THE CASE OF THE ERODING SPECIAL IMMIGRANT JUVENILE STATUS

WENDI J. ADELSON*

This Article provides a case study of a larger problem in American administrative law: the creation of unexecuted rights, with a focus in particular on the recent degradation of the Special Immigrant Juvenile Status (SIJS). Nearly twenty years ago, Congress drafted legislation providing for a pathway to citizenship for unaccompanied minors. In subsequent years, the Department of Homeland Security has ignored Congress' mandate to issue policy directives implementing the benefits and privileges associated with SIJS in a manner that would allow eligible persons to take advantage of this status. After explicating the nature of this creeping erosion of the SIJS mandate, especially as it impacts former foster youth with disabilities, the Article calls for DHS to create clear guidelines that can be implemented in a uniform fashion, treating all applicants in a fair and effective manner to clarify and extend the reach of SIJS.

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* Program Director of the Human Rights and Immigration Law Project, Center for the Advancement of Human Rights, Florida State University College of Law; B.A., Brandeis University; M. Phil., University of Cambridge; J.D., University of Miami School of Law. For conversations and comments on this project, I owe thanks to: Dan Markel, Bernard Perlmutter, Kele Williams, Anthony Alfieri, Jessi Tamayo, Marisa Cianciarulo, and the AALS Clinical Section.

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I. BACKGROUND

Nearly twenty years ago, Congress drafted legislation providing for a pathway to citizenship for unaccompanied minors.[1] This special immigrant juvenile visa (SIJ or J Visa) enables a child who has been abused, abandoned or neglected, in whose best interest it is not to reunite with family members or to return to his/her country of origin or "last habitual residence," to eventually become a United States citizen.[2] Without SIJ relief, children without a home to return to in their country of origin, not enough money to pay for out-of-state or international tuition to attend a state college or university, and no means of achieving lawful work authorization are left without a means of legal support or ability to receive an education. Additionally, such children are vulnerable to all kinds of pernicious influences: traffickers, commercial sexual exploitation, drugs, and gangs, just to name a few. While family ties are often a good way to obtain lawful resident status and eventually to naturalize, a seventeen-year old child is too old to qualify for the kind of adoption by a U.S. citizen aunt or uncle through which one could adjust status as a means to acquire citizenship.[3]

The Department of Homeland Security (DHS) detains several thousand unaccompanied minors who attempt to enter the United States illegally each year, sometimes up to 8,000 minors.[4] Only estimations exist on just how many children enter the U.S. legally,

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1. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005-06 (1990) (codified at 8 U.S.C. § 1101(a)(27)(J) (2006)).

2. § 1101(a)(27(J); Zabrina Aleguire & Gregory Chen, *Special Immigrant Juvenile Status for Children in Legal Guardianships*, 23 CHILD LAW PRACT. 12, 12 (2004). It is important to note that Congress first added the criteria for abuse, abandonment, or neglect in 1997 to limit the number and scope of children eligible for SIJ.

3. See *Report of the Working Group on Lessons of International Law, Norms, and Practice*, 6 NEV. L.J. 656, 664 (2006), for the principle that "a valid state adoption finalized after a child reaches age 16 does not create a parent-child relationship for immigration purposes."

4. Catholic Legal Immigration Network, Unaccompanied Minors, http://www.cliniclegal.org/Advocacy/unaccompaniedminors.html (printout on file with Journal). In 2005, the U.S. government had almost 8,000 unaccompanied minors in its custody (7,787 unaccompanied children, "up 25% from the previous year"). Maria Woltjen, *Looking out for the Best Interests of Unaccompanied Immigrant Children in the U.S.*, CHILDREN'S RIGHTS (ABA/Children's Rts. Litig. Committee, Washington, D.C.), Fall 2006. For some individual stories of these children, see Jennifer Ludden, *Child Migrants in U.S. Alone Get Sheltered, Deported*, NAT'L PUB. RADIO, Nov. 17, 2006, http://www.npr.org/templates/story/story.php?storyId=6469224.

then overstay their visas, and are not picked up by immigration authorities.[5] In 2005, 660 children received SIJ Status (SIJS).[6] Do the math: 8,000 unaccompanied children in DHS custody, another untold amount in guardianship-type situations, and only 660 children receiving green cards through SIJS. The low numbers of J Visas awarded relative to the number available for children in this situation[7] appears incongruous. What explains this discrepancy? First, access to information concerning the J Visa is a hurdle. A child must be fortunate enough to have heard of SIJS, and such information often filters through contact with a social worker, attorney, case manager, or other child advocate.[8] Unfortunately, sometimes this vital information filters too late or not at all, and an otherwise eligible child becomes ineligible through aging-out. In Florida, for example, a child must apply and at least establish dependency on a juvenile court before reaching eighteen years old.[9] Aging out is a problem for dependent immigrant children, but certainly not the only risk they face when anticipating an application for SIJS. Applying for a J Visa exposes a child not in DHS custody—a child who has otherwise flown under the immigration radar—to potential deportation. It is vitally important that both the client and the attorney be aware of the risks involved with bringing a SIJ petition; namely, alerting the immigration authorities to an otherwise "invisible" child.

660 children received lawful immigration status through the Special Immigrant Juvenile visa in 2005.[10] Exact data is currently

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5. Of the approximately 8,000 children that pass through the immigration system, some portion of these children stay in the country and disappear, becoming part of the underground undocumented world. *See* Ludden, *supra* note 4. Also, approximately 1.8 million children (some residing in families and some arriving unaccompanied) live in the United States without legal immigration authorization. *See* JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 8 (Pew Hispanic Ctr., Mar. 7, 2006). Some portion of these children may be eligible for special immigrant juvenile status.

6. OFFICE OF IMMIGR. STAT., DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 22 tbl. 7 (2006) [hereinafter 2005 YEARBOOK], *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf.

7. The quota as outlined in 8 U.S.C. § 1153(b)(4) (2006) extends to all special immigrants, not just juveniles. The quota for special immigrants as outlined in § 101(a)(27) is 7.1% of worldwide immigration for employment-based category (which is 140,000 under 8 U.S.C. § 1151(d) (2006)), meaning that 9,940 special immigrants are eligible for potential citizenship each year.

8. *See* Aleguire, *supra* note 2, at 12.

