United States for a better life. Yet, one of them must wait years before he can become a lawful permanent resident, while the other is enjoying the benefits of residency and the ability to work in the United States. Our immigration laws provide these two boys—with similar backgrounds—very different protections.<sup>6</sup> While Carlos can apply for lawful permanent residence after only one year in the United States without any numerical limitation,<sup>7</sup> William must potentially wait years to obtain lawful permanent residence due to the manner in which the Immigration Act of 1990—the birthplace of SIJS—classifies special immigrant juveniles such as William.<sup>8</sup>

SIJS<sup>9</sup> was enacted to protect the interests of immigrant children living in the United States who have been abandoned, abused, or neglected by their parents; however, these immigrant children are not categorized as a class of immigrants who receive the same protections as asylees.<sup>10</sup> Instead, special immigrant juveniles are classified, pursuant to the Immigration and Nationality Act (INA), as employment-based immigrants.<sup>11</sup> This classification is flawed because there is no requirement that an SIJS applicant be employed in any capacity or possess any special skill, which is not the case with all other employment-based immigrants.<sup>12</sup>

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5. Today's date is August 7, 2017.

6. Compare 8 U.S.C. § 1158(a) (providing authority for an alien present in the United States to apply for asylum), with *id.* § 1153(b)(4) (restricting the number of visas that can be issued for special immigrants).

7. *Id.* § 1158(a)(2)(B).

8. See, e.g., *Surge in SIJS Approvals Creates Backlog at Adjustment Stage*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., <https://cliniclegal.org/resources/articles-clinic/surge-sijs-approvals-creates-backlog-adjustment-stage> [<http://perma.cc/D5VC-4K34>] (displaying a “backlog” of children “who have suffered abuse, abandonment or neglect” attempting to obtain residence pursuant to SIJS).

9. SIJS is governed by section 101(a)(27)(J) of the INA. 8 U.S.C. § 1101(a)(27)(J).

10. Cf. *Immigrant Youth*, IMMIGRANT LEGAL RES. CTR., <https://www.ilrc.org/immigrant-youth> [<http://perma.cc/3N9Y-FYT5>] (describing options afforded to children looking to obtain lawful immigration status, including SIJS).

11. See 8 U.S.C. § 1153(b)(4) (allocating a maximum number of visas for “special immigrants described in section 1101(a)(27) of this title”); *id.* § 1101(a)(27)(J) (governing immigrants declared “dependent on a juvenile court” who have been subject to “abuse, neglect, [or] abandonment”).

12. Compare 8 U.S.C. § 1153(b) (listing preference allocation for employment-based immigrants and considering factors such as “extraordinary ability in the sciences[.]” and whether the

Therefore, to classify these vulnerable children with other employment-based immigrants—for lack of a better category in which to place them—is unjust.

This Article will compare SIJS to asylum, discuss the two forms of relief, and differentiate SIJS from employment-based visa applicants. In doing so, the Article will argue that SIJS applicants should not fall within the purview of employment-based applicants, since SIJS applicants have no similarities to other employment-based applicants. Accordingly, the Article will contend SIJS applicants should not be limited to the visa quota system introduced by the Immigration Act of 1990,<sup>13</sup> but should instead enjoy the same privileges and priorities as asylum seekers.

#### A. *Special Immigrant Juvenile Status History and Procedure*

SIJS was introduced by the U.S. Congress as part of the Immigration Act of 1990.<sup>14</sup> In enacting that Act, Congress sought to protect immigrant children who were ineligible to apply for legalization under the Immigration Reform and Control Act of 1986 (IRCA).<sup>15</sup> IRCA allowed certain dependent children who had been living in the United States since before 1982 to apply for legalization.<sup>16</sup> IRCA did not, however, consider children taken into custody by the United States, nor did it consider children declared dependent on the United States who had not been living in the US since before 1982.<sup>17</sup> Congress sought to rectify this inequity by implementing SIJS.<sup>18</sup> SIJS provides protection to vulnerable children who are abandoned, abused, or neglected by their parents, and

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alien has teaching experience), *with id.* § 1101(a)(27)(I) (enumerating requirements for SIJS, none of which are employment related).

13. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

14. *Id.*

15. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445 (codified as amended in scattered sections of 8 U.S.C.); *cf.* Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843-01, 42844 (Aug. 12, 1993) (providing “qualified aliens with the opportunity to apply” for SIJS, permanent residency and the possibility of becoming a United States citizen).

16. *See* Special Immigrant Status, 58 Fed. Reg. at 42844 (explaining IRCA’s benefits were available to certain aliens who had been in the United States since before 1982).

17. *Id.*

18. *Cf. id.* (announcing “a procedure for classification of certain aliens as special immigrants who have been declared dependent on a juvenile court in the United States”).

whose reunification with their parents, and return to their country of origin, would not be in their best interest.<sup>19</sup>

At the time of the enactment of the Immigration Act of 1990, Congress had little-to-no discussion during its hearings about SIJS, as it was a small piece of much larger legislation.<sup>20</sup> In light of its legislative history, however, it seems as though SIJS was added to the Act as an afterthought, since there have been several amendments to this section of the Act to address issues that were not contemplated at the time of its enactment.<sup>21</sup> What seems clear is most of the amendments to SIJS were enacted to protect children from injustice and give them an opportunity for a better life in a more expeditious manner.<sup>22</sup>

The term “special immigrant” was created during the enactment of the Immigration Act of 1965.<sup>23</sup> The legislative history of the definition of “special immigrant” suggests that the 89th Congress established the term as a category of people who do not fall within new categories of family-based or employment-based immigrants, and, therefore, needed

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19. 8 U.S.C. § 1101(a)(27)(I).

20. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101(a) (2012)) (listing special immigrant status as a miscellaneous topic).

21. Cf. 6 U.S. CITIZENSHIP & IMMIGR. SERVS, POLICY MANUAL (2017) [hereinafter POLICY MANUAL], <https://www.uscis.gov/policymanual/Print/PolicyManual-Volume6-PartJ.html#footnote-1> [http://perma.cc/9JLQ-4SPF] (arranging a table with an overview of key changes to the Immigration Act).

22. Some amendments granted parole status for children with SIJS so that they may apply for adjustment of status. Miscellaneous and Technical Immigration and Nationality Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1744 (codified as amended at 8 U.S.C. § 1255(h)(1)(2012)); see also Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 2978–79 (2006) (codified as amended at 8 U.S.C. § 1101(a)(15)(U) (2012)) (“Ensuring crime victim access to legal services.”); 1998 Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440 (1997) (codified as amended at 8 U.S.C. § 1101(a)(27)(I) (2012)) (expanding eligibility to children declared dependent on a juvenile court while limiting eligibility to children declared abandoned, abused, or neglected). The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 made similar changes, such as: removing the requirement that a court declare the child be in long-term foster care; expanding eligibility to include children placed in custody of a person by the juvenile court; providing age-out protections; and providing for a maximum amount of time for adjudication of SIJS applications. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8 U.S.C.).

23. Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

their own miscellaneous category.<sup>24</sup> As a result, Congress came up with the term “special immigrant” to encompass a group of immigrants who should be granted special immigration status due to the work they do for the military, government, or religious sects.<sup>25</sup>

“Special immigrant” is defined in section 101(a)(27) of the INA and codified in 8 U.S.C. § 1101(a)(27).<sup>26</sup> The definition of who may be a “special immigrant” varies in the statute from subsections A to M.<sup>27</sup> A reading of the statute reveals the definition of “special immigrant” is mostly applied to people who work in a variety of settings, such as: an employee of the Panama Canal Company or an employee’s family member;<sup>28</sup> an employee of a foreign government designated by the United States an international organization under the International Organization Immunities Act (59 Stat. 669);<sup>29</sup> a practitioner or student of medicine;<sup>30</sup> a worker in a religious setting;<sup>31</sup> a member of the military;<sup>32</sup> or a diplomat or family member of a government employee—with some exceptions made for people who are already lawful permanent residents—who is seeking to return after a visit abroad<sup>33</sup> or to apply for reacquisition of citizenship.<sup>34</sup>

The legislative history of “special immigrant” suggests that when Congress made policies regarding this group of immigrants, it was considering only those *special immigrants* who were employed in a variety of settings, or family members of these employees, but was not considering the term to encompass juveniles who had been abandoned, abused, or neglected.<sup>35</sup> This lack of consideration suggests these immigrant

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24. See Wendi J. Adelson, *The Case of the Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT'L L. & POL'Y 65, 77 (2008) (“Congressional intent underlying the creation of SIJ Status was to create a permanent option in the U.S. for undocumented, state-dependent minors.”).

25. See, e.g., Immigration Act of 1990, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101(a)(27) (2012)) (revising special immigrant provisions relating to religious workers).

26. 8 U.S.C. § 1101(a)(27)(I).

27. *Id.* §§ 1101(a)(27)(A)–(M).

28. *Id.* §§ 1101(a)(27)(E)–(G).

29. *Id.* § 1101(a)(27)(I).

30. *Id.* § 1101(a)(27)(H).

31. *Id.* § 1101(a)(27)(C).

32. *Id.* § 1101(a)(27)(K).

33. *Id.* § 1101(a)(27)(A).

34. *Id.* § 1101(a)(27)(B).

35. See, e.g., Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 913 (affording visas to immigrants who are professionals or possess advanced abilities in science or art, and who will benefit the United States economically).

juveniles—who were abandoned, abused, or neglected—did not fit within the categories of family-based or employment-based immigrants that were being contemplated by the Immigration Act of 1990, and were instead classified as “special immigrants” within section 101(a)(27) of the INA for lack of a better place to categorize them.

However, “special immigrant juveniles,” as defined in section 101(a)(27)(J), have no similarities to the other “special immigrants” defined in section 101(a)(27) of the INA, as all other special immigrants in this section are granted status as a result of some sort of work done by the immigrant.<sup>36</sup> Juveniles who have been abandoned, abused, or neglected should not fall within this category of immigrants just because there is no better category to include them.<sup>37</sup>

A child like William can apply for SIJS only if proved to the United States Citizenship & Immigration Service (USCIS) that a court of competent jurisdiction has declared William abandoned, abused, or neglected by one or both of his parents under state law.<sup>38</sup> The same court must also declare that returning to the country of origin is not in the best interest of the child.<sup>39</sup> Such a declaration requires that the child have one parent, or an approved guardian, file a petition on the child’s behalf that seeks an order of abandonment, abuse, or neglect from a court of competent jurisdiction.<sup>40</sup> During the court hearing, the parent or guardian, on behalf of the child, must submit to the court evidence of the circumstances and facts surrounding the abandonment, abuse, or

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36. Compare 8 U.S.C. § 1101(a)(27)(J) (listing requirements for an immigrant present in the United States to obtain SIJS without considering work or employment), *with id.* § 1101(a)(27)(D) (defining “special immigrant” as an immigrant “who is an employee, or an honorably retired former employee” of several statutory enumerated organizations).

37. Here, the argument is that, depending on several factors like employment, special immigrants are defined pursuant to section 101(a)(27) of the INA. *Id.* § 1101(a)(27). In comparison, SIJS is defined under section 101(a)(27)(J) of the INA and is devoid of employment considerations. *Id.* § 1101(a)(27)(J). Therefore, it seems Congress grouped juveniles who have been abandoned, abused, or neglected—those subject to SIJS—into this category of immigrants under 101(a)(27)(J) simply because there is no other place to categorize them.

38. *Id.* § 1101(a)(27)(J)(i).

39. *Id.* § 1101(a)(27)(J)(ii).

40. POLICY MANUAL, *supra* note 21. However, a *temporary* guardian will not suffice. *See id.* (“A court-appointed custodian that is acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent, is not considered a custodian for purposes of establishing SIJ eligibility.” (footnote omitted)).



neglect.<sup>41</sup> Submission of evidence is done either by sworn affidavit of the child, parent, or guardian, and any other evidence—such as police reports or medical records—that substantiate the abandonment, abuse, or neglect.<sup>42</sup> The elements of abandonment, abuse, or neglect are defined by each state's jurisdiction where the juvenile resides.<sup>43</sup> There is no requirement or necessity to submit evidence of employment history, education level, or skill set.<sup>44</sup> Once the court is satisfied with the evidence and has heard from all parties involved, the court determines whether an order of abandonment, abuse, or neglect is warranted and issues the order.<sup>45</sup> Upon entering the order, the child submits an application for SIJS to USCIS through “a Petition for Amerasian, Widow(er) or Special Immigrant (Form I-360)” for SIJS classification.<sup>46</sup> The Form I-360 must be accompanied by a certified copy of the court's order that details the facts found by the court to determine eligibility of the applicant for SIJS classification.<sup>47</sup> When the I-360 is approved, the child must wait for a visa to become available for him or her in the fourth preference employment-based category, based on a visa bulletin that is issued by the Department of State monthly.<sup>48</sup>

#### B. *Visa Bulletin System and Delays*

The Immigration Act of 1990<sup>49</sup> vastly changed our immigration system by implementing a three-track system consisting of family-based immigrants, employment-based immigrants, and immigrants based on diversity.<sup>50</sup> The Act also implemented a quota system that limited the

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41. *See id.* (explaining that the adjudication of an SIJS petition “includes a review of the petition” and evidence).

42. *See id.* (listing permissible evidence to support the factual basis for a petition).

43. *Id.*

44. *See generally id.* (providing requirements for SIJS eligibility, none of which are related to employment, education, or skill).

45. *See id.* (requiring specific findings for a child to obtain SIJS).

46. *Id.*

47. *Id.*

48. 8 C.F.R. § 1245.1(g)(1) (2018); *Visa Bulletin for August 2017*, U.S. DEPARTMENT OF STATE—BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2017/visa-bulletin-for-august-2017.html> [http://perma.cc/9YRG-BADZ] [hereinafter *Visa Bulletin for August 2017*].

49. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 4987 (codified as amended in scattered sections of 8 U.S.C.).

50. *Id.* at 4986–87.

number of immigrants who can migrate to the United States.<sup>51</sup> Pursuant to the Act, the category of employment-based immigrants is limited to 140,000 immigrants yearly.<sup>52</sup>

The date that determines when an applicant can apply for lawful permanent residence (or adjustment of status) is the priority date.<sup>53</sup> The priority date is the date the application is filed.<sup>54</sup> The Department of State controls the number of visas issued and allocates them in chronological order.<sup>55</sup> In other words, visas are issued on a first-come, first-served basis, and only if the maximum amount of visas has not been exhausted each year.

