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Keeping Promises to Immigrant Youth

Theo S. Liebmann*

As New York's immigrant population of nearly four million continues to grow, so too does the number of immigrant youth.¹ Yet, until recently, there has been remarkably little consistency on the role of the courts and government agencies in addressing the needs of immigrant youth. In particular, questions have lingered on the role of the state in implementing a remarkably compassionate section of the federal Immigration and Nationality Act that provides a pathway for abused, neglected, or abandoned children under twenty-one to obtain legal status.² This pathway, called Special Immigrant Juvenile ("SIJ") status,³ allows immigrant youth to petition for status as a permanent legal resident—commonly known as a "green card"—so long as they meet certain criteria.⁴ SIJ status has understandably been embraced by many immigration and family lawyers around the country as the best hope to normalize the lives of youths confronting the dual daunting challenges of abusive homes and harsh governmental treatment of illegal immigrants.⁵

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1. See Pew Hispanic Center, Foreign Born at Mid-Decade, Table 11, Change in Foreign Population by State: 2000 and 2005 (Oct. 2006), <http://pewhispanic.org/files/other/foreignborn/Table-11.pdf>.

2. See § 101, 8 U.S.C. § 1101(a)(27)(J) (2006); USCIS Special Immigrant Juvenile Rule, 8 C.F.R. § 204.11 (2009) (interpreting and implementing § 1101(a)(27)(J)).

3. 8 U.S.C. § 1101(a)(27)(J)(iii); 8 C.F.R. § 204.11.

4. See 8 C.F.R. § 204.11(a)-(c).

5. See, e.g., Michelle Abarca et al., *No Abused, Abandoned, or Neglected Child Left Behind: Overcoming Barriers Facing Special Immigrant Juveniles*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 520 (Gregory P. Adams et al. eds., 2007-2008); Anne Chandler, et al., *The ABCs of Working With Immigrant Children to Obtain Special Immigrant Juvenile Status for Those Abused, Neglected, or Abandoned*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 308 (Gregory P. Adams et al. eds., 2006-2007).

While federal law has provided a method for these youths to legalize their status for nearly eighteen years,⁶ New York courts, legislative bodies, and agencies have only recently reconciled some of the key aspects of how the federal law should be applied in New York State.⁷ In particular, there has long been a lack of clear guidance in New York on two crucial questions related to SIJ status: (1) whether local child protection services (“CPS”) departments have any legal mandate to assist eligible immigrant youths in their care in obtaining legal status, and (2) which youths meet the SIJ status eligibility requirements under state law? These are fundamental questions. If the answer to the first is “no,” then it will be only a lucky few youths, who happen to have extraordinarily knowledgeable and proactive CPS caseworkers, who will benefit from SIJ status, even though thousands may be eligible. The answer to the second determines vital aspects of the law’s application, such as the maximum age at which a youth is covered and what kinds of cases in family court meet the SIJ requirements.

The lack of clarity on these issues has led to a confusing and inconsistent application of the law in state courts and social services departments. Some judges have been very open to applying the law to youths in guardianship cases,⁸ while others have refused outright.⁹ Similarly, some local jurisdictions, like New York City’s Administration for Children’s Services, have issued clear guidelines for their caseworkers to assist neglected youths who have no legal status,¹⁰ while others have seemed

6. See Immigration Act of 1990, sec. 153, §101(a)(27), 104 Stat. 4978, 5005-06 (codified as amended at 8 U.S.C. § 1101(a)(27)(J)); 8 C.F.R. § 204.11 (rule issued on May 21, 1991).

7. See *infra* Parts II-III. Other states have already taken steps to address these questions. In California, for example, child welfare agencies must submit reports which verify that youths in their care have proof of citizenship or residence before they age out of the foster system. See CAL. WELF. & INST. CODE § 391(a)(2) (West 2008). These agencies must also teach all undocumented youth in their care how to acquire and complete a SIJ application. See CAL. CODE REGS. tit. 22, § 86070(b)(1) (2009).