9. *See* § 39.5075(6), FLA. STAT. (2008). Section 39.013(2) of the Florida Statutes (2008) expressly authorizes a Motion for Extension of Jurisdiction to be granted in any cases where the application for SIJ status and adjustment of status is pending past the child's eighteenth birthday.

10. In fiscal year 2005, U.S. Citizenship and Immigration Services made 660 grants of Special Immigrant Juvenile Status. 2005 YEARBOOK, *supra* note 6, at 22 tbl. 7; in fiscal year 2004, 624 grants were made, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2004

unavailable as to exactly how many juveniles applied for SIJS and how many applications were approved.[11] That said, 660 is a small number considering that over 9,000 spots are reserved for special immigrants each year.[12] Given that few SIJ petitions are approved for adjustment to lawful permanent resident status each year, one might wonder why anyone would oppose these applications filed by children deemed dependent by the juvenile court system.

A recent internal memorandum from U.S. Citizenship and Immigration Services (USCIS) written by William Yates (Yates Memo) sheds some light on possible reasons for the newly increased resistance to SIJ petitions.[13] The Yates Memo states that the "[USCIS] adjudicator generally should not second-guess the [juvenile] court's rulings or question whether the court's order was properly issued."[14] Such language indicates that while "generally" USCIS will support the findings of juvenile court judges who are statutorily granted the authority to make specific findings of fact in relation to the juveniles in question,[15] exceptions could exist where an adjudicator would have the freedom to substitute his/her opinion for that of a juvenile court judge.[16] The juvenile court is,

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YEARBOOK OF IMMIGRATION STATISTICS 18 tbl. 5 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf; in fiscal year 2003, 445 grants were grant, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 23 tbl. 5 (2004), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003Yearbook.pdf; in fiscal year 2002, 510 grants, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 24 tbl. 5 (2003), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2002/Yearbook2002.pdf; in fiscal year 2001, 541 grants, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 29 tbl. 5 (2003), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf; in fiscal year 2000, 658 grants, OFFICE OF IMMIGRANT STAT., DEP'T OF HOMELAND SEC., 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 31 tbl. 5 (2002), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2000/Yearbook2000.pdf.

11. The author has filed a FOIA request on the matter that has not yet been answered.

12. *See* discussion *supra* note 7.

13. *See* Memorandum from William R. Yates on Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004), *available at* http://www.uscis.gov/files/pressrelease/SIJ_Memo_052704.pdf.

14. *Id.* at 4-5.

15. *See* 8 U.S.C. § 1101(a)(27)(J)(ii) (2006). All of these findings should be clearly set forth in the order, and the court should also make clear that the findings and determinations were made as a result of the neglect, abuse, or abandonment of the child. *See* Memorandum from William R. Yates, *supra* note 13, at 4. Such a finding can be made by the court or an administrative agency. *See id.*

In Florida dependency proceedings, these findings can only be made by a Circuit Court Judge, pursuant to section 39.5075(4) of the Florida Statutes (2008).

16. For example, the Yates Memo outlines the procedure a USCIS adjudicator would follow if s/he suspects that the juvenile court performed insufficient oversight over the facts presented by the juvenile in question:

> If an adjudicator encounters what s/he believes to be a fraudulently obtained order s/he should promptly notify a supervisor, who should imme-

however, the proper place for a "best interest of the child" analysis to occur.[17] In light of that expertise, and given that Congress intended the juvenile court to be the sole finders of fact and authority to grant best interest orders, this wiggle room for USCIS to insert itself into the fact finders' seat without Congressional authority begins a dangerously slippery slope toward second guessing of juvenile courts that lawfully grant SIJ Status to eligible juveniles.

Although this Article uses the example of SIJ status as the core case study, the inability of otherwise qualified juveniles to receive SIJ status is certainly not the only instance of unexecuted administrative rights, especially as it relates to immigration law. Some other examples include Freedom of Information Act requests, U Visas before the regulations arrived in September 2007,[18] and the situation of unclear regulations with respect to unaccompanied immigrant children who languish in detention awaiting decisions with regard to their immigration status.[19] These other instances of unexecuted rights are equally important, but for the purpose of this Article, this author will focus exclusively on the problem with rights associated with SIJS.

A. *Jean's Story*[20]

In recent cases, DHS has maintained that certain foster care eligible children are ineligible for SIJS. Jean Toussaint is a seventeen year old child from Haiti. Jean has never known his father and was orphaned by his mother at a very young age. When he was approximately six years old, Jean came to the United States

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> diately notify USCIS Headquarters, Office of Field Operations and Office or Program and Regulation Development, through designated channels, to coordinate appropriate follow-up.

Memorandum from William R. Yates, *supra* note 13, at 5.

17. *See* Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993). The comments also state that the INS "believes it would be both impractical and inappropriate for the [INS] to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile's best interest." *Id.*

18. Even at the time of this publication, few if any U Visas have been approved, given the immense backlog predating 2007. *See* OFFICE OF THE OMBUDSMAN, U.S. CITIZENSHIP & IMMIGRATION SERVICES, IMPROVING THE PROCESS FOR VICTIMS OF HUMAN TRAFFICKING AND CERTAIN CRIMINAL ACTIVITY: THE T AND U VISA 1 (2009), *available at* http://www.aila.org/content/default.aspx?docid=27793.

19. For more information on this legal action, see Hernan Rozemberg, *Unaccompanied Immigrant Minors Face Major Consequences*, SAN ANTONIO EXPRESS-NEWS, Sept. 4, 2007, *available at* http://www.mysanantonio.com/news/MYSA090207_01A_Immigrant_kids_3a416eb_html708.html.

20. All names have been changed to protect the identities of those involved. This case is currently pending and the omission of sources is necessary to protect the integrity of the outcome.

and was placed with his aunt. He no longer speaks nor understands Haitian Creole. When Jean was eleven years old, the Florida Department of Children and Families removed him from his aunt's abusive and neglectful care and placed him under state custody in the Florida foster care system. Jean was adjudicated dependent on the juvenile court in 2002,[21] and the Court terminated rights for both parents in March of 2003.

