

# Guide for State Courts in Cases Involving Unaccompanied Immigrant Children

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# TABLE OF CONTENTS

I. The Purpose of the <i>Guide</i>	1
II. Introduction	2
III. Background	3
IV. Roles of the Federal Immigration System and the State Courts	5
V. Special Immigrant Juvenile Status	7
VI. Types of State Court Cases Involving UACs	9
VII. Action Steps to Address Cases Involving UACs	11
Endnotes	12



## I. THE PURPOSE OF THE *GUIDE*

The purpose of the *Guide* is to increase understanding among state court judges, court administrators, and other key stakeholders regarding:

- Federal immigration law, policy, and practice, and the impact on state court cases involving Unaccompanied Alien Children (UACs);
- how the work of the state courts in cases involving UACs intersects with the needs of the federal immigration system;
- the different types of cases and matters where UACs might appear in state courts; and

- the potential role of the state courts in providing factual findings in cases involving UACs.

While there are other forms of federal immigration relief for refugees, victims of human trafficking, and other groups, the *Guide* focuses solely on the state court findings required for use in federal determination of Special Immigrant Juvenile Status (SIJS). The *Guide* also provides recommended action steps for state courts to use in addressing cases involving UACs.

## II. INTRODUCTION

Over the last decade, the number of UACs entering the United States (U.S.) from Central America has been on a steady rise. This trend is expected to lead to an increase in filings in state juvenile courts on behalf of UACs seeking court findings to support applications for Special Immigrant Juvenile Status (SIJS). There is concern that the state courts do not have the capacity to handle this influx of cases, or are not fully prepared for the complexity of these cases.

Unaccompanied immigrant children, defined as Unaccompanied Alien Children in federal immigration law, are children who:

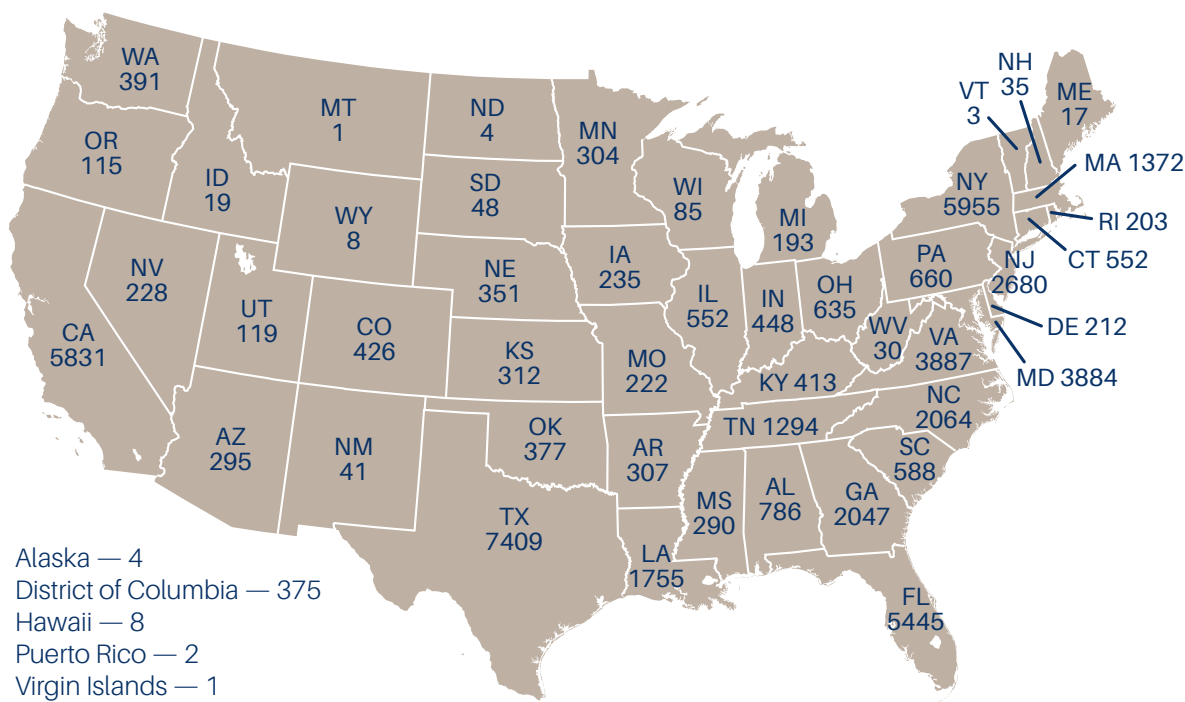
1. have no lawful immigration status in the U.S.;
2. have not attained 18 years of age; and
3. have no parent or legal guardian in the U.S. or have no parent or legal guardian in the U.S. available to provide care and physical custody.