Every month, each consular post provides the Department of State with a report on the number of applicants granted visas in each category (i.e., family-based or employment-based) and preference (i.e., first preference or second preference).<sup>56</sup> The Department of State then determines if a preference has a visa number available and lists it as current, signaling to applicants with a particular priority date in a particular preference that their visa is available.<sup>57</sup> If the preference category is oversubscribed, the Department of State will establish a cut-off date, which is the priority date of the first applicant who cannot be granted a visa number.<sup>58</sup> These dates are then placed on a visa bulletin that the Department of State publishes on their website and submits to each consular post and USCIS.<sup>59</sup>

Immigrants who are granted asylee status are not subject to the visa limitations implemented by the Immigration Act of 1990.<sup>60</sup> As stated

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51. See, e.g., *id.* at 4980 (limiting the “worldwide level of family-sponsored immigrants” to less than 480,000). It is noteworthy to mention that immigrants who are not subject to visa limitations are reduced from the 480,000 total visas allowed first, and then all other preferences are deducted from the maximum number. This means that asylees are given preference for lawful permanent residence over SIJS applicants. 8 U.S.C. §§ 1151(c)(1)(A)(i)–(iii).

52. 8 U.S.C. § 1151(d)(1)(A). Section 203(b) of the INA sets out various calculations in the event of undersubscribed and oversubscribed visas categories. *Id.* § 1153(b).

53. 22 C.F.R. § 42.53 (2018).

54. *Id.*

55. *Id.* § 42.51.

56. See, e.g., *Visa Bulletin for August 2017*, *supra* note 48 (providing statistics on family-sponsored preferences, employment-based preferences, and diversity immigrants).

57. *Id.*

58. *Id.*

59. *The Visa Bulletin*, U.S. DEPARTMENT OF STATE–BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html> [http://perma.cc/5B2A-D5JS].

60. Immigration and Nationality Act § 201(b)(1)(B), 8 U.S.C. § 1151(b)(1)(B) (2012).

previously, SIJS applicants are categorized as fourth preference employment-based immigrants. As of August 7, 2017, the latest visa bulletin indicates fourth preference employment-based applications filed on September 15, 2015, are currently in process—which means there is at least a two-year wait for children like William to obtain lawful permanent residence.<sup>61</sup> Authorization to work during the wait period is also not an option for William because he can only apply for employment when an application for adjustment of status is pending.<sup>62</sup> Authorization to work is an important benefit for undocumented minors because it allows them to apply for a Social Security number, which in turn helps them obtain a driver's license and/or obtain a part-time job.<sup>63</sup>

### C. *Asylum History and Procedure*

The law on asylum was enacted with the passage of the Refugee Act of 1980.<sup>64</sup> The Refugee Act of 1980 brought the United States in compliance with its international treaty obligations,<sup>65</sup> and thereby developed a procedure for adjudicating asylum applications and defining the term “refugee” to mirror its definition under the 1967 Protocol.<sup>66</sup> Section 208 of the INA establishes the procedures for asylum and Section 101 defines the term “refugee.”<sup>67</sup> A “refugee” is a person who is outside his or her home country and “unable or unwilling” to avail themselves of the protection of their government for fear of being persecuted based on

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61. *The Visa Bulletin*, *supra* note 59.

62. 8 C.F.R. § 274a.12(c)(9) (2018). There is no statute that allows for SIJS applicants to apply for employment authorization prior to the filing of the adjustment of status.

63. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231, 313 (codified as amended at 49 U.S.C. § 30301 (2012)) (listing required documentation for obtaining a driver's license); *cf.* Kevin R. Johnson, *Critical Race Studies: The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1504 (2002) (arguing the denial of a driver's license increases an immigrant's fear of arrest and deportation and limits employment prospects).

64. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

65. *Cf. id.* (“Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.”).

66. *See id.* (“The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide a comprehensive and uniform provision for the effective resettlement and absorption of those refugees who are admitted.”).

67. 8 U.S.C. §§ 1158, 1101(a)(42).

their “race, religion, nationality, membership in a particular social group, or political opinion[.]”<sup>68</sup>

The United States Government signed the 1967 Protocol after the United Nations High Commission for Refugees made amendments to the 1951 Protocol that “removed all geographic limitations and temporal limitations.”<sup>69</sup> One purpose of the 1967 Protocol is humanitarian in nature because it provides protection to those who have been “persecuted on account of race, religion, nationality, [ethnic origin or] membership in a particular social group[.]”<sup>70</sup> Another purpose of the 1967 Protocol is to provide foreign nationals with protection from discrimination, penalization, and refoulement.<sup>71</sup> With these humanitarian principals in mind, Congress enacted the Refugee Act of 1980.<sup>72</sup>

The Refugee Act of 1980 left the former Immigration Naturalization Service (INS)—now USCIS—the task of implementing the procedural and application processes for asylee and refugee status.<sup>73</sup> In turn, INS developed procedures that allowed for adjudications to be based on an officer’s discretion regarding the credibility of the applicant.<sup>74</sup> Unlike applicants for refugee status, applicants for asylee status must be in the United States and apply for asylee status within the first year of arrival in the United States.<sup>75</sup> The applicant must prove they are a refugee within

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68. *Id.* § 1101(a)(42).

69. Temporal limitations were intended to apply to persons who were fleeing events occurring before January 1, 1951, within Europe. *See, e.g.*, Office of the United Nations Comm’r for Refugees, *Convention and Protocol Relation to the Status of Refugees*, UNHCR at 2, <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> [<http://perma.cc/CS6U-XMXR>].

70. 8 U.S.C. § 1101(a)(42); *see also* Office of the United Nations Comm’r for Refugees, *supra* note 69, at 3 (describing the fundamental rights-based principles of the Protocol).

71. *See* Refugee Act of 1980, 94 Stat. 102 (describing the purpose of the Act as one directed to Congress, so that they may “respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas”).

72. *See* Lawyers Comm. for Human Rights, *The Implementation of the Refugee Act of 1980: A Decade of Experience*, REFUGEE PROJECT at 1, <http://www.attorneynelson.com/sitebuildercontent/sitebuilderfiles/LCHRRefugeeDecadeReport.pdf> [<https://perma.cc/SW4Q-NMW4>] (explaining the Act was the result of a “decade-long effort to incorporate obligations assumed by the United States under an international refugee treaty” (footnote omitted)).

73. *Cf.* Refugee Act of 1980, 94 Stat. 102 (finding the Act was intended “to amend the Immigration and Nationality Act, to revise the procedures for the admission of refugees, [and] to establish a more uniform basis for the provision of assistance to refugees, and for other purposes”).

74. *See* Lawyers Comm. for Human Rights, *supra* note 72 (“The Refugee Act sought to establish a domestic legal framework for refugee protection, and to strike a balance of fairness in individual adjudications and executive discretion.”).