On April 22, 2003, the former Immigration and Naturalization Service (INS) approved Jean's Petition for Special Immigrant Juvenile Status (SIJS).[22] Here is how SIJS works.[23] To qualify, a child must first be adjudicated dependent by the state court.[24] The state court then makes findings as to whether: reunification with the child's parents is likely, the child is eligible for long-term foster care,[25] and if it would be in the "best interests" of the child to remain in the U.S. in the care of a legal guardian.[26]

After the juvenile court approved Jean's SIJ petition, the Department of Homeland Security (DHS) denied his Application for Adjustment of Status, and Jean was placed into removal proceedings before the Miami Immigration Court. DHS then referred some of Jean' delinquency, educational, and mental health records to the Centers for Disease Control and Prevention (CDC). Based on the documents provided by the DHS, the CDC determined in 2005 that Jean has Attention Deficit Hyperactivity Disorder (ADHD) and Disruptive Behavior Disorder, NOS (312.9), both of which are considered Class A medical conditions by the CDC.[27] Having a Class A medical condition precludes the obtainment of legal permanent residency in the United States pursuant to Section 212(a)(1)(A)(iii) of the Immigration and Nationality Act.[28]

A Class A medical condition renders an individual inadmissible to the U.S. unless the applicant is otherwise eligible for a waiver.[29]

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21. An adjudication of dependency signifies that a juvenile court has made findings of fact regarding a child's abuse, abandonment, or neglect by his parental figures. *See, e.g.*, § 39.507, FLA. STAT. (2008). In Florida, dependency is outlined in Chapter 39 of the Florida Statutes.

22. *See* 8 U.S.C. § 1101(a)(27)(J) (2006).

23. For a more detailed account of the SIJS process, see WENDI J. ADELSON, SPECIAL IMMIGRANT JUVENILE STATUS IN FLORIDA: A GUIDE FOR JUDGES, LAWYERS, AND CHILD ADVOCATES (2007), http://www.law.miami.edu/pdf/SIJ_Manual.pdf.

24. *Id.*

25. "*Eligible for long-term foster care* means that a determination has been made by the juvenile court that family reunification is no longer a viable option" and that the child will normally go on to foster care, adoption or guardianship. 8 C.F.R. § 204.11(a) (2008) (emphasis in original).

26. *See* 8 U.S.C. § 1101(a)(27(J)(ii) (2006).

27. Under authority from 8 U.S.C. § 1182 (a)(1)(A)(iii)(II) (2006).

28. *See* Hebrew Immigrant Aid Soc'y, Immigration Glossary, http://www.hias.org/immigration/glossary.html (last visited Mar. 4, 2009).

29. *Id.*

These conditions are labeled communicable diseases of public health significance. Currently, this list includes any of the following diseases: "(1) Chancroid, (2) Gonorrhea[,] (3) Granuloma inguinale, (4) Human immunodeficiency virus (HIV) infection, (5) Leprosy, infectious, (6) Lymphogranuloma venereum, (7) Syphilis, infectious stage, and (8) Tuberculosis, active."[30] Also included in Class A, and particularly germane to Jean's case, are labels concerning individuals who possess:

> a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others or . . . have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or lead to other harmful behavior, or . . . [an individual] . . . determined to be a drug user or addict.[31]

The CDC has internal procedures for re-examining an immigrant that it deems to have a Class A medical condition.[32] Upon an appeal by the alien child who has been certified as possessing a Class A condition, the CDC must convene a panel to re-examine the evidence submitted, and hear additional evidence and testimony regarding the condition.[33] The panel must then determine if it concurs with the Class A medical condition classification placed on the child by a prior medical specialist.[34]

Jean's legal representatives appealed the CDC's determination that Jean currently suffers from a Class A medical condition. The lawyers argued that the CDC had insufficient information on which to base an informed determination of Jean's condition. Specifically, the board of examiners relied on limited information provided solely by DHS, and neither evidence nor testimony was provided on Jean' behalf. Jean's legal team believed that upon re-examination, if the board of medical examiners had current and accurate information regarding Jean's theoretical psychiatric condition, it would recognize that he does not currently suffer from a

30. *Id.*

31. Immigration and Nationality Act §212(a)(1)(A)(iii)-(iv), 8 U.S.C. § 1182(a)(1)(A)(iii)-(iv) (2006).

32. *See* 42 C.F.R. § 34.8 (2007).

33. *See id.*

34. *Id.* § 34.8(h).

Class A illness, and, as such, the CDC's initial determination would not preclude Jean from gaining permanent residency in the U.S.[35]

That said, the juvenile court retained jurisdiction over his case, and representatives for Jean Toussaint gathered experts in psychology and psychiatry to clarify the existence or extent of Jean's present relationship with ADHD. Authorities on the condition are divided as to whether an individual can ever "grow out" of ADHD.[36] Jean's representatives collaborated with medical experts to ascertain whether Jean was initially correctly diagnosed with ADHD, since his lengthy records did not contain information as to which individual first diagnosed him at age five, and what their professional qualifications were for determining whether Jean had this disease.

Upon reflection, the CDC found that Jean did not at that time have ADHD. His case was then remanded to the Immigration Judge who ruled to adjust Jean's status to that of a lawful immigrant. DHS has appealed, and Jean's legal team has filed an amicus on his behalf. At this juncture, it is unclear how the court will decide this case.

If decided in his favor, Jean's case could have potentially far-reaching effects. Jean's attorneys hope that since the CDC decided that Jean was misdiagnosed and is not afflicted with a Class A disease, rendering him eligible for adjustment of status, then perhaps the enormous resources garnered to achieve his legal victory will have a chilling effect on DHS officials who would seek to remove a similarly SIJS-eligible individual. The fear is that if Jean loses his case, then other foster children—a group that disproportionately suffers from mental disabilities[37]—who receive SIJS may similarly be unable to naturalize. The systemic consequences are impressive: for Jean, a CDC refusal to overturn its findings regarding his Class A status would mean that a boy who left Haiti at age six, who does not speak Creole, and who has not a single living relative in Haiti to care for him might be forced to return to his country of origin. A loss for Jean could have had potentially far-

35. This legal strategy is not without complications. Given the impact that Jean's case could have on all foster children afflicted with various mental illnesses or disorders, the litigation strategy chosen in this case had to exclude children eligible for SIJ status who were rendered ineligible because of a Class A diagnosis. Accordingly, the legal team for Jean asserted that Jean never had ADHD in the first place.

36. *See* FamilyDoctor.org, ADHD: What Parents Should Know, http://familydoctor.org/118.xml (last visited Mar. 4, 2009).