8. See *In re* K.B., 2008 N.Y. Misc. LEXIS 4657, at *3-5, (Sur. Ct. Aug. 7, 2008).

9. See *In re* Guardianship of Vanessa D., 834 N.Y.S.2d 644, 646-47 (Fam. Ct. 2007), *appeal dismissed sub nom. In re* Vanessa D., 858 N.Y.S.2d 687 (App. Div. 2008).

10. See NYC ADMIN. FOR CHILDREN’S SERVS., IMMIGRATION AND LANGUAGE GUIDELINES FOR CHILD WELFARE STAFF (2d ed. 2005), available at http://www.nyc.gov/html/acs/downloads/pdf/immigration_language_guide.pdf.

completely unaware that the SIJ law even exists.¹¹ Fortunately, in the past year, statutory and appellate law, as well as directives from the state's Office of Children and Family Services and Unified Court System, provided much-needed clarification on (1) the responsibilities of the social service agencies and (2) which youths are eligible under New York law.¹² This essay briefly reviews the original SIJ law passed by the U.S. Congress, the role of the states within that legislation, and how statutes, case law, and state agency directives of the past few months have defined the roles of agencies and courts and defined youth eligibility.

I. The SIJ Process

Family courts play a major role in enabling children to obtain SIJ status. While the SIJ petition itself must be brought before the federal Citizenship and Immigration Services agency ("CIS"), these petitions may not be brought until a family court has rendered an order containing what the federal statute refers to as "special immigrant" findings.¹³ These findings concern matters within the traditional purview of family courts: (1) whether the child is dependent on the juvenile court,¹⁴ (2) whether the child's reunification with one or more of her parents is not viable because the parents have abandoned, abused, or neglected the child,¹⁵ and (3) whether or not it is in the best interest of the child to be returned to his or her country of origin.¹⁶ A family court plays no role in the final determination of the child's immigration status. That decision remains solely within the power of CIS.¹⁷ The special findings, however, may only be made by a state family or juvenile court.¹⁸ Thus, these courts are an indispensable facet of the application for SIJ sta-

11. Not a single other county in New York State has guidelines or procedures in place to handle SIJ cases.

12. See *infra* Parts II-III.

13. Immigration and Nationality Act of 1952 § 101, 8 U.S.C. § 1101(a)(27) (2006); USCIS Special Immigrant Juvenile Rule, 8 C.F.R. § 204.11 (2009).

14. 8 C.F.R. § 204.11(c)(3).

15. 8 U.S.C. § 1101(a)(27)(J)(i).

16. 8 C.F.R. § 204.11(c)(6). The family court must also make findings as to the age and marital status of the child. *Id.* § 204.11(c)(1), (2).

17. *Id.* § 204.11(b)(2), (e).

18. *Id.* § 204.11(a).

tus—without them, CIS cannot grant permanent legal status to the child.

II. The Child Protection Agency's Responsibility

Youths in the child protection system rely on local child protection agencies to provide them with services essential to the youths' well-being both during and after involvement with CPS. The services are expansive and include educational programming,¹⁹ vocational training,²⁰ health care,²¹ and housing assistance.²² However, assistance with immigration needs was not, until recently,²³ mentioned in any statute, regulation, or agency directive. Not surprisingly, except at a few agencies, such as New York City's Administration for Children's Services,²⁴ none of the services necessary to assist youths with immigration needs were being provided.

