



# HUMANITARIAN FORMS OF RELIEF PART II: ASYLUM & SIJS

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This practice advisory is the second resource in a two-part series on Humanitarian Forms of Relief for noncitizen victims of violence, serious crimes and persecution. They include: T nonimmigrant status, U nonimmigrant status, VAWA self-petition, asylum, and special immigrant juvenile status. The first advisory focused on giving an overview of VAWA, U, and T Visas. Including, eligibility requirements and some factors to consider before applying. This practice advisory will focus on giving an overview of asylum and special immigrant juvenile status (SIJS), including their eligibility requirements and some factors to consider before applying.

These advisories should be used as general guidance, to identify potential eligibility, and to understand the processes and benefits of each form of relief. For a more detailed analysis on issues related to humanitarian forms of relief, please visit the Immigrant Legal Resource Center website at <https://www.ilrc.org/immigrant-youth> for more information on SIJS and <https://www.ilrc.org/asylum> for more information on asylum.

## I. Asylum:

Asylum is a form of protection available to individuals who are fleeing persecution or have a fear of persecution in their home country and meet the international definition of “refugee.” Individuals granted asylum will be eligible to live permanently in the United States, apply for lawful permanent residence, and petition for derivatives.

### Law:

Asylum is incorporated into the Immigration and Nationality Act (INA) at INA § 208 for individuals who are applying for protection inside the country. Persons who are outside the United States must apply for refugee status pursuant to INA § 207. Asylum regulations can be found at 8 CFR § 208.

### A. Eligibility for Asylum:

An individual is eligible to apply for asylum if they are physically present in the United States, meet the refugee definition, are not statutorily barred from applying, and merit a favorable exercise of discretion. A refugee is someone who is “unable or unwilling to return to, and is unable or unwilling to avail themselves of the protection of, that 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.”<sup>1</sup>

**The eligibility requirements for asylum are:**

1. The harm feared/suffered rises to the level of persecution;
2. The fear is based on:
  - a. Past persecution OR
  - b. Well-founded fear of future persecution
3. Persecution was or would be *on account of* 1 of 5 enumerated grounds;
4. They could not avail themselves of the protection of their home country; and
5. That they are not barred from asylum protection.

**1. Persecution:**

Applicants for asylum have to show that the harm feared rises to the level of persecution. The INA does not define persecution, but a definition has been outlined by the Board of Immigration Appeals (BIA). The BIA states that persecution is “a threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive.”<sup>2</sup> Physical harm is not necessary to find persecution and courts have used a general definition of persecution that includes many forms of harm beyond physical harm, such as depriving a person of their freedom, food, housing, employment, or other essentials of life.<sup>3</sup>

Without a set definition, determining what constitutes persecution is a fact-intensive inquiry carried out by asylum officers and immigration judges. Adjudicators usually consider the following:

- **The cumulative effect of harm**— Adjudicators will take into consideration the cumulative effect of the abuses committed against the individual and determine whether the combination of those incidents rise to the level of persecution.<sup>4</sup>
- **Applicant’s subjective belief’s and character must be considered** a finding of persecution will depend in part on the subjective character of the asylum applicant.
- **The persecutor need not intend to harm the applicant**— the persecutor’s intent to punish or hurt the victim is not needed to find persecution since some persecutors may have acted to help the asylum seeker or include them in a cultural practice.<sup>5</sup>

Past Persecution refers to harm suffered before the applicant left their country. An applicant who can establish that they were persecuted in the past benefits from a presumption of a well-founded fear of future persecution, and in some cases, can be granted asylum on the basis of severe past persecution alone.