37. SHARON VANDIVERE ET AL., CHILD TRENDS, CHILDREN IN FOSTER HOMES: HOW ARE THEY FARING? (2003) (demonstrating more health problems for foster children than similarly disadvantaged children and a higher incidence of behavioral and emotional problems), *available at* http://www.childtrends.org/Files/FosterHomesRB.pdf.

reaching and catastrophic effects for both the populations of foster and undocumented children residing in the U.S.

Just because Jean was found not to have ADHD and thus not to be inadmissible does not leave other similarly situated young people with ADHD and other disabilities free and clear. This is not a class action case; instead, its potentially positive outcome is for Jean alone to enjoy, unless the enormous time and expense of litigation prevents DHS from wanting to do battle on this contentious SIJ issue again.

As mentioned, the CDC made a conclusive finding that Jean neither has ADHD in combination with a behavioral disorder, nor is he a threat to himself or to society, as DHS had claimed. The CDC board went further to question whether Jean ever had a disease in the first place, the assumption being that he was misdiagnosed. Even after the CDC ruled in Jean's favor, U.S. Immigration and Customs Enforcement (ICE) continued its efforts to deport Jean, by trying to subpoena additional school records, even though the immigration judge who gave the final ruling agreed that he already had all the school records. No doubt ICE viewed this case as an entree into setting bold precedent for other like cases. Because most abused, abandoned, and/or neglected children have also been traumatized, and most traumatized children frequently experience mental conditions resulting from exposure to trauma, then this population of children could also have mental conditions that present a danger to society. However, this is the very group of children that Congress saw fit to protect through SIJ legislation.[38] Without the ability to access the rights that Congress created for them, children eligible for SIJ relief are left with unexecuted rights.

1. ADHD as a Class A Illness

ADHD should not be considered a Class A illness. As mentioned before, DHS asserted that Jean suffered from ADHD which should be considered a Class A illness that would render Jean unable to adjust his status. The CDC has found that 7.8% of all children in the U.S. have been diagnosed with ADHD.[39] The CDC lists ample information on its websites concerning ADHD and explains what the disorder means for individuals, families and communities afflicted.[40] Some of that information is as follows:

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38. *See* discussion *infra* Part I.

39. Centers for Disease Control & Prevention, ADHD Home, http://www.cdc.gov/ncbddd/adhd/ (last visited Mar. 4, 2009).

40. *See, e.g.*, Centers for Disease Control & Prevention, What is Attention-

- ADHD is one of the most common neurobehavioral disorders of childhood thought to affect about 5% of U.S. children aged 6-17[41] and can persist through adolescence and into adulthood.[42]
- "ADHD manifests as an unusually high and chronic level of inattention, impulsive hyperactivity, or both. A person with ADHD may struggle with impairments in crucial areas of life, including relationships with peers and family members, and performance at school or work. Increases in unintentional injuries and health care utilization have been noted in some studies of people with ADHD."[43]

On its face, given the large number of children in the U.S. who are diagnosed with this illness each year, it seems a stretch to label ADHD a disorder or behavior "that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others."[44] Certainly, the CDC and others with intimate knowledge of the disease acknowledge that it has the capacity to cause injury and harm both to the individuals afflicted, to their families, and others.[45] The CDC also noted that "[c]hildren with ADHD appear to have significantly higher medical costs than children without ADHD."[46] However, many diseases and disorders, like cancer, for example, require protracted periods of care and medical attention without amounting to a public health risk.

Why is ADHD different? Attorneys for DHS who would like to see Jean and similarly situated children deported might argue that ADHD in and of itself is not as great a threat to the safety and welfare of others as is ADHD in combination with other disorders, like the oppositional defiance disorder with which Jean was origi-

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Deficit/Hyperactivity Disorder (ADHD)?, http://www.cdc.gov/ncbddd/adhd/what.htm (last visited Mar. 4, 2009).

41. Miranda Hitti, WebMD Health News, CDC: About 5% of Kids of ADHD, http://www.webmd.com/add-adhd/news/20080723/cdc-about-5-percent-of-kids-have-adhd (last visited Mar. 4, 2009).

42. *See* Adult ADD Help, Adult ADD, http://adultaddhelp.net/adult-add (last visited Mar. 4, 2009).

43. Centers for Disease Control & Prevention, ADHD – a Public Perspective, http://www.cdc.gov/ncbddd/adhd/publichealth.htm (last visited Mar. 4, 2009).

44. Immigration and Nationality Act §212(a)(1)(A)(iii)-(iv), 8 U.S.C. § 1182(a)(1)(A)(iii)-(iv) (2006).

45. *See* Centers for Disease Control & Prevention, ADHD and Risk of Injuries, http://www.cdc.gov/ncbddd/adhd/injury.htm (last visited Mar. 4, 2009); *International Consensus Statement on ADHD*, 5 CLINICAL CHILD & FAM. PSYCHOL. REV. 89, 90 (2002).

46. ADHD and Risk of Injuries, *supra* note 45.

nally diagnosed.[47] Oppositional defiance disorder (ODD) is a condition marked by "aggressiveness and a tendency to purposefully bother and irritate others."[48] As a society, it is understandable that we would prevent certain harmful individuals from entering our borders. We would purposely seek to exclude those who intended to harm individual citizens and the political and economic structures of U.S. government. Given the aggression exhibited by individuals with ODD in combination with ADD and ADHD, and the potential danger they could pose to others,[49] perhaps they should also be excluded from admission into the U.S.

That said, ODD is the "most common psychiatric problem in children," and a solid percentage of children with ODD exhibit ADHD as well.[50] Research has demonstrated that early detection, in combination with various kinds of therapy, can greatly reduce the negative impact of ODD and ADHD on the lives of the children afflicted, as well as friends, family and communities impacted by the disease.[51] Moreover, Congress in no way contemplated that DHS would make an exception for abused, abandoned and/or neglected juveniles diagnosed with ADHD and/or ODD who were otherwise eligible for SIJ status. This disorder does not rise to the level of dangerousness to society to justify exclusion of a non-violent juvenile who has not been found delinquent by a juvenile court.

Part of what is most troubling about DHS making decisions as to what diseases or disorders are considered admissible and which are excludable is that these types of large-scale policy decisions are not within the province of individual adjudicators to make. On the contrary, it is the legislature that is tasked with making these kinds of policy decisions. The juvenile court judges also have a role to play in designating which juveniles are dangerous and need to be detained, and which minors require dependence on the court for preservation of their best interests. Under *Chevron*, DHS as an administrative agency of the U.S. government is entitled to deference for its decisions based on statute.[52] However, this level of deference does not extend to the decisions of individual decision-makers when they seek to make independent decisions without authority to do so.