75. 8 U.S.C. § 1158(a)(2)(B).

the meaning of the statute,<sup>76</sup> which requires a demonstration that they have been “persecuted on account of race, religion, nationality, membership in a social group, or political opinion[.]”<sup>77</sup> Because neither the Code of Federal Regulations nor the INA define what it is to be “persecu[ted] on account of race, religion, nationality, membership in a particular social group or political opinion,” the Board of Immigration Appeals (BIA) defined these terms in *In re Acosta*.<sup>78</sup> *In re Acosta* is only the starting point for determining if an immigrant has met their burden of proof, as this area of immigration law is intricate and amorphous, having evolved since 1980 with numerous cases, policy, guidance memoranda, and statutes.<sup>79</sup>

The asylum process begins with the filing of an application for asylum and for withholding of removal—USCIS Form I-589.<sup>80</sup> Applicants who are not in removal proceedings file the application for asylum with the appropriate USCIS service center, along with a declaration made under oath as to the facts and circumstances that would render the applicant statutorily eligible for asylum and eligible as a matter of discretion of the officer.<sup>81</sup> In some instances, in corroboration with the applicant’s declaration, an applicant may also submit country reports, expert reports, police reports, and any other evidence to corroborate the applicant’s story of persecution on account of one of the five protected grounds.<sup>82</sup>

Upon 150 days of filing the application, the applicant is eligible for employment authorization, allowing the immigrant to work while the application for asylum is set for an interview.<sup>83</sup> Once an interview is

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76. *Id.* § 1158(b)(1)(B).

77. *Id.* §§ 1101(a)(42)(A), 1158(b)(1)(B).

78. *See In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987) (defining a “well-founded fear of persecution” as an individual’s fear of persecution based on objective facts “that show there is a realistic likelihood he will be persecuted upon his return to a particular country”).

79. *See Regina Germain, Seeking Refuge: The U.S. Asylum Process*, 35 COLO. LAW. 71, 71 (2006) (“U.S. asylum law has evolved since 1980 through case law, regulations, and numerous administrative guidelines and policy memoranda.”).

80. *Id.* at 74.

81. Removal proceedings are judicial proceedings the Department of Homeland Security (DHS) uses to deport immigrants unlawfully present in the United States or who have committed an act that renders the person deportable. 8 U.S.C. § 1229(a).

82. *Cf. Regina Germain, supra* note 79 (“A completed application [for Withholding of Removal], however, with affidavits from the applicant, witnesses, and experts, along with country condition information, could contain 500 or more pages.”).

83. 8 C.F.R. §§ 208.7, 274a.12(c)(8)(i) (2018).

scheduled, the applicant is interviewed by a USCIS officer who evaluates the credibility of the applicant and reviews evidence presented to determine the applicant's eligibility for asylum status.<sup>84</sup> If the applicant is in removal proceedings, the immigration judge has the same authority as the immigration officer to adjudicate and approve or deny an application for asylum.<sup>85</sup> Judicial review of an immigration judge's discretionary decision is not permitted pursuant to the REAL ID Act.<sup>86</sup> Judicial review of asylum applications, however, is permitted where there is clear error in law.<sup>87</sup>

Upon approval of an asylum application, the asylee is eligible to apply for adjustment of status after being in asylee status for one year.<sup>88</sup> There is no limitation on the number of immigrant visas issued to asylees.<sup>89</sup>

#### D. *Employment-Based Visas History and Procedure*

Immigrants who wish to come to the United States to work may do so if they have exceptional ability and are considered the best in their field of work worldwide,<sup>90</sup> have an advanced degree and perform work of national importance,<sup>91</sup> or have been offered a job with a United States employer, wherein the job requires a certain level or education of skill set.<sup>92</sup> The process of obtaining a visa to work in the United States or becoming a lawful permanent resident is a long and arduous one.<sup>93</sup>

The Immigration and Nationality Act of 1952,<sup>94</sup> also known as the McCarran-Walter Act, developed an immigration system based on

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84. *Id.* § 208.9(b).

85. *Id.* § 208.1(a).

86. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231, 305 (codified as amended at 8 U.S.C. § 1252(a)(2)(B)(2012)).

87. *Id.* at 310. The Real ID Act of 2005 also allows for judicial review by the appropriate court of appeals to hear claims under the United Nations Convention Against Torture. *Id.*

88. 8 U.S.C. § 1159(a)(1)(B).

89. *See id.* § 1159(a)(2) (removing yearly admissions cap on asylees).

90. *Id.* § 1153(b)(1).

91. *Id.* § 1153(b)(2).

92. *Id.* § 1153(b).

93. *See* Cassidy Cloninger, Comment, *Employment and Diversity-Based Visas: Why Birthright Citizenship Is Not All That Is Wrong With America's Immigration System*, 39 CAMPBELL L. REV. 413, 424 (2017) (describing hurdles in the process of obtaining visas and green cards for immigrants).

94. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

preference categories.<sup>95</sup> The preference categories are based on the desirability of the immigrant to immigrate to the United States. For example, immigrants who have an extraordinary ability in a particular field are given first preference, meaning they will be the first employment-based immigrants to be granted a visa due to the United States' desire for their skills.<sup>96</sup> First preference visa immigrants "must be able to demonstrate extraordinary ability[,] and their "achievements must be recognized in [their] field through extensive documentation."<sup>97</sup> Evidence of such accomplishment must include at least three items from a list of ten.<sup>98</sup> Although an offer of employment is not necessary for an immigrant to apply for an immigrant visa based on the first preference employment category, a cursory look at the documentation needed to prove extraordinary ability should give the applicant an indication of the level of difficulty to obtain a visa based on extraordinary ability.

The second and third preference employment-based categories are no better in terms of level of difficulty in obtaining a visa. Second preference immigrants are those who seek to apply for lawful permanent residence and who are members of a profession and who possess an advanced degree or have an exceptional ability.<sup>99</sup> To establish eligibility for the second preference, the immigrant must submit evidence of the advanced degree by way of official academic transcripts that show the immigrant has the United States equivalent of the advanced degree or that the immigrant

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95. *Id.* at 178–79.

96. 8 U.S.C. § 1153(b)(1)(a); *see* 8 C.F.R. § 204.5(h)(2) (2018) (“*Extraordinary ability* means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.”).

97. *Employment-Based Immigration: First Preference EB-1*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> [<https://perma.cc/6D82-ZUXL>].

98. *Id.* As evidence for extraordinary ability, the immigrant must submit any three of the following: 1) Documentation of receipt of national or international awards of excellence in the field; 2) Documentation of membership in an association which requires outstanding attainments for membership; 3) Published media in professional publications about the immigrant's work and excellence in the field; 4) Evidence that the immigrant participated on a panel or individually as a judge on the work of others in the same field; 5) Evidence that the immigrant's work has made major contributions to the field; 6) Evidence of the immigrant's authorship in scholarly articles in major professional media publications; 7) Evidence of display of immigrant's work, such as art exhibitions or showcases; 8) Evidence that the immigrant has performed in a leading role for organizations that have distinguished reputation; 9) Evidence that the immigrant has commanded a high salary or significant remuneration related to others in the field; or 10) “Evidence of [] commercial success in the performing arts[,]” as shown by sales receipts or record sales. *Id.*

99. 8 U.S.C. § 1153(b)(2).

has the United States equivalent of a baccalaureate degree.<sup>100</sup> Additionally, the immigrant must submit evidence—in the form of letters from former employers—stating the immigrant has at least five years of experience in that area of specialty.<sup>101</sup> Moreover, the immigrant must establish an exceptional ability by submitting at least three forms of evidence from a list of six,<sup>102</sup> or other comparable evidence.<sup>103</sup> Second and third preference categories are especially difficult and onerous to obtain because such classifications require, not only a job offer from a United States employer, but also that the United States employer file a labor certification from the U.S. Department of Labor certifying there are no other U.S. workers willing and qualified to perform the job, and that the employment of the immigrant will not adversely affect the wages of other U.S. workers similarly employed.<sup>104</sup> Once the employer applies for labor certification—and it is certified by the U.S. Department of Labor—the employer can file a visa petition and the certified labor certification with USCIS to seek classification as a second or third preference worker, depending on the skill level of the immigrant.<sup>105</sup> These two steps—labor certification and visa petition for classification—must be completed by the

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100. *Employment-Based Immigration: Second Preference EB-2*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-1> [<https://perma.cc/QBL9-UVE3>] [hereinafter *Employment-Based Immigration: Second Preference*].