Well Founded Fear of Future Persecution refers to persecution feared by the asylum seeker. The fear must be both subjectively held (genuine) and objectively reasonable (plausible).<sup>6</sup> The fear may stem from harm to their family, or similarly situated individuals.<sup>7</sup> Past persecution can be used to establish likelihood of future persecution.<sup>8</sup>

**2. Nexus:**

Applicants will have to show that the persecution they suffered was “on account of” 1 of the 5 protected grounds. This is often referred to as the nexus and requires establishing a link between the persecution they experienced or fear and one of the protect grounds in the refugee definition. Proving the persecutor’s motivation<sup>9</sup> can be established by either **direct**<sup>10</sup> or **circumstantial**<sup>11</sup> evidence. Whether the persecutor intends to harm the applicant is irrelevant. The applicant will need to show that they were persecuted or will be because of their race, religion, nationality, political opinion, or membership in a particular social group.<sup>12</sup>

**Example:** After Svetlana’s parents saw her kissing and holding hands with one of her girlfriends from school, they interrogated their 17-year-old daughter and told her she would need to seek psychiatric help and possibly other medical treatment if she wished to continue living in their home and attending school. Fearing for her life and safety after a few psychiatric sessions where she was threatened with additional “corrective treatment,” Svetlana

ran away from home. The acts that Svetlana would be forced to undergo in order to “correct” her sexual orientation constitutes persecution on account of membership in the particular social group of young lesbians in Russia. To meet the nexus requirement, Svetlana must prove that any emotional, psychological, and even physical harm she might suffer as a result of the “corrective” medical treatment would be motivated by her being a lesbian. She must show a causal link between the persecution she will suffer (corrective medical treatment) and the protected ground that applies to her (the particular social group of young lesbians in Russia).

### 3. Enumerated Grounds:

In order to qualify for asylum, the applicant must have been persecuted on account of race, religion, nationality, political opinion, or membership in a particular social group.

Political opinion—beliefs about the society in which the applicant lived, “even if they did not participate in organized political activities.”<sup>13</sup> To demonstrate a nexus between the harm an applicant suffered and their political opinion, the applicant must prove that they held (or their prosecutor believed that they held) a political opinion and they were harmed because of that opinion.<sup>14</sup>

Membership in a particular social group—a more open-ended ground that requires the applicant to define it. It does not require formal membership but rather refers to a “group of persons who share a common characteristic other than their risk of being persecuted OR who are perceived as a group by society.”<sup>15</sup>

In defining particular social group, the BIA has held that three elements must be present:

- (1) Members of a social group must share an “**immutable characteristic**” or a fundamental characteristic that the group cannot or should not be required to change. The characteristic must be “one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>16</sup>
- (2) The group must be defined with “**particularity.**” The core question is “whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a **discrete class of persons.**”<sup>17</sup>
- (3) The social group must be “**socially distinct**” or recognizable within the society in question.<sup>18</sup>

**Note on *Matter of L-E-A*:** In July 2019, Attorney General William Barr issued an opinion in *Matter of L-E-A*,<sup>19</sup> which called into question whether “a nuclear family” will constitute a particular social group for purposes of asylum eligibility. The AG stated that a categorical rule that any nuclear family could be a cognizable PSG is inconsistent with both asylum law and BIA precedent<sup>20</sup> and that asylum adjudicators must look at the whether the specific family is distinct from other persons within the society in some significant way.<sup>21</sup>

For more information on this decision and strategies advocates can use when filing these claims, see the Catholic Legal Immigration Network, Inc. (CLINIC) Practice Pointer *Matter of L-E-A*, 27 I&N Dec. 581 (A.G. 2019), August 2, 2019, <https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Litigation/L-E-A-Practice-Pointer-8-2-2019-Final.pdf>.

Religion—can implicate the right to hold a belief or the right to practice one’s belief, or both. This can include the protection of the “right to freedom of thought, conscience and religion, which includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship, and observance”<sup>22</sup>

Nationality & Race—there is significant overlap between cases that argue persecution based on race and nationality. The term nationality can refer to citizenship, but also encompasses ethnic and linguistic groups. Race also refers to members of an ethnic or minority group.<sup>23</sup>