Once these children are detained by the Department of Homeland Security (DHS), they are then delivered to the Department of Health and Human Services/Office of Refugee

Resettlement (ORR) for placement. Children who are not deported will remain in ORR custody until they can be released to sponsors in the U.S. Following the child's release to a sponsor, ORR considers its responsibility terminated. At that point the sponsor becomes responsible for the care and safety of the child, and if the child becomes involved in a state court dependency, delinquency, abuse and neglect, or guardianship case, any services required will fall under the jurisdiction of the state juvenile court.

Because UACs may seek SIJS until their 21<sup>st</sup> birthday, and due to current delays in deportation proceedings in federal immigration courts, cases involving UACs may not enter the state courts immediately. In addition, the stream of cases involving UACs seeking SIJS findings may last for years. There are concepts that have very different meanings in state law and federal immigration law, such as the concept of best interest of the child. Failure of an immigration court judge or state court judge to understand these differences can result in unintended consequences for the parties in a case.

### TOTAL UNACCOMPANIED CHILDREN RELEASED TO SPONSORS BY STATE FY 2014 = 53,518



### III. BACKGROUND<sup>1</sup>

UACs are at serious risk for abuse and becoming crime victims or human trafficking victims, risks that are exacerbated by their undocumented immigration status. Many of these children have serious problems as a result of the severe trauma and other consequences associated with the violence, poverty, crime, gang terror, abuse, and family dislocation that they have experienced both at home and during their journey to the U.S.

The number of UACs in the U.S. has been on a steady increase and is expected to continue to grow. For example, over the past six years, the number of UACs from El Salvador, Honduras, and Guatemala has increased from approximately 10,000 to over 50,000 children annually. Projections suggest that the numbers are likely to continue to be sizeable in coming years.

While there are numerous reasons fueling this migration, some of the more significant trends include the following:<sup>2</sup>

**Poverty** — With poverty rates well above 50 percent, circumstances are dire for a majority of children in Honduras, El Salvador, and Guatemala.

**Crime and violence** — Honduras, El Salvador, and Guatemala have some of the highest homicide rates in the world. For example, the homicide rates in these three Central American countries range between 10 and 20 times higher than those of the U.S. Moreover, rates for other forms of violence, especially rape, robbery, kidnapping, and extortion, are also exceedingly high.

**Gangs** — Numerous gangs, including gangs which operate not only in the three Central American host countries but also with gangs in the U.S., are major sources of violence of

all types, including labor and sex trafficking, as well as drug, arms and people smuggling, kidnapping, extortion, and theft.

**Lack of opportunity and decaying societal infrastructure** — Economic decline following years of civil war, unrest, and ongoing social conflict, have resulted not only in extremely limited employment opportunities for families and children, but also in breakdowns in the social infrastructure needed to protect and support families and children such as education, health, safety, and justice systems.

**Desire to reunite with family and friends living in the U.S.** — Years of strife in Honduras, El Salvador, and Guatemala have led to many children attempting to reunite with family members and friends who have previously made it to the U.S. Many of these family members are living and working in the U.S. without authorization.

**Misinformation** — Misinformation in the home countries about U.S. immigration policy and the availability of economic and social opportunity available to children arriving in the U.S. have contributed to the influx of UACs.