101. *Id.*

102. Evidence submitted must prove at least three of the following six: 1) official transcript or degree from an institution relating to the area of exceptional ability; 2) letters from former employers showing at least 10 years of full-time experience in the area of expertise; 3) license or certificate to practice the profession in the field of expertise; 4) evidence that the immigrant has commanded salary or remuneration that demonstrates exceptional ability; 5) evidence of membership in an association; or 6) evidence of recognition of achievements and significant contributions to the field by peers, government entities or professional organizations. *Id.*

103. *Id.*

104. 8 U.S.C. § 1182(a)(5)(A); see also *Employment-Based Immigration: Second Preference*, *supra* note 100 (noting that employment-based, second preference applications “must generally be accompanied by an approved individual labor certification from the U.S. Department of Labor on Form ETA-750”).

105. If the immigrant is seeking classification in the third preference, Form I-140 must be filed with a labor certification or PERM (a labor certification program), along with evidence of the immigrant’s qualifications, previous experience, and evidence showing the employer can pay the immigrants the wages set. 8 U.S.C. § 1153(b)(3)(C); *Employment-Based Immigration: Third Preference EB-3*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-third-preference-eb-3> [<https://perma.cc/5T3V-GDT9>].



employer and approved before the intended immigrant can file for lawful permanent residence.<sup>106</sup>

Likewise, applicants within the fourth preference employment-based category have a challenging task when seeking classification, as most special immigrants do, because they must submit evidence of either a job offer, education and skill set, or former employment.<sup>107</sup> Special immigrants, however, do not need to submit evidence of an approved labor certification or Form I-140, but will instead file Form I-360 with various requirements of evidence showing employment or skill set.<sup>108</sup> The number of immigrant visas issued varies by the class of “special immigrant” in the fourth preference employment-based category.<sup>109</sup>

Once the visa petition is approved, whether through an I-140 or I-360, all employment-based immigrants—applying for a first or fourth preference employment-based visa—are subject to the visa limitation under section 201(d) of the INA and must wait for a visa number to become available pursuant to the Department of State’s visa bulletin to apply for lawful permanent residence.<sup>110</sup>

## II. SIMILARITIES BETWEEN ASYLUM CLAIMS AND SPECIAL IMMIGRANT JUVENILE CLAIMS

Asylum applicants and special immigrant juvenile applicants have much in common. Aside from the similarities in William’s and Carlos’s stories are similarities in the policy reasons for granting asylum status and SIJS. Many immigrants come to the United States fleeing their home countries

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106. *Permanent Labor Certification*, U.S. DEP’T OF LABOR, <https://www.foreignlaborcert.doleta.gov/perm.cfm> [<https://perma.cc/B7D7-2S8C>]; see also *Employment-Based Immigration: Second Preference*, *supra* note 100 (requiring an employer to file a Form I-140).

107. 8 U.S.C. §§ 1101(a)(27)(C)–(M).

108. See *Employment Based Immigrant Visas*, U.S. DEP’T OF STATE–BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/employment-based-immigrant-visas.html#fourth> [<https://perma.cc/UEG9-92Z8>] [hereinafter *Employment Based Immigrant Visas*] (“Labor certification is not required for any of the Certain Special Immigrants subgroups.”).

109. Although only 7.1 percent of worldwide visas are allocated to the fourth preference employment-based category, this percentage is not divided equally amongst the various “special immigrants.” 8 U.S.C. § 1153(b)(4). For example, only five thousand visas are allocated per year for religious workers, and one hundred visas are allocated per year for Broadcasting Board of Governors broadcasters. *Id.* § 1101(a)(27)(M).

110. See *Employment Based Immigrant Visas*, *supra* note 108 (articulating the chronological procedure for granting employment-based immigrant visas and explaining visas “cannot be issued until an applicant’s priority date is reached”).

due to the persecution, violence, and/or abandonment they endured without ability to seek protection in their home country.<sup>111</sup> Asylum law arose out of humanitarian concerns over the many refugees who were fleeing their home countries due to the worldwide devastation of World War II.<sup>112</sup> Although there were many considerations that prompted the United States' entry into the 1967 Protocol, it is certain one of those was the protection of persons suffering from prosecution, who were unable to avail themselves of any kind of protection.<sup>113</sup> Similarly, SIJS was born out of Congress's recognition that children who have been victims of abuse, abandonment, or neglect by their families deserve protection.<sup>114</sup> Statuses such as asylum and SIJS are granted not for family unity or economic benefit to the United States, but for humanitarian reasons.<sup>115</sup> Likewise, asylum and special immigrant juvenile applicants are both self-petitioners, which means they are not dependent on a family member or an employer to file a petition with USCIS for status to be granted.<sup>116</sup> The adjudication of both asylum and SIJS is fact intensive,<sup>117</sup> which means the facts and circumstances surrounding the persecution and/or the abandonment, abuse, or neglect are the focus in determining the grant or denial of an application. Moreover, the evidence submitted in both types of cases is similar in that both applicants must submit sworn declarations to USCIS and/or a state court to substantiate the claim without the need of

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111. See Wendi J. Adelson, *supra* note 24, at 66 (describing SIJS as an opportunity for those neglected, abandoned, or abused in their home country to seek solace in the United States).

112. See Office of the United Nations Comm'r for Refugees, *supra* note 69, at 2 ("The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe.").

113. See Victoria Rapoport, *The Politicization of United States Asylum and Refugee Policies*, 11 SCHOLAR 195, 196 (2009) (contending the United States "has a strong desire to protect those who have been persecuted").

114. See Wendi J. Adelson, *supra* note 24, at 66 (arguing SIJS enables children who have been abandoned, neglected, or abused—and in whose best interest it is to avoid returning to their country of origin—to become United States citizens).

115. See Victoria Rapoport, *supra* note 113, at 199 ("To qualify for refugee status, an applicant must be a refugee as defined in the INA, as well as be of special humanitarian concern to the United States." (footnote omitted)); see also POLICY MANUAL, *supra* note 21 (claiming "humanitarian protection" as the reason Congress initially created the special immigrant juvenile classification).

116. Immigration and Nationality Act § 204(a)(1)(G)(i), 8 U.S.C. §§ 1154(a)(1)(G)(i), 1158(b). (2012).

117. Compare *id.* § 1158(b)(1)(B)(ii) (placing the burden of proof on an applicant to prove to "the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee"), with *id.* § 1101(a)(27)(J) (explaining SIJS must be obtained through "judicial proceedings" under state law).

corroboration.<sup>118</sup> Although there are some distinctions in the application process for these two forms of relief,<sup>119</sup> the policy reasons for each form of relief and the type of evidence submitted to prove the claim are similar.