#### 4. Persecutor State versus Non-State Actor:

An applicant for asylum will have to show that they are unable or unwilling to avail themselves of the protection of their home country. An applicant can be unwilling to seek protection because of fear of harm or unable because the government cannot or will not offer protection.<sup>24</sup> When proving this, applicants will have to show that the harm was inflicted by a “state actor” or a “non-state actor” who the government was unable to unwilling to control. A “state actor” is an individual or group who is part of the government. When the state actor is the persecutor, the applicant will not need to show they attempted to report the persecution to the police or to explain why the persecution was not reported.<sup>25</sup> A “non-state” actor includes all private individuals and groups, including family members. When the non-state actor is inflicting the harm, applicants may have to show that they sought the protection of the state but did not receive it. It is not essential to report harm to authorities when country conditions information indicates that reporting would have been dangerous or futile.<sup>26</sup>

**Note on *Matter of A-B*:** In June 2018, the U.S. Attorney General Sessions (AG) issued *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018), which threatens the viability of asylum claims of domestic violence survivors and others who have faced persecution by a private actor. The AG deemed persecution by non-governmental actors as suspect questioning the validity of the asylum claims. This decision raises concerns for applications based on other protected grounds where a private actor carried out the persecution, specifically raising concerns about the likelihood of succeeding with claims of persecution based on domestic violence and gang violence. The AG decision gives a higher standard for satisfying the element of the government being “unable or unwilling,” stating that inaction alone is insufficient to satisfy the element and that applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims. It is important to note that the language of the decision does not alter the legal framework underlying asylum claims, but ICE and USCIS has incorporated the decisions’ language into policy memoranda and implementing new policy when evaluating these cases.

There are resources available on how to argue these cases and strategies when filing asylum claims. For more information about *Matter of A-B* and related practice materials, see <https://cgrs.uchastings.edu/A-B-Action> and ILRC’s Practice Advisory *Matter of A-B- Consideration* available at [https://www.ilrc.org/sites/default/files/resources/matter\\_a\\_b\\_considerations-20180927.pdf](https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf).

#### 5. Bars to Asylum Protection:

Applicants for asylum must not be statutorily barred. These statutory bars only apply to applicants who file for asylum after April 1, 1997. One of the most common is the one-year filing deadline that states an applicant who failed to file within one year of entry is barred from asylum.<sup>27</sup> There are some exceptions to meeting the one year filing deadline for “changed circumstances” and “extraordinary circumstances” at 8 CFR § 208.4. Changed circumstances refer to situations directly affecting the applicant’s eligibility for asylum, like a change in the applicant’s home country.<sup>28</sup> Extraordinary circumstances refer to factors related to missing the 1-year filing deadline. Applicants will have to show they did not intentionally fail to file because of their own actions or inactions.<sup>29</sup>

Other bars include having an application previously denied, reentering after removal, conviction of a particular serious crime, committing a serious nonpolitical crime in home country, or persecution of others. A complete list of bars can be found in the regulations at 8 CFR § 208.4.

## B. Benefits of Asylum:

If an asylum application remains pending for a period of 150 days without a decision or applicant-caused delay, the applicant will be eligible to apply for a work permit (EAD). Also, applicants may be eligible for some public benefits depending on the state they live in.

Applicants who are granted asylum are given lawful status indefinitely. Asylum never expires and if an applicant chooses to, they can remain in this status. Asylees are able to work legally in the United States and apply for lawful permanent residence after 1 year of being granted asylum. Furthermore, they will be eligible for several public benefits, like health and medical services, cash assistance, food stamps and others.

**Derivatives:** Applicants can include their spouses and unmarried children under 21 years of age in their asylum application and, if the application, is approved, they will be granted asylum as well. An asylee is able to petition derivatives, even after being granted asylum, whether they live in the United States or abroad, so long as they do so within two years of receiving asylum.

**Waiver:** An asylee who is applying for adjustment of status must also show they are not inadmissible to the United States under the grounds of inadmissibility at INA § 212(a). There are some grounds of inadmissibility that do not apply to asylees, like the public charge. Asylees are eligible to apply for a waiver under INA § 209(c) for inadmissibility grounds that do apply. This waiver is more generous than the regular waivers under the various sections of INA § 212, as it allows USCIS to approve such a waiver “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”

**Pathway to Lawful Permanent Residence:** An asylee will be able to apply for lawful permanent residence one year after being granted asylum. Asylees adjust status under INA § 209. Asylees are eligible to adjust status if they are in status, have been physically present in the United States for one-year, have not otherwise acquired LPR status, and are not inadmissible.