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47. *Cf.* James Chandler, Oppositional Defiant Disorder (ODD) and Conduct Disorder (CD) in Children and Adolescents: Diagnosis and Treatment, http://www.klis.com/chandler/pamphlet/oddcd/oddcdpamphlet.htm#_Toc121406159 (last visited Mar. 4, 2009).

48. *Id.*

49. *See* 4 ADHD, ADHD and Oppositional Defiance Disorder (ODD), http://www.4-adhd.com/adhd-odd.html (last visited Mar. 4, 2009).

50. Chandler, *supra* note 47.

51. *See* 4 ADHD, *supra* note 49.

52. *See* Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

B. *The Government's Position and Congressional Intent*

For the government to maintain this position flies in the face of congressional intent. The enactment of the 1990 SIJ provision of the Immigration and Nationality Act[53] demonstrates Congress' recognition that children who have experienced maltreatment in their families deserve special protection. During the creation of this provision, twenty-eight different commentators to the proposed statute expressed concern about how juveniles eligible for SIJ visas would adjust their status to that of lawful permanent residents.[54] One commentator asked about whether the adjustment of status would be an automatic process or whether a SIJ would be required to go through the regular immigration channels to adjust their status.[55] Further, "several [of the] commentators indicated that, since Congressional intent was to allow special immigrant juveniles to become permanent residents, the [USCIS] should revise the rule to allow adjustment regardless of whether the applicants were ineligible for adjustment under existing statutes."[56] Although Congressional intent is never uniform or easy to divine, this commentary sheds at least a little light on the underlying discussions surrounding the creation of SIJS.

Many Congressional members in support of the creation of SIJS thought that a juvenile who had received a best interest order from a juvenile court judge rendering them eligible for a J visa would sail through a seamless pathway to citizenship.[57] For a long time, that certainly was the case.[58] Part of the reason for the streamlined nature of the J visa was that most exclusionary provisions are waived for special immigrant juveniles "for humanitarian purposes, family unity, or when it is otherwise in the public interest."[59] The only exclusionary provisions that cannot be waived are those involving criminal and security related grounds.[60] After a quick reading of the statute, it would not seem legally possible that someone in Jean's position—that of a juvenile granted SIJ status

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53. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005-06 (1990) (codified at 8 U.S.C. § 1101(a)(27)(J) (2006)).

54. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42848-49 (Aug. 12, 1993).

55. *Id.* at 42848.

56. *Id.*

57. Interview with Professor Bernard P. Perlmutter, Univ. of Miami Sch. of Law in Miami, Fla. (Mar. 15, 2007).

58. *Id.*

59. 8 U.S.C. § 1255(h)(2)(B) (2006).

60. The grounds that persist for exclusion of special immigrant juveniles are laid out in 8 U.S.C. § 1182 (a)(2)(A), (2)(B), (3)(A), (3)(C), (3)(E) (2006).

who was diagnosed with a commonplace disability—would be unable to adjust his status. Yet, Jean is just one of many juveniles whom the juvenile courts have found eligible for an SIJ visa and then found ineligible by the USCIS.[61]

1. Lack of Any Congressional Indication

Congress never indicated that SIJS should be unavailable to kids with certain medical conditions. Nowhere in the legislative history surrounding the enactment of SIJS does it mention medical illness as a ground for excludability or inadmissibility. The absence of such a reference is noticeable given the other grounds of inadmissibility that are explicitly mentioned and waived. For example, as the Yates Memo provides, "SIJ beneficiaries are excused from many requirements that other applicants for adjustment must meet."[62] SIJ applicants are excused from "provisions prohibiting entry for those likely to become a public charge,"[63] "those without proper labor certification,"[64] "and those without a proper immigrant visa."[65] However, certain grounds of inadmissibility are not waivable for SIJ applicants. These grounds are listed in the Immigration and Nationality Act § 212(a)(2)(A), (B), and (C), as well as (3)(A), (B), (C), and (E) and cover offenses such as multiple criminal convictions and controlled substance trafficking.[66]

Certainly it would seem that a child like Jean, who has no family left in Haiti and who has already been recommended by a juvenile court for SIJ status, would be in the very kind of situation that USCIS contemplated when it wrote clarifying Yates Memo on the SIJ Visa, which articulated "humanitarian purposes" as a potential route for going around another potential inadmissibility.[67] However, DHS considered Jean inadmissible due to his Class A characterization on account of his ADHD. Congressional intent underlying the creation of SIJ Status was to create a permanent option in the U.S. for undocumented, state-dependent minors.[68] The absence of mention of commonplace medical conditions like ADHD as grounds for inadmissibility in the SIJ statute indicates

61. See Holland & Knight, Children's Rights, http://www.hklaw.com/id146/#2 (under "Special Immigrant Juvenile Status Secured in Florida") (last visited Mar. 4, 2009), for an explanation of this litigation in Florida.

62. Memorandum from William R. Yates, *supra* note 13, at 6.

63. *Id.* (citing Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2006)).

64. *Id.* (citing Immigration and Nationality Act § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A) (2006)).

65. *Id.* (citing Immigration and Nationality Act § 212(a)(7)(A), 8 U.S.C. § 1182(7)(A) (2006)).

66. *Id.*

67. *Id.*

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

that USCIS officials are carrying out the SIJ mandate for state-dependent unaccompanied juveniles in a way different from that envisioned by Congress.

2. SIJS

Given that a separate court system was created for juveniles, the juvenile court seems the most appropriate place to make findings as to a child's welfare in the context of his or her family situation.[69] Until Congress intervened in 1990, one group of children remained outside the purview of state court jurisdiction; namely, undocumented children who had been abused, abandoned and neglected.[70] The impetus for the creation of the SIJS arose primarily out of a desire to provide relief for this discrete group of young people.[71]

No administrative regulations aid in implementation of the SIJS. Several law review articles have called for such aid and guidance in interpreting various portions of the statute.[72] The lack of administrative regulations has been made more problematic by the 1997 amendments to SIJ law.[73] For example, the 1997 amendments to SIJ law make it necessary for a child in DHS detention to seek the "specific[] consent" of the Attorney General to a state juvenile court exercising jurisdiction over undocumented children in "actual or constructive custody of the Attorney General."[74] Because neither "consent" nor "actual or constructive custody" have been clearly defined through administrative regulation,[75] children and their legal advocates remain uncertain as to how to properly follow the law.