The notable distinction in these two forms of relief is the priority given to each applicant to apply for lawful permanent residence. An applicant who is granted asylee status is eligible to apply for lawful permanent residence after having established one year of physical presence in the United States while in asylee status.<sup>120</sup> Furthermore, as mentioned, asylee applicants are not subject to the visa number limit unlike many other family-based applicants and all employment-based applicants.<sup>121</sup> Upon completion of the one-year physical presence period, there is no limit on the number of asylees who can apply for lawful permanent residence.<sup>122</sup> In contrast, SIJS applicants must wait for their priority date to be current, as they are subjected to the visa limitation of fourth preference employment-based category visas.<sup>123</sup> Significantly, only 7.1 percent of worldwide employment-based visas (or ten thousand worldwide visas) are allocated to special immigrants of section 101(a)(27) of the INA,<sup>124</sup> with a maximum of five thousand out of the ten thousand visas going first to religious workers.<sup>125</sup>

Another important distinction between SIJS and asylum applicants is an asylum applicant's ability to apply for employment authorization.<sup>126</sup> As stated earlier, asylum applicants are eligible for employment authorization once the asylum application has been pending for 150 days and has not been adjudicated. SIJS applicants, however, are not granted such a

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118. *See id.* § 1158(b)(1)(B)(ii) (refuting the need for corroboration); § 1101(a)(27)(J) (providing several requirements to establishing SIJS, none of which are corroboration).

119. SIJS claims require the applicant to obtain a predicate order from a court of competent jurisdiction prior to the filing of the application with USCIS, and, although there is no requirement that a declaration be filed with the Form I-360, the applicant must submit a predicate order with sufficient facts to support the court's findings. *See* POLICY MANUAL, *supra* note 21. The asylum application requires some form of declaration from the applicant to support the allegations of persecution. 8 U.S.C. § 1158(b)(1)(B)(ii).

120. 8 U.S.C. § 1159(b).

121. *Id.* §§ 1151(b)–(c).

122. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42866, PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 5 (2014).

123. 8 U.S.C. §§ 1153(b)(4), 1101(a)(27)(J).

124. *Id.* § 1153(b)(4); WILLIAM A. KANDEL, *supra* note 122.

125. 8 U.S.C. § 1153(b)(4); WILLIAM A. KANDEL, *supra* note 122.

126. *See* 8 C.F.R. § 208.7 (2018) (describing employment authorization and its procedures).

privilege.<sup>127</sup> In other words, once an asylum application is granted, the asylee is entitled to work until the asylee applies for lawful permanent residence.<sup>128</sup> This is not the case for SIJS applicants.

Seeing these two forms of immigration relief are granted for humanitarian reasons and not for family unity or economic reasons, it is logical that SIJS applicants also be entitled to apply for authorization to work once the Form I-360 is filed with USCIS.

A. *Adjustment of Status for SIJS and Asylees*

Even in the context of adjustment of status, asylees and SIJS applicants are more alike than SIJS applicants and employment-based visa applicants.

Immigrants seeking lawful permanent residence in the United States must file an application for adjustment of status pursuant to section 245 of the INA.<sup>129</sup> The applicant must file the application with USCIS stating they want to adjust their status to that of lawful permanent resident, the applicant must be eligible to receive an immigrant visa, and must be admissible into the United States.<sup>130</sup> The applicant must also have a visa immediately available.<sup>131</sup> To be eligible to receive an immigrant visa, the applicant must have been classified as an immigrant either due to a familial relationship or employment-based category, pursuant to section 204 of the INA.<sup>132</sup>

Applicants for adjustment of status who are seeking immigrant visas may encounter delays due to the numerical limitation of visas in every preference category.<sup>133</sup> As previously stated, the exception to the numerical limitation applies to special immigrants defined in sections 101(a)(27)(A) and (B),<sup>134</sup> aliens whose removal was cancelled pursuant to section 240A(a) of the INA,<sup>135</sup> special agricultural

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127. *Id.* § 274a.12(c)(9).

128. *Id.* § 208.7.

129. 8 U.S.C. § 1255(a).

130. *Id.*

131. *Id.*

132. *Id.* § 1151(a).

133. *See, e.g., id.* (stipulating several limitations on the number of visas issued to family-sponsored immigrants per fiscal year).

134. These are *asylees*. *Compare id.* § 1151(b) (stating aliens “not subject to worldwide levels or numerical limitations” include those admitted pursuant to section 1159), *with id.* § 1159(b) (allowing for adjustment of aliens granted residence and asylum).

135. *Id.* § 1151(b)(1)(D).

workers,<sup>136</sup> certain foreign nations who entered before 1924 or 1972,<sup>137</sup> and immediate relatives.<sup>138</sup>

Although refugees and asylees are eligible to apply for admission as immigrants and to seek to adjust their status pursuant to section 209 of the INA, asylees and refugees must also establish admissibility pursuant to section 212 of the INA.<sup>139</sup> Stated differently, applicants who are inadmissible pursuant to section 212 of the INA are not entitled to admission into the United States and unable to adjust their status to that of a lawful permanent resident.<sup>140</sup> Two additional grounds of inadmissibility for applicants are entry without inspection by an immigration officer in violation of section 212(a)(6) and unlawful presence in the United States in violation of section 212(a)(9).<sup>141</sup> There are many other sections of 212 that could render an applicant inadmissible,<sup>142</sup> but these two sections are most common for unaccompanied minors seeking asylum or SIJS, since those categories of immigrants increasingly immigrate to the United States from Central America without proper documentation.<sup>143</sup>

However, asylees and special immigrant juveniles are exempt from the inadmissibility violations of unlawful entry and presence of section 212(a)(6) and 212(a)(9), respectively.<sup>144</sup> Unlawful entry for asylees is waived by section 40.6.2(a) of the Adjudicators Field Manual,<sup>145</sup> and for special immigrant juveniles by virtue of section 245(h)(2)(A) of the INA.<sup>146</sup> Unlawful presence is waived for asylees pursuant to

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136. *Id.* § 1151(b)(1)(C).

137. *Id.* § 1151(b)(1)(E).

138. *Id.* § 1151(b)(2)(A)(i). The term “immediate relatives” is defined in section 201(b)(A)(i) of the INA, specifying those are children, spouses or parents of a United States Citizen. *Id.*

139. *Id.* § 1182.

140. *Id.*

141. *Id.* §§ 1182(a)(6), 1182(a)(9).

142. Other grounds include criminal and security related grounds. *Id.* §§ 1182(a)(2), 1182(a)(3).

143. See, e.g., Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M. L. REV. 247, 250 (2017) (“[T]he number of minors fleeing Central America to the United States has risen to new heights, peaking with almost 70,000 unaccompanied children arriving at the US-Mexico border in 2014 . . .” (footnote omitted)).

144. 8 U.S.C. §§ 1182(a)(9)(B)(iii)(II), 1255(h)(2)(A); U.S. CITIZENSHIP & IMMIGR. SERVS, ADJUDICATOR'S FIELD MANUAL § 40.6.2(a) (2014) [hereinafter ADJUDICATOR'S FIELD MANUAL], <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-17138/0-0-0-17444.html#0-0-0-1777> [<https://perma.cc/3JD2-Z98N>].