Although asylees are not required to file for adjustment, since their status will never expire, they are encouraged to, so that they can access other benefits, naturalize, and ensure they do not lose their protection.

**Travel:** Asylees can apply for a refugee travel document for international travel. However, asylees cannot travel back to their country of origin and generally should not do so, unless there is an emergency, until they become U.S. Citizen.

## C. Considerations Before Applying for Asylum Status:

- Every asylum application requires either an interview with an asylum officer or a hearing before an immigration judge.
- Asylum cases that are not granted at the asylum office are referred to immigration court.
- There have been recent cases decided by the Attorney General and BIA attempting to limit many types of asylum claims—including claims based on domestic violence, gang violence, and the nuclear family. Despite this, asylum law has not changed, and adjudicators still have to analyze on a case by case basis.<sup>30</sup>
- Affirmative asylum applications- those filed by people who do not have an active case in immigration court- are processed on a ‘last in, first out’ basis. Therefore, someone who applies will likely have an interview within a few weeks of submitting their application.
- While asylees can travel internationally with a refugee travel document, they should not travel back to their country of origin.

## II. Special Immigrant Juvenile Visa (SIJS):

Special Immigrant Juvenile Status (SIJS) is a form of immigration relief available to undocumented children and youth who have been abandoned, neglected, or abused by one or both parents AND who have been found to be dependent upon a juvenile court or placed in the custody of an agency, entity, or individual appointed by the court. Individuals granted SIJS will be eligible to apply for Lawful Permanent Status once a visa is available.

### Law:

The law for SIJS can be located at INA § 101(a)(27)(J) and the regulations are located at 8 CFR § 204.11.

Note that the regulations have not been updated to reflect changes made to SIJS by the Trafficking Victims Protection and Reauthorization Act (TVPRA) of 2008. It is important that individuals working on these cases use the Statute and Regulations with the new USCIS policy guidance available at: <https://www.uscis.gov/policymanual/HTML/PolicyManual.html> -I-360: Volume 6 (Immigrants), Part J (Special Immigrant Juveniles).

Furthermore, SIJS depends on the law of the State in which the findings are made.

### A. Eligibility for SIJS:

#### The eligibility requirements for SIJS<sup>31</sup>:

1. Declared dependent of a juvenile court **or** placed under the custody of a state agency or individual or entity appointed by the state or court;
2. Reunification with one **or** both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
3. Not in youth's best interest to be returned to country of origin.
4. Under 21 years of age;<sup>32</sup>
5. Unmarried;

Before filing with USCIS, an applicant will have to obtain an order from a juvenile court with jurisdiction over the applicant where the judge finds that they meet the above requirements. These are referred to as "SIJS Findings." The SIJS findings must find that the child meets all of the eligibility requirements listed above.

#### **1. Dependent of a juvenile court or placed under the custody of a state agency/individual/entity:**

In order to be eligible to apply for SIJS, the applicant must be declared a dependent of a juvenile court or the court must have legally committed the child to, or placed them under the custody of, an agency or department of a state or an individual or entity appointed by a state or juvenile court.<sup>33</sup> A juvenile court is any court located in the United States that has jurisdiction under the state law to make judicial determinations about the custody of juvenile.<sup>34</sup>

Dependency refers to the process by which decisions are made about the custody and care of a child who has come into the child welfare system because they are "dependent" upon government intervention to ensure their adequate care. When a juvenile court accepts jurisdiction to make a decision about the care and custody of a child, the child is dependent on a juvenile court and therefore the court can make SIJS findings.<sup>35</sup> This includes dependency court (child welfare), probate court (guardianship), family court (custody), and delinquency court (alleged violations of law by youth)<sup>36</sup>.

**Note for Applicants 18-21 years old**—State laws vary as to how long a child can remain under juvenile court jurisdiction. Some states end dependency at 18 while others extend it until 21. This is in direct conflict with the statute which allows any person under 21 to apply. Because of this tension, there is a class of youth who are effectively barred from applying because no state court can take jurisdiction of them.