Immigrant youths' most pressing need is simply to be made aware of how their status might affect their future. Adults with immigration needs, and even lawyers who practice in the area, often struggle with the intricacies of the federal immigration system. Youths are even more overwhelmed by these complexities. They need an adult with expertise to examine their immigration status and determine what sort of assistance they might need—including the pursuit of SIJ status. Youths in the child welfare system rely on the child protection agencies that are being paid to care for them. Yet, these agencies consistently fail to assist them with immigration needs—even when the youths bring those needs to the attention of the agency.²⁵

19. See N.Y. FAM. CT. ACT § 1089(c)(2)(iii) (McKinney Supp. 2009).

20. See N.Y. COMP. CODES R. & REGS. tit. 18, § 441.10 (2009).

21. See N.Y. FAM. CT. ACT § 1089(c)(2); N.Y. COMP. CODES R. & REGS. tit. 18, § 441.22(f).

22. See N.Y. SOC. SERV. LAW § 409-a(5)(c) (McKinney 2003); N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(f).

23. See *infra* notes 27-34 and accompanying text.

24. See NYC ADMIN. FOR CHILDREN'S SERVS., *supra* note 10.

25. Organizations such as The Door in Manhattan, and law school legal clinics like those at Columbia and Hofstra, often end up working with youths who are on the verge of aging out of foster care or who have been adopted and are about to lose SIJ eligibility. See Columbia Law School, Child Advocacy Clinic, <http://www.law.columbia.edu/focusareas/clinics/childadvocacy> (last visited Apr. 20, 2009); The Door, <http://www.door.org/> (last visited Apr. 20, 2009); Hofstra Law, "Live Client"

The case of JT provides a harrowing illustration of what can happen when local child protection agencies do not assess the immigration status and needs of youths in their care.²⁶ JT arrived from Honduras when he was only five years old. He was soon placed in foster care due to his parents' neglect and was eventually adopted by his foster mother when he was twelve. Upon his placement in foster care, JT's life dramatically improved. He was cared for, supported, and loved by his foster parents. He actively participated in after-school programs, was a starter for his school's varsity basketball team, and graduated from high school. After graduation, he was offered a job as the head of inventory at a law firm. JT made plans to return to school to learn to be a paralegal.

Due to the negligence of the foster care agency, however, his status in the United States had never been legalized. At eighteen, JT was suddenly at risk of deportation at any time and had no prospect of obtaining a legal job or pursuing higher education. It was too late for JT to seek legal status through his adoptive mother, and SIJ findings seemed out of the question since he was no longer in the family court system. The usual pressure accompanying an SIJ case was even greater in this instance since JT had been in the country for fourteen years, had no contacts or support system in Honduras, and was the sole caretaker for his adoptive mother, who was diabetic and blind.

A recent directive issued by the Office of Children and Family Services (OCFS), the New York State agency responsible for overseeing and regulating all of the local child protection agencies, does much to ensure that youths like JT will get the assistance they need from the agencies responsible for their care before it is too late.²⁷ The OCFS directive focuses on two key needs of immigrant youth in foster care: having their immigration status correctly identified and obtaining necessary legal

Clinics, http://law.hofstra.edu/Academics/Clinics/clinic_descriptions.html (last visited Apr. 20, 2009).

26. JT was an actual client of the author. His name and other identifying information have been changed to protect his confidentiality.

27. See N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., TRANSMITTAL NO. 08-OCFS-ADM-05, SPECIAL IMMIGRANT JUVENILE STATUS (2008), *available at* http://www.ocfs.state.ny.us/main/policies/external/ocfs_2008/adms/08-ocfs-adm-05%20special%20immigrant%20juvenile%20status.pdf.

representation for immigration issues.²⁸ These added responsibilities essentially elevate the level of casework required on immigration issues to that required for other services, such as housing, education, health care, and employment.²⁹

Notably, the OCFS directive calls for a comprehensive assessment of SIJ eligibility status for every youth in foster care before the youth leaves the system.³⁰ Such an assessment may require contacting the consulate in the youth's home country, obtaining a birth certificate, or extensive conversations with the youth and his family about the youth's country of origin, the language spoken at home, and the length of time the youth has been in the United States.³¹ These requirements appropriately recognize the need not just to ask about immigration status, but to collect documentation when assessing eligibility for SIJ status.