As a result of these trends, state courts across the nation will be seeing increasing numbers of cases involving UACs. Of particular concern is that the overburdened, cumbersome, multiple-agency federal immigration system lacks the capacity to adjudicate cases quickly. Consequently, UACs are likely to be in the U.S. for many years, and for some children, permanently. In addition, it is likely that many of the recently arriving UACs may eventually end up in state courts in child protection and delinquency matters; due to the

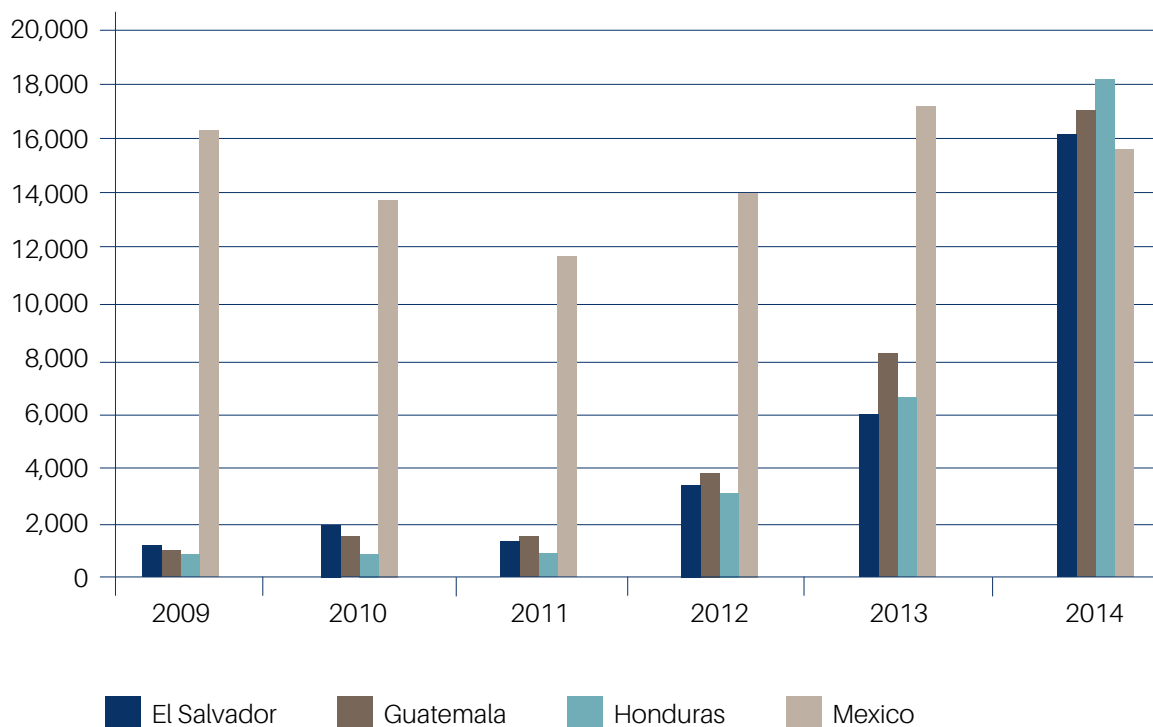
fact that many of these children have difficult backgrounds, the time delays of their immigration proceedings, and the uncertainty in their lives once they have been placed with sponsors.

Although the vast majority of UACs were apprehended crossing into the U.S. at the U.S.-Mexico border, the problems they present could impact all states, not only those states contiguous to the border. A combination of numerous factors — including child sponsor and shelter space availability, as well as the complexity of federal immigration law, policy, and practice

— have resulted in children being placed in every state across the U.S.

In light of these issues, state courts throughout the nation can anticipate that sizeable numbers of UACs will be requesting findings from state court proceedings for use by the UAC in an application process for SIJS. SIJS is a form of immigration relief that allows the UAC to remain in the U.S. temporarily, and eventually serves as a step in support of a subsequent application for Lawful Permanent Residence (LPR) status.