Additionally, recently USCIS has begun denying cases for youth who obtained a SIJS finding after they turned 18 years old. USCIS stated that state courts do not have power or authority to make these finding since they do not have the power to give custody back to the parents once the child turns 18. A class action lawsuit has been filed in New York and California challenging USCIS's denial of cases. *R.F.M. et al v. Nielsen et al*, No. 1:18-cv-05068 (S.D.N.Y. filed June 7, 2018); *J.L. et al v. Cissna et al*, No. 5:18-cv-04914 (N.D. Cal. filed Aug. 14, 2018).

Recently, the United States District Court of Southern District of New York issued a decision on the *R.F.M. et al v. Nielsen et al*, finding that the Government violated the law for all people like the plaintiffs (individuals whose application was based on New York Family Court Special Findings Order issued between their 18<sup>th</sup> and 21<sup>st</sup> birthday after January 1, 2016). For more information on the class action visit <https://www.uscis.gov/legal-resources/legal-settlement-notice/class-notice-rfm-v-nielsen-118-cv-5068-sdny>.

Visit the ILRC <https://www.ilrc.org/immigrant-youth> and Kids in Need of Defense (KIND) at <https://supportkind.org/> for general information on this matter.

## 2. Reunification with one or both parents is not viable due to abuse, neglect, or abandonment:

Applicants for SIJS will need a state court to find that reunification with one or both parents is not viable due to abuse, neglect or abandonment.

**Reunification not viable:** A state court must make a determination that reunification with one or both parents is not viable. This finding must happen under state law and without this a child cannot apply for SIJS.<sup>37</sup> This does not require a formal termination of parental rights or a determination that reunification will never be possible. In fact, it is possible that future reunification can happen without making a child ineligible, **BUT** separation should be significant and more than just short term.<sup>38</sup> Furthermore, the child does not need to be separated from both parents to be eligible for SIJS. In one-parent SIJS cases, where a child is in the custody of one parent, a court can still issue SIJS findings.

**Abuse, neglect, or abandonment:** A state court must find that reunification was not possible because of the abuse, neglect, or abandonment (or similar state law).<sup>39</sup> Abuse, neglect, and abandonment are defined under the law of the state where the child resides when filing for SIJS. There is no requirement that the abuse, neglect, or abandonment took place in the United States for the child to be eligible. This also does not require that formal charges of abuse, neglect, or abandonment be levied against that parent(s).

**Example:** Daniel, a 13-year-old boy from Honduras, was detained when entering the United States. He was later reunified with his mother in Fresno. Daniel had not seen his mother since he was eight, when she came to the United States to work and send money home to provide for Daniel. Daniel was raised by his maternal grandparents in Honduras. Daniel's father has not had any contact with him since he was three years old nor has he provided any financial or emotional support. Daniel's maternal grandparents cared for him in Honduras, but they were unable to protect him from gang violence and threats as he grew older.

Here, Daniel would be eligible to seek SIJS even though he is living with his mother because his father abandoned him when he was three years old. Moreover, it would not be in Daniel's best interest to return to Honduras because his grandparent's, who cared for him, were unable to shield him from danger in his home country and his mother would be able to care for him here.

### 3. Not in the youth's best interest to be returned to country of origin:

The court has to determine that it is not in the child's best interest to return to their home country. This can be shown through documentation about how the child is best supported by staying in the United States. For example, applicants can speak to their support network as well as their access to education, justice systems, and medical attention. In addition, country conditions information about their home country and the lack of resources or poor living conditions there can bolster their claim. For example, applicants can describe how they do not have a family member that can care for them in their home country or protect them from harm.

#### B. Benefits of SIJS:

Applicants who are granted SIJS will be eligible to apply for LPR status once a visa becomes available. Once they adjust status, they will be able to access public benefits and work lawfully.

Even though most locations do not allow access to public benefits until SIJS applicants adjust status, some states and localities do make certain benefits available to these minors. Other states provide general access for all minors to certain benefits regardless of immigration status.

**Derivatives:** SIJS applicants cannot include derivatives and while they can petition certain family members once they are LPRs or USCs through the regular family-based system, they are prohibited from ever petitioning their parents.