The OCFS directive's requirement that youths with immigration issues be referred to lawyers with immigration expertise is equally remarkable and essential.³² In accepting the responsibility to provide immigration lawyers to youths, the OCFS directive accounts for the fact that even if a caseworker identifies eligibility for SIJ status, he or she does not have the legal expertise or training to take the appropriate actions.³³

The OCFS directive sends a clear message to child protection agencies that they need to be trained in immigration issues, thoroughly investigate the immigration needs of the youths they serve, and make appropriate referrals to lawyers with immigration expertise.³⁴ The directive opens the door for the attorneys who represent child protection agencies to counsel their clients on the importance of meeting these standards and provides an avenue for attorneys who represent children in foster care and family court judges to demand the same.

28. *Id.* at 1-2.

29. *See id.* at 5-6, 7-9.

30. *Id.* at 2.

31. *Id.* at 5.

32. *Id.* at 2, 6.

33. *Id.* at 3.

34. *See id.* at 1-2.

III. Assessing a Youth's Eligibility

The case of *In re Guardianship of Vanessa D.*³⁵ raises two vital questions that had, until recently, been most treacherous for youths seeking SIJ special findings in Family Court: whether findings can be made in guardianship cases³⁶ and whether youths older than eighteen cease to be eligible for findings.³⁷

Vanessa D. was born in Haiti and brought to the United States by her father when she was fifteen.³⁸ Soon after her arrival, Vanessa was abandoned by both of her parents to the care of a family friend.³⁹ Shortly before Vanessa turned eighteen, the friend went to family court and petitioned for guardianship.⁴⁰ Vanessa had no family resources in Haiti, and because of her lack of legal immigration status, she was at constant risk of being deported.⁴¹ The family court granted the guardianship petition but denied a motion for SIJ special findings.⁴² The court reasoned that it had no jurisdiction to make a finding of dependency where the motion was made in the context of a guardianship petition rather than a child protection, surrender, or adoption proceeding.⁴³

On appeal, the Second Department ruled that the trial court may have erred in denying jurisdiction.⁴⁴ The court held, however, that because Vanessa had turned nineteen since the appeal was filed, she was no longer eligible to have a guardian appointed and the appeal was dismissed.⁴⁵ As a result, Vanessa now lives without lawful status in the United States, unable to get a legal job, health insurance, or pursue higher education, and under the constant threat of deportation back to a country where she has no family on which to rely.

35. 834 N.Y.S.2d 644 (Fam. Ct. 2007), *appeal dismissed sub nom. In re Vanessa D.*, 858 N.Y.S.2d 687 (App. Div. 2008).

36. *See id.* at 645-47.

37. *In re Vanessa D.*, 858 N.Y.S.2d at 688.

38. *In re Guardianship of Vanessa D.*, 834 N.Y.S.2d at 645.

39. *Id.*

40. *Id.*

41. *See id.*

42. *Id.* at 645-47.

43. *Id.* at 646.

44. *In re Vanessa D.*, 858 N.Y.S.2d 687, 688 (App. Div. 2008).

45. *Id.*

Fortunately for those coming after Vanessa, both the family court's and the appellate court's decisions are no longer good law. The family court's decision is now contradicted by subsequent appellate law,⁴⁶ and the Second Department's age limitation has been superseded by a recent amendment to the Family Court Act.⁴⁷

*In re Antowa McD.*⁴⁸ settles the question of whether courts hearing guardianship cases have jurisdiction to make SIJ special findings. As is typical for SIJ cases, the facts of *In re Antowa McD.* portray a child in tragic circumstances. At age four, Antowa was sent from Jamaica to the United States to live with her father.⁴⁹ Her father soon abandoned her, and after Antowa's mother refused to take her back, Antowa ended up in the care of an aunt.⁵⁰ The aunt eventually petitioned for guardianship and Antowa, still without legal immigration status, sought SIJ special findings.⁵¹