Confusion regarding this question of Attorney General consent, which arose from the 1997 amendments, also persists in cases where the juvenile is no longer in DHS custody. Absent regulations, these questions of consent must be resolved on a case by case basis. For example, in a letter dated February 13, 2007, the John Pogash, Chief of the National Juvenile Coordination Unit of ICE Office of Detention and Removal Operations sought to clarify the

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69. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) (discussing the early movement toward treating juvenile offenders differently than adult offenders by, among other things, creating a separate justice system for them).

70. *See* Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children From Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 237-38 (2006).

71. *See id.* at 238.

72. *See, e.g.*, *id.* at 261.

73. *See id.* at 244-47.

74. *See* 8 U.S.C. § 1101(a)(27)(J)(iii)(I); Lloyd, *supra* note 70, at 245-46.

75. Lloyd, *supra* note 70, at 240.

consent conundrum.[76] Pogash emphasized in this letter to an attorney for an SIJ applicants that the specific consent of the Attorney General is not needed for minors who have been released from federal custody.[77] The letter is definitely a step in the right direction toward greater clarity. However, such a policy lacks uniformity if attorneys are still confused as to how the 1997 amendments apply to their clients and see the need to write to the Chief of ICE in the first place. Administrative regulations are still necessary, and still missing.

3. Congress' Clear Intent

Congress' intent of SIJS is clear that SIJS should be implemented fairly, clearly, and robustly. When Congress promulgated SIJ law in 1990, it clearly intended to create a legal right for undocumented abused, abandoned or neglected children residing in the U.S. Although the 1997 amendments have obfuscated a few of the original provisions, such as the issue of Attorney General consent mentioned above, the general intent remains intact. That said, cases like that of Jean, and others currently on appeal, chip away, at the least, at one remedy available to vulnerable children residing in our nation.

One way in which practice belies the intent underlying SIJ law is when the system is overwhelmed by applications for adjustment of status, such that many individuals applying, including a few applications for SIJ status, fall to the wayside. This result undermines congressional intent that SIJ applicants be processed quickly, fairly and accurately so that the benefit of legal status arrives in time to aid juveniles aging out of public school to lawfully enter advanced education and/or the work force. The case of *Yu v. Brown* addressed such an issue.[78] In this class action, Yu was the named plaintiff representing a group of individuals that had been approved for SIJ Status, but had been waiting more than one year for the former Immigration and Naturalization Service (INS) to process their applications for adjustment of status.[79] The court held that, "regardless of the ultimate decision, [the] INS ha[d] a

76. Letter (redacted) from John J. Pogash, Chief of the Nat'l Juvenile Coordination Unit, Office of Detention & Removal Operations, U.S. Immigration & Customs Enforcement, to counsel Mr. X (Feb. 13, 2007) (regarding Mr. X's request for more information about how Attorney General consent would function in his client's case), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Pogash%20Letter%20_2007.pdf.

77. *See id.*

78. Yu v. Brown, 36 F. Supp. 2d 922 (D.N.M. 1999).

79. *Id.* at 925.

non-discretionary, mandatory duty to act on [the class's] applications."[80] In terms of the agency's role in carrying out congressional intent, the court in *Yu* also cites a related case for the proposition that the court's "function in such cases is to assure the vitality of the congressional instruction that agencies conclude matters within a reasonable time."[81]

The need to process the immigration paperwork portion of the J visa expeditiously is certainly an important facet of adhering to congressional intent with regard to SIJ. Another manner in which congressional intent regarding SIJ has been thwarted relates to the challenges that USCIS has made to the juvenile court's findings of abuse, abandonment or neglect. Federal law governing a child's eligibility for SIJ legal relief requires that a child be declared dependent upon a juvenile court due to his or her abuse, abandonment, or neglect.[82] When administrative officers insert their own opinions, displacing those of juvenile court judges who are experienced in fact-finding on abuse, abandonment, and neglect regarding juveniles, the potential for accurate SIJ determinations is undermined.

USCIS declared in the Yates Memo that immigration officials should not attempt to substitute their judgment for that of the juvenile court judges.[83] The Yates Memo clearly states that the USCIS "adjudicator generally should not second-guess the court rulings or question whether the court's order was properly issued."[84] It is possible that the word "generally" was carefully placed to permit the kind of second-guessing that currently takes place by USCIS adjudicators with regard to juvenile court best interest orders for SIJ. In fact, the Miami Office of USCIS has repeatedly readjudicated cases decided by juvenile court judges based on their perceptions of improper decisions on abuse, abandonment, and neglect.[85] Such actions run counter to DHS's policies and practices wherein the agency acknowledges its limitations in the field of dependency law. According to its own policy, the former INS

> does not intend to make determinations in the course of deportation proceedings regarding the "best inter-

80. *Id.* at 931.

81. *Id.* at 930 (citing *In re* Amer. Fed. of Gov. Employees, AFL-CIO, 790 F. 2d 116, 117 (D.C.Cir. 1986) (citation omitted)) (internal quotation marks omitted).

82. 8 U.S.C. § 1101(a)(27)(J) (2006).

83. Memorandum from William R. Yates, *supra* note 13, at 4-5.

84. *Id.*

85. *See* Letter from Cheryl Little, Executive Dir., Fla. Immigrant Advocacy Ctr., to Cheryl Phillips, U.S. Citizenship & Immigration Services 5 (Dec. 20, 2006) (on file with the *Journal*).

> est" of a child for the purpose of establishing eligibility for special immigrant juvenile classification. . . . *[I]t would be both impractical and inappropriate for the Service to routinely readjudicate judicial . . . administrative determinations as to the juvenile's best interest.*"[86]

II. SIJ AND JEAN

A. Precedent of Courts Applying SIJS to Folks Like Jean Elsewhere

Jean's case is most likely one of first impression. The attorneys involved in the case have yet to uncover any prior case law regarding children eligible for SIJ visas who have been denied based on Class A inadmissibility. The juvenile court in this case looked to Jean's attorneys to inform the judge as to whether she had the authority to order that Jean receive an expert evaluation before his hearing in front of the CDC. Further, the CDC actually had to write its own rules of procedure to govern this precedent-setting case, whereby a child would be reevaluated by the CDC and other medical specialists.