**Waiver:** There are many grounds of inadmissibility that do not apply to SIJS-based adjustment of status. There is no need to file for a waiver for those grounds, even if the child has triggered them. In addition, SIJS-based adjustment of status applicants are eligible for a waiver under INA § 245(h)(2)(B) for "humanitarian purposes, family unity, or when it is otherwise in the public interest" for the grounds that do apply to them.

As for March 2009, the following grounds of inadmissibility automatically do not apply to SIJS-based adjustment of status applicants and no application for a waiver is needed: public charge; aliens present without admission or parole; misrepresentation, including false claim to USC; stowaways; immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document; and unlawful presence (though minors do not accrue unlawful presence).

Most of the remaining grounds of inadmissibility may be "waived" for SIJS<sup>40</sup>: health related grounds; prostitution and commercialized vices; failure to attend removal proceedings; smugglers; previous removals.

**Pathway to Lawful Permanent Residence:** An individual with an approved SIJS petition will be able to apply to adjust status when a visa becomes available. Depending on the country of origin of the minor, it may be possible to apply for adjustment concurrently or the individual may be subject to a waiting list. Once the applicant submits their application to adjust status, they will be issued a work permit. SIJS recipients are subject to the Employment-Based Preference Category 4. Minors from El Salvador, Guatemala, Honduras, and Mexico are subject to wait list while minors from any other country are immediately eligible to adjust status. Applicants can refer to the Visa Bulletin to estimate when their visa will be available at: <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-june-2019.html>.

#### C. Considerations Before Applying for SIJS Status:

- There are some discrepancies between states on when a child can be declared dependent on a court making it hard for some applicants between the ages of 18-21 years old to apply for SIJS despite the statute allowing for children who are under 21 to apply;
- Recently USCIS has been denying cases for youth who received their SIJS findings after turning 18 years old. Previously, cases in which the youth was over 18 were routinely approved but it has been reported that



changes in policy have resulted in massive denials of these cases. There have been class action lawsuits filed in New York and California and advocates should visit the ILRC at <https://www.ilrc.org/immigrant-youth>, and Kids in Need of Defense (KIND) at <https://supportkind.org/> for up to information and resources on the matter;<sup>41</sup>

- An applicant who is divorced or has children will not be barred from eligibility BUT an applicant will be ineligible if they are married. Applicants must remain unmarried until they are granted LPR;
- SIJS visas are given under the 4<sup>th</sup> preference category of employment-based visas (E4)—these have been recently oversubscribed for immigrants from El Salvador, Guatemala, Honduras, and Mexico. Applicants from these countries will have to wait until a visa is available before they can submit their application for adjustment.
- SIJS applicants are prohibited from ever petitioning their parents, even once they are USCs.

### III. Conclusion:

The above is only a brief overview of what makes a person eligible for these humanitarian forms of relief. It is important to research each immigration option thoroughly before submitting an application and to consult immigration experts for any complex cases, especially in light of recent changes in policy and procedure within the Department of Homeland Security and Immigration Courts. Below is a list of resources to support advocates in exploring and pursuing these legal options with clients.

### IV. Resources:

- For technical assistance when filing these applications:
  - ILRC Attorney of the Day Technical Assistance at <https://www.ilrc.org/technical-assistance>
  - Kids in Need of Defense (KIND) for assistance on youth filings at <https://supportkind.org/resources/>
  - Center for Gender and Refugee Studies (CGRS) for Asylum at <https://cgrs.uchastings.edu/request-assistance/requesting-assistance-cgrs>
- To refer clients to a free or low-cost, trusted legal service provider:
  - National Immigration Legal Services Directory: <https://www.immigrationadvocates.org/nonprofit/legaldirectory/>
- The National Immigration Law Center for resources on access to public benefits at [www.nilc.org/accesstobens.html](http://www.nilc.org/accesstobens.html).
- USCIS released a new policy regarding when they will issue Notices to Appear (NTA) for applications that are denied, and the applicant has no other lawful status. For more information on how these impact these cases visit: <https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance>
- There will be changes to the fee waiver in the coming months that may make it harder for applicants to apply because of application costs. Visit the ILRC website for up to date information on changes to the fee waiver at <https://www.ilrc.org/>.