145. ADJUDICATOR'S FIELD MANUAL, *supra* note 144.

146. 8 U.S.C. § 1255(h)(2)(A).

section 212(a)(9)(B)(iii) of the INA<sup>147</sup> and for special immigrant juveniles through section 245(h)(2)(A).<sup>148</sup>

This waiver of inadmissibility for unlawful entry and unlawful presence is not available for any other employment-based category. Instead, all employment-based applicants must establish lawful entry and continuous lawful status in the United States at the time of adjustment of status.<sup>149</sup>

The similarities in policy reasons, the evidence submitted to substantiate the claim, and the waivers granted by the INA make clear that these two forms of relief should be granted the same priority and ability to obtain lawful permanent residence without being subjected to any visa limitation.

### III. DISTINCTION BETWEEN SPECIAL IMMIGRANT JUVENILE CLAIMS AND EMPLOYMENT-BASED APPLICATIONS

Immigrants who come to the United States to work generally do so because they wish to pursue a field of work that may not be as lucrative in their home country.<sup>150</sup> Some come to the United States to study with non-immigrant F-1 status and end up seeking employment in the United States—and staying because the employer has agreed to petition for the immigrant to stay.<sup>151</sup> As explained above, there are various employment-based categories for which an immigrant may qualify, and the evidence requires, at a minimum, a skill and/or a degree in a field of work.<sup>152</sup> It is never required, however, that an employment-based visa beneficiary submit evidence relative to hardship the immigrant suffered in his or her home country.<sup>153</sup> This is but one example of the many ways in which SIJS applicants differ from employment-based visa beneficiaries.

The focus of this paper thus far has been to differentiate the SIJS process from the employment-based process. Section II argued that asylum applications are akin to special immigrant juvenile applications in that each applicant is a self-petitioner—without the necessity of a

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147. *Id.* § 1182(a)(9)(B)(iii)(II).

148. *Id.* § 1255(h)(2)(A).

149. *Id.* § 1255(a).

150. *Cf.* Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 248 (2017) (“Immigration has always been closely connected to labor in [the United States].” (footnote omitted)).

151. F-1 status is a non-immigrant visa granted to foreign nationals who wish to study in the United States. 8 C.F.R. § 214.2(f)(1)(i) (2018); *see also id.* § 214.6(h)(1) (providing an avenue for a United States employer to apply for an extension of a nonimmigrant employee).

152. 8 U.S.C. §§ 1153(b)(1)–(2).

153. *See generally id.* § 1153 (detailing the allocation of immigration visas).

petitioner to file the application.<sup>154</sup> However, an argument can be made that SIJS is not so different from employment-based-petitions, because beneficiaries of employment-based petitions—as well as special immigrant juveniles—must first obtain predicate orders or labor certifications before they can apply for classification with USCIS.<sup>155</sup> Specifically, special immigrant juvenile beneficiaries must first obtain a predicate order from a court of competent jurisdiction that makes findings of fact and a determination that the juvenile has been abandoned, abused, or neglected by one or both of his or her parents.<sup>156</sup>

Employment-based beneficiaries, on the other hand, must first obtain a labor certification from the U.S. Department of Labor certifying that: the beneficiary is qualified;<sup>157</sup> the hiring of the foreign national will not displace American workers;<sup>158</sup> there are no United States workers available at the time the visa application is filed;<sup>159</sup> the foreign national's wages will be commensurate with other similarly situated American workers;<sup>160</sup> and wages will not affect United States workers' wages or working conditions.<sup>161</sup> SIJS and employment-based visas are similar because both require an initial step of a predicate order and/or a labor certification.<sup>162</sup> However, SIJS classification should not be classified as employment-based visa preference solely because both processes have a predicate requirement.

The key difference between these two processes is the policy underlying the immigration laws that allow for each of these visas. Employment-based visas are granted because of some shortage in the economy or

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154. *See id.* § 1154(a)(G)(i) (stating aliens applying for a visa under the special immigrant classification can file their own petition).

155. *See* SARAH BRONSTEIN & MICHELLE MENDEZ, CATHOLIC LEGAL IMMIGRATION NETWORK, STRATEGIES FOR SIJS CASES IN LIGHT OF ADJUSTMENT BACKLOG 6 <https://cliniclegal.org/sites/default/files/resources/Strategies-for-SIJS-Case-in-Light-of-Adjustment-Backlog.pdf> [<https://perma.cc/53FP-AVAF>] (equating the steps involved in an employment-based visa petition as being similar to the special immigrant juvenile-based adjustment process).

156. 8 U.S.C. § 1101(a)(27)(J)(i).

157. *Id.* § 1182(a)(5)(A)(i).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *See* SARAH BRONSTEIN & MICHELLE MENDEZ, *supra* note 155 (describing the three-step process required for both employment-based and special immigrant juvenile-based adjustment process).

industry.<sup>163</sup> The status is based on some skill that the immigrant possesses to do a job they have been offered by a U.S. employer.<sup>164</sup> The U.S. employer must make assurances, by way of the first step—the labor certification<sup>165</sup>—that no U.S. worker will be displaced by the immigrant being granted the status and that United States workers’ wages are not affected by the immigrant’s employment.<sup>166</sup> The purpose of employment-based visas is economic in nature.<sup>167</sup> The SIJS process, however, is granted for the humanitarian purpose of protecting children living in the United States from neglectful and/or abusive parents. The first step in obtaining the predicate order from a court with proper jurisdiction does not require any assurances of economic growth or that a U.S. citizen will not be displaced. It only requires that a court make findings of fact that demonstrate it is in the best interest of the child to remain in the United States instead of reunited with the child’s parent(s), and that the child remain in the United States under the jurisdiction of the court.<sup>168</sup> As such, the necessity of the predicate order is viewed as being required on a humanitarian basis and not on whether the U.S. economy will benefit by the grant of the juvenile’s status.

Moreover, the Board of Immigration Appeals (BIA)<sup>169</sup> has concluded these statutes are different, and therefore, *arguendo*, deserving of different outcomes in relation to motions to continue removal proceedings. For instance, in *In re Rajah*,<sup>170</sup> the BIA considered establishing norms for granting continuances in removal matters where a labor certification was pending with the U.S. Department of Labor.<sup>171</sup> In doing so, it considered

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163. See 8 U.S.C. § 1182(a)(5)(A)(i)(I) (conditioning labor certification eligibility on whether “there are not sufficient workers who are able, willing, [and] qualified” for the labor the alien is proposing to perform).

164. See, e.g., *id.* § 1153(b)(2)(A) (providing visas for immigrants who are professionals or hold “advanced degrees or their equivalent” and who are “sought by an employer in the United States”).

165. See 20 C.F.R. § 656.10 (2018) (detailing the requirements of the labor certification process).

166. 8 U.S.C. § 1182(a)(5)(A)(i).

167. See, e.g., *id.* § 1153(b)(2)(A) (granting visa priority to immigrants based on their ability to benefit the national economy).

168. *Id.* §§ 1101(a)(27)(f)(i)–(ii).

169. “The Board of Immigration Appeals (BIA) is the highest administrative body for interpreting and applying immigration laws.” *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/9PRQ-DPEB>].

170. *In re Rajah*, 25 I. & N. Dec. 127 (BIA 2009).

171. *Id.* at 135–36.