#### UNACCOMPANIED MINORS ENCOUNTERED BY CBP, FY 2009-14





## IV. ROLES OF THE FEDERAL IMMIGRATION SYSTEM AND THE STATE COURTS

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There is an inherent tension between the purposes and roles of the federal immigration system and the state courts. The federal government is charged with determining: 1) who should be in the U.S. for how long and under what conditions; 2) who should not be in the U.S. and why; and 3) who should become a U.S. citizen. In contrast, the state courts have numerous roles such as: punishment and rehabilitation; restoration/making victims whole; protecting the vulnerable; adjudicating disputes; and providing justice in individual cases. The state courts do not adjudicate immigration status; however, the state courts must provide equal access to justice for all.

Federal immigration law generally does not consider the best interests of the child. Neither the federal immigration courts nor United States Citizenship and Immigration Services (USCIS) has a mandate or the resources to investigate what is in the best interests of the child in determining immigration rights of parents and/or children. Therefore, the federal government is dependent on a state court's determination of the best interests of the child.

The federal government has clearly defined methods for handling UACs. Upon initial contact and apprehension, UACs entering the U.S. will be detained by the U.S. Department of Homeland Security (DHS)/Customs and Border Patrol (CBP). For children detained who are from countries contiguous to the United States, CBP has authority to return the UAC to his/her home country if the following three determinations are made:

- The UAC is not a victim of a severe form of human trafficking as defined in federal immigration law;
- The UAC does not have a fear of returning to the country of nationality or last habitual residence; and
- The UAC is able to make an independent decision to return home.<sup>3</sup>

UACs who are not from a country contiguous to the U.S., or are not returned to their home country by CBP, are delivered to the U.S. Department of Health and Human Services

(DHHS)/Office of Refugee Resettlement (ORR) for placement anywhere in the U.S. ORR initially places UACs in an ORR facility, run by ORR contractors that provide shelter and services.

While a juvenile is in the physical and legal custody of ORR and is housed in an ORR contractor facility or an ORR-grantee/contractor-funded foster home, a state juvenile court can accept filings to take jurisdiction over the juvenile. The juvenile court may exercise its jurisdiction to make findings to enable the juvenile to apply for certain immigration protections. For change of custody or placement, ORR consent is required for a UAC who is in the physical and legal custody of ORR. However, such consent is not required once ORR places the child with a sponsor.<sup>4</sup>

Children who are not deported will remain in ORR custody until they can be released to sponsors, if a suitable sponsor is available. The sponsors may be one of the following, in order of preference:

1. a parent;
2. a legal guardian;
3. an adult relative;
4. an unrelated adult or an entity designated by a parent or legal guardian;
5. a licensed program; or
6. an adult or entity approved by ORR if no other alternative to long-term detention is available.<sup>5</sup>

When a child is released to a sponsor, ORR considers its responsibility as terminated. At that point the sponsor becomes responsible for the care and safety of the child, and if the child becomes involved in a state court dependency, delinquency, abuse and neglect, or guardianship case, any services required will fall under the jurisdiction of the state juvenile court.<sup>6</sup> During this time, DHS/Immigration and Customs Enforcement (ICE) has the authority to begin deportation proceedings against the UAC. Federal immigration court proceedings can continue even after a minor is placed with a sponsor.

When ORR releases a child to a sponsor, that sponsor is given care-giving authority over the child but not legal custody. The sponsor, if not the child's parent, does not become the legal guardian of the child until named as such by an

order of a state court. As noted above, once the UAC is released to a sponsor, ORR no longer has care and custody over the UAC. Therefore, the state juvenile court does not need the consent of ORR to convert the placement to legal custody.