## End Notes

<sup>1</sup> INA § 101(a)(42)(A).

<sup>2</sup> *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

<sup>3</sup> See *In re T-Z-*, 24 I&N Dec. 163, 171 (BIA 2007) (quoting H.R. Rep. No. 95-1452, at 5, as reprinted in 1978 USCCAN 4700, 4704, 1978 WL 8575 (“House Report”)).

<sup>4</sup> See, e.g., *Bracic v. Holder*, 603 F.3d 1027, 1035-36 (8th Cir. 2010) (finding past persecution where respondent described numerous incidents of mistreatment by police and individuals dressed in police uniform, credible threats and beatings from soldiers, police and spy groups that had the authority to execute Muslims); *Javhlan v. Holder*, 626 F.3d 1119, 1123 (9th Cir. 2010) (detainment for four to five hours plus many threats to life resulting in partial stroke cumulatively constituted persecution); *Maldonado v. Att’y Gen.*, 188 Fed. Appx. 101 (3rd Cir. 2006) (finding that a gay man from Argentina had experienced persecution even though he had never suffered serious physical injuries, because he had been arrested and detained at least twenty times after coming out of a gay club); see also *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998) (“We find that these incidents constitute more than mere discrimination and harassment. In the aggregate, they rise to the level of persecution as contemplated by the Act”); *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (“The key question is whether, looking at the cumulative effect of all the incidents petitioner has suffered, the treatment she received rises to the level of persecution”).

<sup>5</sup> *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

<sup>6</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987).

<sup>7</sup> *Chen v. INS*, 195 F.3d 198, 203 (4th Cir. 1999); *Kourouma v. Holder*, 588 F.3d 234, 240 (4th Cir. 2009); *Huaman-Cornelio v. BIA*, 979 F.2d 995, 999 (4th Cir. 1992).

<sup>8</sup> *Salari v. Ashcroft*, 114 F.App’x 815, 816 (9th Cir. 2004).

<sup>9</sup> *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

<sup>10</sup> Direct Evidence of Motivation—statements made by either the persecutor or the applicant, notes left by the persecutor.

<sup>11</sup> Circumstantial Evidence of Motivation—overly severe punishment, flyers for hate groups left by the persecutor, anonymous threats and calls

<sup>12</sup> In *INS v. Elias-Zacaris* the “Court held that an asylum applicant must show proof of the persecutor’s motivation and demonstrate that the persecutor harmed the applicant “on account of” one of the enumerated grounds.

<sup>13</sup> *Meza-Menay v. INS*, 139 F.3d 759, 763 (9th Cir. 1998); see also *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (finding applicant’s belief that armed forces could not be restrained from their brutality constituted a political opinion even where the applicant “camouflaged” her belief and did not participate in politics), overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*).

<sup>14</sup> *Antonyan v. Holder*, 642 F.3d 1250, 1254 (9th Cir. 2011) (pre-REAL ID Act application).

<sup>15</sup> UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, at ¶ 29, 7, available at [www.unhcr.org/en-us/publications/legal/3d58ddef4/guidelines-internationalprotection-1-gender-related-persecution-context.html](http://www.unhcr.org/en-us/publications/legal/3d58ddef4/guidelines-internationalprotection-1-gender-related-persecution-context.html) (last visited: June 11, 2019).

<sup>16</sup> *Matter of Acosta*, 19 I&N Dec. at 233.

<sup>17</sup> *Matter of S-E-G*, 24 I&N Dec. 579, 584 (BIA 2008) (emphasis added).

<sup>18</sup> See *Matter of M-E-V-G, Respondent*, 26 I&N Dec. 227, 237 (BIA 2014); see also *Matter of W-G-R, Respondent*, 26 I&N Dec. 208 (BIA 2014) (review granted in part and vacated on other grounds by *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016)).

<sup>19</sup> *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019).

<sup>20</sup> *Id.* at 591.

<sup>21</sup> *Id.* at 594 (emphasis original).