*In re Hashmi*<sup>172</sup>—the leading case establishing factors to be considered by an immigration judge when ruling on a respondent's motion to continue.<sup>173</sup>

In *Rajah*, the respondent was a citizen and native of Morocco who entered the United States on a visitor's visa in 1994 and overstayed the allowed six-month stay period.<sup>174</sup> On or about April 30, 2001, the respondent's employer filed a labor certification, which was pending when the respondent was placed in removal proceedings in 2003 and charged with violating section 237(a)(1)(B) of the INA.<sup>175</sup> The respondent's case had been continued thirteen times in eighteen months for a variety of reasons, two of which were to afford time for the approval of a labor certification.<sup>176</sup> At the last scheduled hearing, the respondent again asked the court for a continuance to allow time for the labor certification to be approved.<sup>177</sup> The immigration judge ruled that the respondent had sufficient time to obtain an approval on the labor certification.<sup>178</sup> The BIA agreed; nevertheless the matter reached the Second Circuit Court of Appeals who remanded the case back to the BIA, ordering it to set standards for those seeking continuances.<sup>179</sup> On remand, the BIA held that "the pendency of a labor certification generally would not be sufficient to grant a continuance in the absence of additional persuasive factors, such as the demonstrated likelihood of its imminent adjudication or DHS support for the motion."<sup>180</sup> Specifically, the BIA found that the pendency of a labor certification alone, without evidence of the filing of a prima facie approvable visa petition, was not sufficient to prove eligibility for adjustment of status.<sup>181</sup>

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172. *In re Hashmi*, 24 I. & N. Dec. 785 (BIA 2009).

173. *Id.* at 785 (listing "a variety of factors" to be considered in determining "whether good cause exists to continue" proceedings).

174. *In re Rajah*, 25 I. & N. Dec. at 128.

175. Immigration and Nationality Act § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (2012); *In re Rajah*, 25 I. & N. Dec. at 128.

176. *In re Rajah*, 25 I. & N. Dec. at 128.

177. *Id.*

178. *Id.* at 129.

179. *Rajah v. Mukasey*, 544 F.3d 449, 450 (2d Cir. 2008).

180. *In re Rajah*, 25 I. & N. Dec. at 137 (footnote omitted).

181. *Id.*

Conversely, in *In re W-E-P-M*,<sup>182</sup> an unpublished BIA decision, the BIA held that the immigration judge erred when he denied a juvenile's request for a continuance based on the pendency of the predicate hearing for findings of fact.<sup>183</sup> The respondent in *In re W-E-P-M* was a juvenile citizen and national of El Salvador in removal proceedings for being inadmissible pursuant to section 212(a)(6)(A)(i) of the INA—in other words, for entering the United States without inspection.<sup>184</sup> While in proceedings, the respondent requested a continuance expressing his intention to file a petition in family court to seek a predicate order of abandonment, abuse, or neglect.<sup>185</sup> The immigration judge scheduled the matter for two weeks later, requesting that the respondent provide evidence of the filing of the petition with the family court for the predicate order.<sup>186</sup> At the next scheduled hearing, the respondent provided the court with a notice of hearing in the family court, and sought a continuance to seek permission from the family court to provide the immigration court with a copy of the petition due to the State's confidentiality laws pertaining to juveniles.<sup>187</sup> The immigration judge denied the respondent's request and ordered the respondent removed.<sup>188</sup> On appeal, the BIA found error with the immigration judge's denial of the continuance.<sup>189</sup> In particular, the BIA found the immigration judge abused his discretion because there was ample evidence that the case was filed and a hearing was scheduled.<sup>190</sup> Within the decision, the Court cites *In re Sanchez Sosa*,<sup>191</sup> which stands for the proposition that, generally, "there is a rebuttable presumption that [where] an alien . . . has filed a prima facie approvable application with the USCIS," the immigration

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182. *In re W-E-P-M*, AXXX XXX 859 (BIA July 15, 2015), <https://www.scribd.com/document/274423255/W-E-P-M-AXXX-XXX-859-BIA-July-15-2015> [https://perma.cc/BFC7-W949].

183. *Id.*

184. *Id.*

185. *See id.* (reporting the respondent planned on filing for SIJS status, which requires a juvenile court to first declare the immigrant "is deserving of protection because reunification with her parents was not viable due to abuse, neglect, or abandonment").

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *In re Sanchez Sosa*, 25 I. & N. Dec 807 (BIA 2012).

court should grant a continuance.<sup>192</sup> Notably, the respondent had not yet filed his *prima facie* application with USCIS but was in the same position—in the first step of the process—as the respondent in *Rajah*.<sup>193</sup>

Based on the BIA's position on granting motions to continue for immigrants seeking employment-based visas versus special immigrant juvenile visas, and on the sorts of documents each beneficiary must submit to prove their claim, it seems clear that although both of these processes—SIJS and employment-based visas—consist of three steps, the policy reasons for granting such statuses are very different.

#### IV. CONCLUSION

Immigrants are permitted to immigrate to the United States based on familial relationships, employment relationships, diversity, and humanitarian reasons.<sup>194</sup> Immigration law has created sections that separate family-based immigrants from employment-based, and diversity concerns from humanitarian ones.<sup>195</sup> These sections are determined based on each immigrant's situation.<sup>196</sup> Unaccompanied minors who come to the United States fleeing violence, poverty, and neglect by their parents or others are granted on humanitarian grounds.<sup>197</sup> The similarities in the stories of minor asylees, special immigrant juveniles, and immigration policy and procedure acknowledges that these two categories of immigrants are similar.<sup>198</sup> As such, unaccompanied minors classified as

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192. *In re W-E-P-M-*, AXXX XXX 859 (BIA July 15, 2015) (citing *In re Sanchez Sosa*, 25 I. & N. Dec 807, 815 (BIA 2012)), <https://www.scribd.com/document/274423255/W-E-P-M-XXXX-XXXX-859-BIA-July-15-2015> [<https://perma.cc/BFC7-W949>].

193. *See In re Rajah*, 25 I. & N. Dec. 127, 128 (BIA 2009) (describing the respondent's active pursuit of a continuance based on a pending labor certificate).

194. *See, e.g.*, Immigration and Nationality Act §§ 203(a)–(c), 8 U.S.C. §§ 1153(a)–(c) (2012) (grouping the allocation of visas into family-sponsored immigrants, employment-based immigrants, and diversity immigrants).

195. *See id.* (dividing the visa allocation process between family-sponsored immigrants, employment-based immigrants, and diversity immigrants); *see also id.* § 1158(b) (establishing the conditions for granting asylum status); *id.* § 1101(a)(27)(f)(i) (creating a separate category for special juvenile immigrants).

196. *See, e.g., id.* § 1153(b) (listing various ways to get an employment-based visa).

197. *See* POLICY MANUAL, *supra* note 21 (“Congress initially created the special immigrant juvenile (SIJ) classification to provide humanitarian protection for abused, neglected, or abandoned child immigrants eligible for long-term foster care.”).

198. *Compare* 8 U.S.C. § 1101(a)(42)(A) (defining refugees to include people who are unable or unwilling to return to their country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”), *with id.* § 1101(a)(27)(f) (defining special immigrant juveniles to include children who cannot

special immigrant juveniles should be given priority to receive their lawful permanent status with the same urgency immigration law and policy allows for minor asylees coming to the United States fleeing persecution. Special immigrant juveniles should not be subject to the numerical limitation of employment-based visas; rather, they should fall within the purview of section 201(b) of the INA, and be granted lawful permanent resident status immediately upon SIJS classification.

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return to their country “due to abuse, neglect, [or] abandonment” by “one or both of the immigrant’s parents”).