## V. SPECIAL IMMIGRANT JUVENILE STATUS

Because UACs are a highly vulnerable population, federal immigration law provides immigration protections that might allow UACs to stay in the U.S. temporarily. This primary protection comes through Special Immigrant Juvenile Status (SIJS).<sup>7</sup> If granted SIJS, the juvenile may also apply for Lawful Permanent Resident (LPR) status, which is a more permanent residency status. SIJS requires an application to the DHS/USCIS. As part of that process, a state juvenile court judge will be faced with a request to provide certain findings or certifications based on information received in the context of the state juvenile court proceeding.<sup>8</sup>

State juvenile court judges should be aware that they cannot decide whether or not the UAC will be allowed to remain in the U.S. The state juvenile court judge's findings in a dependency proceeding do not constitute a grant of SIJS. It is USCIS, and not the state juvenile court, who determines if the UAC is eligible for SIJS. Furthermore, the juvenile court findings do not guarantee that USCIS will grant the UAC SIJS as there are other considerations that enter into that decision.

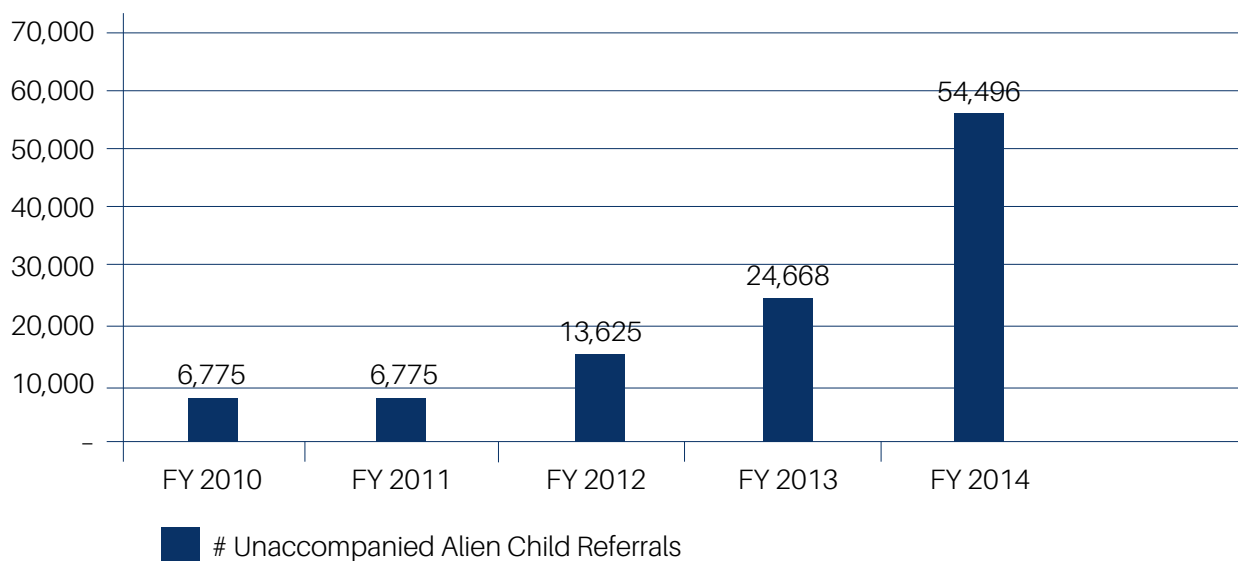
There is a 3-step process for the UAC to obtain SIJS and subsequently apply for LPR status. The UAC must first obtain a state court order with

the required findings (described below), and the factual basis for each finding, signed by the state juvenile court judge. This court order permits the juvenile to file an application for SIJS with USCIS; however, the order does not guarantee that USCIS will approve the application.

In cases where the UAC wants to apply to USCIS for SIJS, the juvenile must supply USCIS with a state juvenile court order making the following three (3) factual findings based on state law:

1. The juvenile has been declared dependent on a juvenile court located in the U.S. or whom such a court has legally committed to, or placed under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court located in the U.S.;
2. Reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis found under state law; and
3. It has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence.<sup>9</sup>

### UNACCOMPANIED CHILDREN REFERRALS TO OFFICE OF REFUGEE RESETTLEMENT



Data Source: U.S. Citizenship and Immigration Services and Administration for Children and Families

The UAC is eligible to apply for SIJS if reunification is not viable with one parent. The juvenile may be eligible to apply for SIJS if declared dependent due to abuse, neglect, or abandonment by one parent, even if the UAC is still living with the other parent.