While granting guardianship, the family court refused to find that Antowa was eligible for long-term foster care or that it was in Antowa's best interest to remain in the United States.⁵² The First Department reversed the family court and for the first time, clearly held that an appointment of a guardian constitutes a necessary finding of dependency and that, even in a guardianship case, the record alone can establish that reunification is not viable due to abuse, neglect, or abandonment.⁵³

In fairness to the family court judges in *In re Guardianship of Vanessa D.* and *In re Antowa McD.*, it had not been obvious that special findings were appropriate under guardianship cases when those cases were decided. In particular, questions often arose as to whether a judge could make a determination that a youth had been abused, neglected, or abandoned.⁵⁴ Typi-

46. *See id.*

47. *See* Act of Nov. 3, 2008, ch. 404, sec. 1, § 661, 2008 N.Y. Laws 404 (codified as amended at N.Y. FAM. CT. ACT § 661 (McKinney 2009)).

48. 856 N.Y.S.2d 576 (App. Div. 2008).

49. *Id.* at 576-77.

50. *Id.* at 577.

51. *Id.*

52. *Id.*

53. *Id.*

54. *See In re Guardianship of Vanessa D.*, 834 N.Y.S.2d 644, 645-47 (Fam. Ct. 2007), *appeal dismissed sub nom. In re Vanessa D.* 858 N.Y.S.2d 687 (App. Div. 2008).

cally, these types of findings are made under a child protection or termination of parental rights proceeding.⁵⁵ Denying immigrant youth the ability to seek these findings under guardianship proceedings, however, was a tragic disservice.

Large numbers of the immigrant children and youths ending up in family court guardianship proceedings have clearly suffered from abuse, neglect, or abandonment in their home countries. Typically, these youths come to the United States on their own to escape abusive environments. Their journeys are usually as harrowing as the home situations they are escaping. Yet, because the homes where these youths suffered maltreatment are in other countries, let alone other jurisdictions, state child protection agencies are reluctant to file cases against the parents.⁵⁶ Consequently, the only mechanism by which they can be brought under the jurisdiction of the family court is through a guardianship petition brought by a relative or family friend who has stepped forward to care for them.⁵⁷ *In re Antowa* makes clear that these youths can receive the findings they need in these guardianship cases.⁵⁸

A recent amendment to Section 661 of the Family Court Act resolves the additional question of whether youths over the age of eighteen are eligible to have a guardian appointed for them, stating that “[f]or the purposes of appointment of a guardian of the person pursuant to this part, the terms infant or minor shall include a person who is less than twenty-one years old who consents to the appointment or continuation of a guardian after the age of eighteen.”⁵⁹ The amendment resolves the diffi-

55. See N.Y. FAM. CT. ACT § 1012(e)-(f) (McKinney 2007) (child protection proceeding); N.Y. SOC. SERV. LAW § 384-b (McKinney 2007) (termination of parental rights proceeding).

56. This reluctance is likely based primarily on the difficulty involved in investigating the allegations, and not on jurisdictional issues. See N.Y. FAM. CT. ACT § 1015(a) (McKinney 1998) (granting family court jurisdiction over any case where a child resides in the county where the court sits, regardless of where the maltreatment occurred).

57. See *In re Antowa McD.*, 856 N.Y.S.2d at 577.

58. *Id.*

59. Act of Nov. 3, 2008, ch. 404, sec. 1, § 661, 2008 N.Y. Laws 404 (codified as amended at N.Y. FAM. CT. ACT § 661(a) (McKinney 2009)). As discussed below, this act also amends Section 1707 of the Surrogate’s Court Procedure Act. See Act of Nov. 3, 2008, ch. 404, sec. 9, § 1707, 2008 N.Y. Laws 404 (codified as amended at N.Y. SURR. CT. PROC. ACT § 1707 (McKinney Supp. 2009)).