While it seems precedent does not exist on the exact issue present in Jean's case, similar erosions of congressional intent underlying SIJ law are occurring in pockets around the United States. The U.S. Committee for Refugee and Immigrant Children diligently manages these flare-ups nationwide.[87] The Committee has mentioned that a few juvenile court judges in New Jersey and northern Florida have refused to adjudicate a child dependent who otherwise appeared eligible for dependency because the judge assumed that the child would later seek immigration relief.[88] Such a belief undermines congressional intent concerning SIJ law in that the law exists as a form of immigration relief for qualified juveniles; therefore, a juvenile who seeks the immigration relief that SIJ affords after being adjudicated dependant is well within his or her right.

Jean's case has especially important precedential value because his situation involves a child formerly in foster care, quali-

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86. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993) (emphasis added).

87. Telephone Conversation with Eric Sigmon and Carolyn Seugling (Apr. 30, 2007) (regarding problems nationwide with SIJ adjudications in juvenile courts).

88. *Id.*

fied for SIJ, and who, because of a medical illness or disability, is being denied immigration relief. Social science research has demonstrated that current or former foster children are more likely to suffer from mental illness and disability.[89] Current case law has also exposed the increased likelihood that foster children will suffer from a lack of necessary medical or mental health treatment.[90] Given that abused, abandoned and/or neglected children eligible for foster care are the very children most likely to suffer from these disabilities, it does not follow that having such a disorder like ADHD could keep a child from accessing U.S. citizenship through SIJ status, which is what just as Congress intended.

B. Policy Reasons for Applying SIJS Properly

In addition to the legal reasons for carrying out congressional intent with regard to SIJ law, policy reasons to uphold this legislation abound. One of the core reasons for properly effectuating SIJ law and ensuring that those juveniles eligible for SIJ receive this form of legal relief is found in the "best interests of the child" standard borrowed from family law.[91] As David Thronson has asserted, "the ubiquitous 'best interests of the child' standard that governs or influences many decisions affecting children in other arenas does not drive immigration law."[92] Thronson notes, however, that this standard, otherwise absent from immigration law, is readily apparent in SIJ legislation where dependency was explicitly made the province of the juvenile court, which is a more appropriate body than an immigration court to decide matters relating to a ju-

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89. *See generally* Sandra K. Cook-Fong, *The Adult Well-Being of Individuals Reared in Family Foster Care Placements*, 29 CHILD & YOUTH CARE F. 7 (2000); John G. Orme & Cheryl Buehler, *Foster Family Characteristics and Behavioral and Emotional Problems of Foster Children: A Narrative Review*, 50 FAM. REL. 3 (2001); VANDIVERE, *supra* note 37 (demonstrating more health problems for foster children than similarly disadvantaged children and a higher incidence of behavioral and emotional problems).

90. *See, e.g.*, Kenny A. *ex rel.* Winn v. Perdue, 218 F.R.D. 277, 286 (D. Ga. 2003) (alleged failures by Georgia's foster care system including failing to provide necessary mental health and medical services to foster children); Braam *ex rel.* Braam v. State, 81 P.3d 851, 856 (Wash. 2003) (findings made by the trial court against Washington's Department of Social and Health Services included the denial of necessary mental health services to foster children and the provision of inappropriate services).

91. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 68 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children."); 47 AM. JUR. 2D *Juvenile Courts, Etc.* § 53 (2008) ("The best interests of the child must be considered, and the court cannot disregard that the purpose of juvenile laws is to provide for the care, protection, and welfare of the child in a family environment whenever possible, separating the child from his or her parents only when necessary." (footnote omitted)).

92. David B. Thronson, *You Can't Get Here From Here: Toward A More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 67-68 (2006).

venile's welfare.[93] To have a juvenile court grant an best interest order for SIJ informed by the best interests of the child standard and then not grant the concomitant forms of immigration relief due to incorrect implementation undermines the policy goals associated with this important legislation.

Correct implementation of SIJ legislation also serves a humanitarian function. This space for humanitarian principles to override other potential minor deficiencies in the application is written into the statute. For example, most other exclusionary provisions generally applicable in immigration law are waived for special immigrant juveniles "for humanitarian purposes, family unity, or when it is otherwise in the public interest."[94] In Jean's case especially, both the law and humanitarian concerns underlying public policy support his receipt of a SIJ visa.

Another reason to grant SIJ visas for juveniles who have already received best interest orders from the juvenile court is that, in many states, SIJ relief is the only legal option for abandoned, abused, and neglected foreign-born children to have an opportunity to lead safe, healthy, and productive lives. Children who lack legal immigration status who would like to attend college in the U.S. currently are eligible to do so only—if they can afford the tuition—as international students. The mechanism by which non-citizens could afford to attend school is through the Development, Relief and Education for Alien Minors Act (DREAM Act) legislation.[95] The DREAM Act would repeal Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[96] and would thereby remove limits on a state's ability to provide in-state tuition to students lacking legal immigration status.[97] This piece of bipartisan legislation died with the last round of efforts for comprehensive immigration reform in the U.S. Congress.[98] If enacted, the DREAM Act would provide a great help to children eligible for SIJ status who either age out of eligibility or are otherwise ineligible because of their married status,[99] or because their applications

93. *See id.* at 68 n.41.

94. *See* 8 U.S.C. § 1255(h) (2006).

95. Development, Relief, and Education for Alien Minors Act of 2007, S. 774, 110th Cong. (2007).

96. *Id.* § 3(a).

97. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, 8 U.S.C. § 1623 (2006) (prohibiting illegal aliens residing in a state or political subdivision from being eligible for "any postsecondary education benefit" unless a United States citizen, regardless of his or her residence, can claim the same benefit).

98. GovTrack.us, S. 1438[110th]: Comprehensive Immigration Reform Act of 2007, http://www.govtrack.us/congress/bill.xpd?bill=s110-1348 (last visited Mar. 4, 2009).

99. Non-eligibility because of marriage occurs in Florida where that person, although under eighteen, would no longer be considered a juvenile. *See* § 743.01, FLA. STAT. (2008).

were denied by USCIS for any number of reasons. Until the DREAM Act becomes national legislation, the J visa remains the best hope for this vulnerable population of immigrant youth.