For SIJS purposes, a **state juvenile court** is a court in the U.S. having jurisdiction under state law to make judicial determinations about the care and custody of children.<sup>10</sup> Examples include: juvenile, family, orphans, dependency, guardianship, probate, and delinquency courts.<sup>11</sup>

A **dependent** is a child legally committed to, or placed under the custody of, an agency or department of the state, or an individual or entity appointed by a state or state juvenile court. Placements in foster homes, group homes, with relatives, or with guardians qualify.

The dependency filing may be made by a state agency, such as law enforcement, social services or child protective services, or by a private individual, such as a family member or friend.

In addition, under 8 U.S.C. 1101(a)(27)(J) and USCIS regulations, for USCIS to grant SIJS, the following requirements must be met:

- The juvenile must be declared dependent while present in the U.S. and under the jurisdiction of the court;
- The juvenile must file for SIJS (USCIS Form I-360) before reaching the age of 21;
- The juvenile must be unmarried at filing and remain so until SIJS is granted;
- The child must remain under juvenile court jurisdiction until SIJS has been granted by USCIS, subject to exceptions for age-related cases and certain other circumstances; and
- The dependency case must have been filed primarily to obtain relief from abuse, neglect, or abandonment and not primarily to obtain an immigration benefit.

When the UAC files an application for SIJS, the state juvenile court order making the required juvenile court findings (and signed by the judge)

must be attached to the application. The USCIS then makes the determination of eligibility for SIJS. The decision to approve the SIJS application is discretionary and is based in part on the factual bases for the juvenile court findings, and also on other concerns that USCIS may consider under federal immigration law.

If the SIJS application is approved, the juvenile is eligible to file an application with USCIS for adjustment to LPR status. However, the approval does not guarantee that the child will be eligible to remain in the U.S. USCIS will review the basis of each finding to assure that there is a genuine dependency issue.<sup>12</sup> The grant of adjustment to LPR status is discretionary and is not guaranteed even if the juvenile has been granted SIJS. If the juvenile is in removal proceedings, only a federal immigration judge, not the USCIS, can grant the adjustment of status. The state juvenile court judge does not have the power to grant adjustment of status.

While the approval of an SIJS application does not constitute a termination of parental rights, a juvenile who becomes an LPR will no longer be considered the child of his or her parents for immigration purposes, even if parental rights were not terminated. Thus, the child will not be able to use the lawful status attained through SIJS as a means to obtain lawful status for his or her parents. This bar applies to both parents, despite whether only one parent was responsible for the abuse, neglect, or abandonment that was the basis of the SIJS.

It is important to note that the state juvenile court judge cannot decide whether the juvenile is granted SIJS or subsequent LPR status. Furthermore, SIJS and LPR status are not automatically granted based on the findings of the juvenile court. USCIS makes an independent decision for both benefits, and USCIS must consider the requirements for admissibility, in addition to the order of the state juvenile court, to determine if the juvenile is eligible for adjustment to LPR status.

## VI. TYPES OF STATE COURT CASES INVOLVING UACS

UACs can appear in the state courts in a variety of case types, including the following:

- dependency/child protection;
- juvenile delinquency;
- juvenile status offenses;
- guardianships;
- juvenile offender tried as adult;
- victims of crimes; and
- code violations.

The *Guide* focuses on the three main types of cases where UACs may seek findings supporting applications for SIJS, which are dependency/child protection, delinquency and status offenses, and guardianships. Provided below are considerations and factors of which the court should be aware in those three types of cases.

### Dependency/Child Protection

UACs may appear in a dependency case in two main circumstances: 1) if the UAC develops problems with an ORR sponsor, a dependency case may be filed in the local juvenile court to remove the juvenile from the ORR sponsor and find a new placement; or 2) a request may be filed in the juvenile court for a court order specifying the three findings required as part of the juvenile's SIJS application to USCIS.