culty that arose from the fact that while federal law said youths remain eligible for SIJ status up to age twenty-one,⁶⁰ the issue of a court's jurisdiction for the underlying guardianship or child protection case depended on state law. In New York, while youths in foster care through a child protection case can remain under the family court's jurisdiction after age eighteen until age twenty-one,⁶¹ the eligibility of youths to have a guardian appointed after age eighteen was less clear until now. With the inconsistency resolved, both surrogate's courts and family courts now have jurisdiction to appoint guardians for youths up to age twenty-one.⁶²

Prior to the amendment, appellate courts had ruled that there was no jurisdiction to appoint a guardian for a child who had turned eighteen.⁶³ The effect on immigrant youth was devastating. Many youths who were eligible for guardianship, special findings, and SIJ status but were not aware of the law until after turning eighteen, simply missed out on their only opportunity to legalize their status and normalize their life.⁶⁴ With the amendment of Section 661, youths up to age twenty-one are now being given that chance.⁶⁵

There remains one age-related issue that still seems to be confounding some family court judges—the question of whether a court can issue the special finding that “family reunification is not viable due to abuse, neglect or abandonment” for youths between eighteen and twenty-one.⁶⁶ Recently, the Suffolk County Family Court determined that it could not make such a finding for a twenty-year-old youth because the New York statute says that only children under eighteen can be deemed neglected.⁶⁷

60. 8 C.F.R. § 204.11(c)(1) (2009).

61. N.Y. FAM. CT. ACT § 1087(a) (McKinney Supp. 2009).

62. See N.Y. FAM. CT. ACT § 661(a); N.Y. SURR. CT. PROC. ACT § 1707.

63. *In re Vanessa D.*, 858 N.Y.S.2d 687 (App. Div. 2008); *In re Zaim R.*, 840 N.Y.S.2d 877 (App. Div. 2007).

64. In supporting the recent *Fostering Connections to Success and Increasing Adoptions Act*, U.S. Congressman James McDermott expressed similar concern over children being forced out of foster care at age eighteen. See 154 CONG. REC. H8313 (daily ed. Sept. 17, 2008) (statement of Rep. McDermott).

65. See Act of Nov. 3, 2008, ch. 404, sec. 1, § 661, 2008 N.Y. Laws 404 (codified as amended at N.Y. FAM. CT. ACT § 661(a)).

66. Immigration and Nationality Act of 1952 § 101, 8 U.S.C. § 1101(a)(27)(J) (2006).

67. *In re D.F.*, N.Y. L.J., Dec. 16, 2008, at 25, col. 2.

Other judges, however, have determined that if the neglect or abuse itself occurs before a child turns eighteen, then it can still be the barrier to reunification that the statute contemplates.⁶⁸ It remains to be seen how the Appellate Division will rule on this issue. Advocates for youth, of course, hope that the recent amendment to the guardianship law is part of a trend toward recognizing that youths up to age twenty-one often require ongoing caretaking from individuals and oversight from the court.

IV. Conclusion

At least 1.8 million youths with no legal immigration status live in the United States,⁶⁹ and about seven percent, or 126,000 of them, live in New York State.⁷⁰ They face futures with little or no likelihood of legal employment, health insurance, or higher education of any sort.⁷¹ For those immigrant youths who end up under the jurisdiction of the family court, however, there is recourse. The recent statutory changes, common law rulings, and agency directives described in this essay provide these youths with a much better chance of beating the odds in New York—but only if the judges, agencies, and lawyers working in New York’s family courts educate themselves about the new provisions diligently and implement them vigorously. After overcoming so many odds already, these youths deserve nothing less.

68. As most Family Court decisions are not published, the records of these decisions are on file with the author.

69. See JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 8 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

70. See JEFFREY S. PASSEL, PEW HISPANIC CTR., *UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS* 12 (2005), available at <http://pewhispanic.org/files/reports/46.pdf>.

71. *Id.* at 22, 26, 30, 34, 35.