C. Other Relevant Legal Instruments: Americans with Disabilities Act?

Jean's case has the potential to affect a large class of children—those who have been abused, abandoned, or neglected; who have been in foster care or would be eligible for such state-based care; who cannot be reunited with their families; who cannot return to their countries of origin; and who suffer from mental illnesses like ADHD. Given that some of Class A inadmissibility seems to unfairly target those with non-communicable infirmities that do not affect the health or welfare of U.S. citizens but simply affect the individuals themselves, reading this type of inadmissibility into the SIJ statute unfairly discriminates against an already vulnerable population. If these children were citizens, they could be eligible for a claim of discrimination under the Americans with Disabilities Act (ADA).[100] The statute states that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our society is justifiably famous."[101] Although the ADA does not apply to noncitizens, the statute's underlying goals should be similarly applicable to children in Jean's situation.

III. DHS SHOULD REMEDY THE SIJS PROBLEM IMMINENTLY

Every day that passes without clarification from DHS and USCIS on their policies and procedures regarding SIJ implementation causes problems for SIJ applicants and the attorneys who represent them. The Florida Immigrant Advocacy Center has encountered situations where their clients' SIJ applicants are denied based on what the Miami Office of USCIS ("Miami Office") terms their own "federal" standards of "abuse, abandonment[,] and neglect."[102] The Miami Office has refused to provide any clarification of these standards.[103] In addition, the Miami Office has cited to

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Also, if they were adjudicated dependent on the state, but then the court extends jurisdiction until age twenty-two, they could be twenty-one years old, and if they marry they will lose the ability to get SIJ.

100. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213 (2000).

101. *Id.* §12101(a)(9).

102. *See* Letter from Cheryl Little to Cheryl Phillips, *supra* note 85, at 6.

103. *Id.*

unpublished USCIS Administrative Appeals Office decisions to support their denials of candidates otherwise ostensibly eligible for SIJ relief.[104] This secrecy and lack of clarity shrouds in mystery a process that should otherwise be a transparent and straightforward form of legal relief for a vulnerable population of children residing in this country.

A. DHS's Specious Reasoning

DHS has offered no adequate reasoning to support its current parsimony with respect to SIJS. As previously mentioned, fewer than 700 SIJ visas were granted in 2005 nationwide.[105] Often during heated debates over immigration, the side that favors stronger controls on U.S. citizenship will decry the opening of the floodgates if a certain measure is implemented. Given the small numbers of juveniles applying for SIJ status, the strong level of resistance that child advocates face from USCIS appears both surprising and disproportionate.

One possible source for this blowback is the new anti-fraud directive issued from USCIS national headquarters.[106] Certainly fear over a juvenile trying to game the system and receive a benefit to which they are not lawfully entitled could inspire those in the USCIS adjudicators' seats to closely scrutinize SIJ applications. A careful reading of SIJ applicants is warranted; however, second-guessing a juvenile court judge is just plain unlawful. Although it would appear a fine line to walk between close scrutiny and overzealous reinterpretation of a juvenile's application for SIJ, the path USCIS adjudicators walk with regard to courts' decisions should be one of fairness, clarity and transparency. Denials are appropriate where an individual fails to fulfill the necessary requirements for a J visa and not because bad faith or fraud is assumed by default.

B. DHS's Meritless Objections

When USCIS denies the grant of SIJ status to a child who has been recommended for such status by a juvenile court, child advocates scramble to understand such a decision. In a few recent cases, USCIS has simply misunderstood and misapplied the law. For example, in a recent case in Miami, USCIS found that because Jo-

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104. *Id.*

105. 2005 YEARBOOK, *supra* note 6, at 22 tbl. 7.

106. Press Release, U.S. Immigration & Customs Enforcement, ICE expands document and benefit fraud task forces to six more cities (Apr. 25, 2007), http://www.ice.gov/pi/news/newsreleases/articles/070425washingtondc.htm.

seph's[107] father, who was abusive to Joseph for many years, had died, Joseph could no longer be adjudicated dependent on the juvenile court based on his past abuse. Such a reading is an incorrect application of SIJ law. The statute concerning dependency is disjunctive, in that abuse, abandonment or neglect could qualify a minor for dependent status, and based *alone* on suffering prior abuse (or abandonment or neglect, for that matter), Joseph was correctly declared dependent on the Juvenile Court, and continues to remain dependent, rendering him eligible for SIJ status.

In Jean's case, however, the situation is a bit more complex because it does not involve such a clear misreading of the statute. The question amounts to this: should a child who is otherwise eligible for SIJ relief be rendered ineligible because their medical disability renders them inadmissible under a Class A determination? Given that medical disability was not one of the grounds of mandatory ineligibility (i.e. those that cannot be waived) mentioned in the Yates Memo,[108] it seems that this medical problem would be one resolved under the elastic clause that permits the Attorney General to waive inadmissibility when it amounts to a humanitarian issue or it is otherwise in the public interest to do so.[109]

C. Clear, Fair, and Effective Guidelines

DHS should create clear guidelines that can be implemented in a uniform manner, treating all applicants in a fair and effective manner. Waivers are used to respond to various categories of inadmissibility in the field of immigration law. Given Jean's situation, the waiver could be broadened to encompass those diseases or deficiencies that children eligible for SIJ suffer from and that arise from abuse, abandonment, and/or neglect. Although ADHD should not be considered a Class A illness, if it is characterized as such, then a waiver for an individual whose ADHD (or perhaps ADHD in combination with another disorder) does not rise to the level of harm to the health and welfare of the society as a whole should receive a waiver.

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107. Names have been changed and sources omitted to protect the identity of the juvenile involved.

108. Memorandum from William R. Yates, *supra* note 13, at 6.

109. 8 U.S.C. § 1255(h)(2)(B) (2006).

IV. Conclusion

In order to properly execute congressional intent to create a legal benefit for abused, abandoned, and neglected children who come from outside the United States, who cannot return to their home countries, and who require the protection of our state juvenile courts to ensure a viable future in the U.S., DHS should cease chipping away at the right to Special Immigrant Juvenile Status. This right is especially important to former foster youth who disproportionately suffer from mental illness and disability. To effectuate this goal of protection of the right to SIJ relief for eligible non-citizen juveniles, DHS should enact regulations that reflect the current practices and policies of the department with regard to current and former foster youth in their application for SIJ Status. These regulations must be clear and unambiguous, and reflect congressional intent to preserve the right to SIJS for this country's burgeoning population of abused, abandoned, and neglected immigrant youth.