For change of custody or placement, ORR consent is required for a juvenile who is in the physical and legal custody of ORR. However, such consent is not required once ORR places the UAC with a sponsor. In making determinations of a UAC's dependency or placement, particularly if termination of parental rights may be a possible outcome, the state juvenile court may have to determine whether notice to natural parents in another country is required.

Once the UAC is placed with a sponsor, ORR will no longer pay for their services. The state juvenile court will then be responsible for determining the availability of state-funded services for the juvenile. The availability of services then becomes a critical issue for the state juvenile court, both in

terms of limits on eligibility of an undocumented immigrant for federally- and/or state-funded services, and the availability of services that are culturally appropriate and in the UAC's first language if the UAC does not speak English.

In dependency/child protection cases where the UAC wants to apply for SIJS, the state juvenile court judge will be faced with a request to make the following three required factual findings:

1. With regard to the first SIJS finding, a threshold issue for the state court is what constitutes dependency jurisdiction under state law. For example, in some states, the UAC may be able to submit a filing to the state juvenile court for a declaratory judgment just to obtain the court order with the requested SIJS findings.
2. An issue may arise regarding the judge's ability to determine the factual basis for the second finding, in particular if it is a declaratory judgment case. The required finding for SIJS must be that the UAC cannot be reunited with one or both parents due to abuse, neglect, or abandonment or a similar basis under state law. If there is no evidence regarding abuse or neglect by the parents in the home country, the only ground may be abandonment. States may vary on whether, and in what circumstances, the state courts can find that a UAC has been abandoned solely on the basis of the parents' sending the child unaccompanied to the U.S.
3. For the third finding, the judge will need some information to back the finding that it is not in the UAC's best interest to be returned to his/her home country. The information may come from an assessment or study conducted by another agency.

The court order should recite the factual basis for each of the three findings described above, even if the UAC's testimony is the only basis for the findings and no other evidence is available.

An application for SIJS may affect the timing of the state juvenile court proceeding. If the UAC is in a removal proceeding in federal immigration court, the state juvenile court judge may be faced with a request for continuances to allow the immigration court to complete its hearing before the dependency case is closed. The UAC may also request that the juvenile court retain dependency jurisdiction pending the USCIS's consideration of the SIJS application.

Finally, the applicant has the burden of proof for establishing eligibility for an immigration benefit, including SIJS or adjustment of status to LPR. USCIS can require the juvenile applying for an immigration benefit to produce any juvenile court records it deems necessary or face denial of the requested benefit. If the records of the state juvenile court relating to the findings cannot be opened without a court order, the state court may be faced with requests to open those records.

## Delinquency and Status Offenses

When dealing with delinquency matters involving UACs, state juvenile court judges should consider that UACs are susceptible to victimization and are at great risk of becoming involved in delinquent behavior. They may be particularly susceptible to gang involvement or victimization by traffickers, which can in turn get them involved in a variety of delinquent activities, such as prostitution, theft, drug use, and drug sales.

Also, UACs who are runaways or truants may be at a high risk for victimization. In some states, the ability of the state juvenile court to hold those types of offenders in a secure facility may be limited by state law.

Under federal immigration law, a delinquency case can be the source of the required findings for SIJS eligibility. The procedure for making the findings may vary by state. Some states have provisions to treat certain cases as dual status cases, so the juvenile is considered both a delinquent and a dependent of the court. Other states may allow the delinquency judge to make the placement decision as well. Finally, some states may require that a separate dependency case be opened.

## Guardianships

As previously noted, if a UAC is in the physical and legal custody of ORR, the state juvenile court needs the specific consent of ORR before it can make custody or placement decisions. Once the UAC is released to a sponsor, ORR no longer has care and custody over the UAC, and the state juvenile court does not need the consent of ORR to convert the placement to legal custody. Furthermore, the transfer of physical custody to a sponsor does not establish legal custody. That can be done only by a state court.