<sup>22</sup> UN Handbook at ¶ 71, 16.

<sup>23</sup> UN Handbook at ¶ 74, 16.

<sup>24</sup> *Navas v. INS*, 217 F.3d at 655-56.

<sup>25</sup> *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (“Only where non-governmental actors are

responsible for persecution do we consider whether an applicant reports the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors”).

<sup>26</sup> *In re S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (explaining that

reporting is unreasonable in certain circumstances, e.g., where the applicant’s persecutor is family who continues to closely monitor her every action).

<sup>27</sup> 8 CFR § 208.4(a)(2).

<sup>28</sup> 8 CFR § 208.4(a)(4)(i).

<sup>29</sup> 8 CFR § 208.4(a)(5)(i).

<sup>30</sup> See Immigrant Legal Resource Center’s Practice Advisory *Matter of A-B- Considerations* available at [https://www.ilrc.org/sites/default/files/resources/matter\\_a\\_b\\_considerations-20180927.pdf](https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf) and the Center for Refugee and Gender Studies *Matter of A-B- Resources* available at <https://cgrs.uchastings.edu/A-B-Action> for more information on strategies for filing cases.

<sup>31</sup> INA § 101(a)(27)(J).

<sup>32</sup> TVPRA provided an age out protection for SIJS, beginning in Dec. 23, 2008 so long as an applicant is under 21 years of age on the date on which an SIJS petition is properly filed, USCIS cannot deny SIJS to a person based on age. (Special Immigrant Juvenile Petitions 76 Fed. Reg. 54978 (sept. 6, 2011)).

<sup>33</sup> INA § 101(a)(27)(J)(i).

<sup>34</sup> 8 CFR 204.11(a).

<sup>35</sup> See, e.g., *In re Y.M.*, 207 Cal. App. 4th 892 (4th Dist. 2012).

<sup>36</sup> Note that that in other states juvenile courts may have different names and different types of qualifying proceedings (e.g., Surrogates Court, or “destitute child” proceedings in NY).

<sup>37</sup> INA § 101(a)(27)(J).

<sup>38</sup> *USCIS Policy Manual* Vol. 6, Part J, Ch. 2(D)(2) available at <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2>.

<sup>39</sup> INA 101(a)(27)(J)(i).

<sup>40</sup> See INA § 245(h)(2)(B), as amended by the Miscellaneous and Technical Corrections Act of 1991 § 301(d)(2); USCIS Memorandum, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, HQOPS 70, 8.5, 4–5 (Mar. 24, 2009) [hereinafter *Neufeld Memorandum*]; 7 USCIS-PM F(7)(C)(4).

<sup>41</sup> Liz Robbins, *A Rule is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES, Apr. 17, 2018, <https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html>. This change occurred without USCIS issuing any public announcement about a change in policy or otherwise announcing a changed interpretation of the SIJS eligibility requirements. Soon thereafter, *Politico* reported on a “clarification” by the USCIS chief counsel’s office—never announced publicly—“which called in February for the agency to reject pending applications in cases where applicants could not be returned to the custody of a parent.” Ted Hesson, *USCIS Explains Juvenile Visa Denials*, POLITICO, Apr. 25, 2018, <https://www.politico.com/newsletters/morning-shift/2018/04/25/travel-ban-at-scotus-182935>. Since most courts cannot place a child back into the custody of their parent once the child reaches the age of majority, according to the new USCIS interpretation, those state courts “do not have power and authority to make the reunification findings for purposes of SIJ eligibility.” *Id.* At the time of writing, class action lawsuits have been filed in New York and California challenging USCIS’s denial of cases based on this unannounced policy change. *M. et al v. Nielsen et al*, No. 1:18-cv-05068 (S.D.N.Y. filed June 7, 2018); *J.L. et al v. Cissna et al*, No. 5:18-cv-04914 (N.D. Cal. filed Aug. 14, 2018). However, in the meantime, it seems clear that USCIS intends to deny many cases in which the SIJS findings were obtained after the youth turned eighteen, though this may depend to some extent on state law



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**About the Immigrant Legal Resource Center**

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.