The state court in a guardianship case, which could be a probate, family, or juvenile court, qualifies as a court with juvenile jurisdiction for the purpose of making the findings for SIJS eligibility. A major issue with regard to petitions for guardianship in state probate and family courts is that in some jurisdictions those courts may not have the resources that state juvenile courts have, such as investigative resources provided by child protective services or a similar agency, for obtaining the evidence needed to justify the findings.



## VII. ACTION STEPS TO ADDRESS CASES INVOLVING UACs

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State courts need to prepare for an influx of UACs, which primarily includes enhancing their operational capacity to process cases involving UACs. There is a strong need for education, data collection, and resources on this critical issue. The following are action steps that state courts can take to prepare for, and effectively adjudicate, these cases:

### EDUCATE

State courts should develop continuing education programs for judges, court administrators, and court staff. The programs should include information on current trends involving UACs, federal immigration and applicable state laws, and opportunities for cross-training with state and local bar associations. The Center for Public Policy Studies (CPPS) and the National Center for State Courts (NCSC) have a free [webinar](#)<sup>13</sup> available that provides additional background information on the UAC issue. This webinar could serve as a starting point for further education and training.

### ACTION TEAMS

State courts should convene multi-disciplinary action teams at the state and local level to engage in UAC strategic planning. In addition to judges and court administrators, action teams should also include state and local bar associations, immigration attorneys, other justice system stakeholders, child welfare agencies, and other groups identified by the state courts as critical to strategic planning. Action teams should identify the characteristics of the UAC population and develop the roles and responsibilities of each partner agency.

### RESOURCES

As part of assessing future trends involving UACs at the state and local level, the state courts and their partners should determine future resource requirements, such as the allocation of judicial officers and staff, interpreters, and court-appointed attorneys.

### ENHANCE DATA COLLECTION

If possible, case management systems should be configured to track the number of cases involving UACs, time to disposition, dispositions, and any other data elements that would be useful to case tracking and reporting at both the state and local level.

## ENDNOTES

1. The discussion in the Background section is based on information from the Office of Refugee Resettlement web site. See <http://www.acf.hhs.gov/programs/orr/programs/ucs/about#stats>
2. See [http://www.sji.gov/articles.php?yr=2014&pg=unaccompanied\\_minors\\_trends](http://www.sji.gov/articles.php?yr=2014&pg=unaccompanied_minors_trends) and <http://www.ncsc.org/sitecore/content/microsites/trends-2014/home/Monthly-Trends-Articles/Unaccompanied-Minors-in-State-Courts.aspx>
3. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, § 235(2)(A).
4. See 8 U.S.C. 1101(a)(27)(J)(iii)(I); USCIS web page, Green Card Based on SIJ Status.
5. See <http://www.acf.hhs.gov/programs/orr/resource/children-entering-the-united-states-unaccompanied-section-2>. See also Byrne, O. and Miller, E., *The Flow of Unaccompanied Children Through the Immigration System*, Vera Institute of Justice (New York, 2012).
6. Statement by Mark Greenberg, Acting Assistant Secretary, Administration for Children and Families, U.S. Department of Health and Human Services, before the Committee on Homeland Security and Governmental Affairs, United States Senate, July 9, 2014.
7. See 8 U.S.C. § 1101(a)(27)(J).
8. See 8 U.S.C. § 1101(a)(27)(J) and 8 C.F.R. § 204.11.
9. See USCIS Guide: *Special Immigrant Juvenile Status: Information for Juvenile Courts* and 8 U.S.C. 1101(a)(27)(J).
10. 8 C.F.R. 204.11(a).
11. See USCIS Guide: *Special Immigrant Juvenile Status: Information for Juvenile Courts*.
12. Id.
13. Webinar: *Crossing the Border: How the Unaccompanied Minor Crisis will Impact Your Court*, 2014, <http://icmelearning.com/crossing%20the%20border/lib/playback.html>



